

Balan Vs. State of Kerala

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Court : Kerala

Decided On : Aug-12-2003

Reported in : 2004CriLJ3427; I(2004)DMC827; 2003(3)KLT472

Judge : Jawahar Lal Gupta, C.J. and; A.K. Basheer, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 438 and 439

Appeal No. : B.A. No. 949 of 2003

Appellant : Balan

Respondent : State of Kerala

Advocate for Def. : P.V. Madhavan Nambiar, Director General of Prosecutions

Advocate for Pet/Ap. : Sangeetha Lakshmana and; Rajendran, Advs.

Judgement :

ORDER

Jawahar Lal Gupta, C.J.

1. Is an applicant seeking bail bound to approach the Court of Sessions before he can move the High Court? Should the High Court refuse to entertain a petition under Section 438 or 439 of the Criminal Procedure Code directly unless 'exceptional circumstances' are shown? This is the core of the controversy in this case. The sequence of events leading to this 'reference' to the Division Bench may

be briefly noticed.

2. A petition for the grant of anticipatory bail viz. Cr.M.C. No. 3265/2003 was filed by Usman. The applicant apprehended arrest in a case registered under Sections 498A and 306 I.P.C. Similarly, there was another application viz., CrI.M.C. No. 3391/2003. This had been filed under Section 439. The applicant had been arrested on the allegation that he was guilty of the offence punishable under Section 55(a) of the Kerala Abkari Act. Both the applications were decided by a learned Single Judge of this Court vide order dated May 3, 2003. On a consideration of the matter, the learned Judge had taken the view that 'in respect of bail applications, 'frog leaping' cannot be permitted'. While it was acknowledged that this Court had the 'jurisdictional competence... to consider and exercise powers in an application for bail/anticipatory bail under Section 438/439 of the Criminal Procedure Code at the first instance,' it was observed that there was need for a 'salutary procedural self-imposed rule or restriction'. Thus it was held that the 'High Court shall not ordinarily (and except under exceptional circumstances) exercise its powers under Sections 438 and 439 of Code of Criminal Procedure without and before the Sessions Court having concurrent jurisdiction is moved for identical relief. It was further observed that the Court 'must be very careful and circumspect in identifying such exceptional cases.' To effectuate this order, the learned Judge gave the following directions:

'In the result, these petitions are dismissed and the following directions are issued:-

i. Applications under Sections 438 and 439 CrI.P.C. shall hereafter be numbered by the Registry of this Court only when it is accompanied by the copy of the order of the Sessions Court (or memo/petition as indicated in clause (ii) below).

ii. If it is not accompanied by copy of the order, such applications must be accompanied by a petition/memo explaining why copy is not produced or why the Sessions Court had not been moved earlier. The application shall be numbered by the Registry only after the court in its discretion by order passed in such memo/petition directs such reception/numbering.

iii. Every application for bail/anticipatory bail must be disposed of by the respective subordinate courts in the State on the date of receipt of the application itself ideally if moved with sufficient prior notice to the Prosecutor. At any rate all courts including the Sessions Courts shall scrupulously ensure that bail applications are disposed of within the outer limit of three working days of their filing without fail.

iv. The Director General of Police shall ensure that a competent police officer is posted in every District to assist the District Public Prosecutor to liaison between the police and the Prosecutor and to ensure that relevant records and instructions are given to the Prosecutor promptly. Similarly, every police station shall also depute a competent official to assist the Public Prosecutor in charge at the Court having local jurisdiction.

v. Copies of orders in every bail application (whether regular or anticipatory) shall be furnished to the accused/counsel free of cost and acknowledgment obtained from the respective counsel/accused (one copy in each application irrespective of the number of petitioners) immediately after pronouncement of orders on the same day as mandated in the case of judgments in Section 363(1) CrI.P.C. It shall be the duty of the Presiding Officer of the Court to ensure this.

41. The Registry shall ensure that the directions above are complied with and communicated to all the criminal courts and the officers concerned'.

3. On June 26, 2003, a Bail Application was put up before another court. The learned Judge noticed the above-mentioned directions and expressed certain reservations. Thus, the matter was referred to the Division Bench.

4. Learned counsel for both sides have been heard. On behalf of the applicant, Ms. Sangeetha has contended that in view of the plain language of the statute, there was no reason for imposing the restrictions laid down in the judgment. The claim made on behalf of the applicant has been supported by Mr. Rajendran who states that even a petition under Article 226 has been filed to challenge the legality of the directions given by the learned Judge. Mr. Madhavan Nambiar, Director General of Prosecution appearing for the State has also submitted that the directions as given by the learned Judge need to be given a second look.

5. The Code of Criminal Procedure did not initially provide for the grant of anticipatory bail. Whether a petition could be entertained under the inherent jurisdiction of the court was a debatable issue. There was divergence of judicial opinion. The preponderance of judicial opinion was that only a person in custody could claim bail. The Law Commission considered the advisability of providing for anticipatory bail. In the 41st report, it observed:

'The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty, while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail'.

6. Thus, the need for making a specific provision for the grant of anticipatory bail was acknowledged. Ultimately, the provision was made in S.438. It would be appropriate to examine the relevant part of the provision. Section 438(1) provides as under:

'438. Direction for grant of bail to person apprehending arrest: (1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Sessions for a direction under this section; and that court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail'.

7. Ordinarily, bail is granted when a person is in custody. The bail releases him from the bars. However, the above provision provides for bail in anticipation of arrest. A person apprehending arrest for a non-bailable offence can approach the Court. The statute in terms provides that 'he may apply to the High Court or the Court of Sessions for a direction under this section'. If the Court finds good reason, it can direct that in the event of such arrest, he shall be released on bail. Thus, it is clear that the provision confers a right on the person who is apprehending arrest to

move a petition. He can choose the forum. He can file the application before either the High Court or the Sessions Court. The statute gives him the right. It imposes no restriction. The provision confers discretion on the Court to either accept or to reject his prayer. The exercise of discretion is unfettered. The statute places no restriction. However, it is a judicial discretion. It has to be exercised judicially. The facts and circumstances of each case have to be examined by the court. The Judge has to take a view. No strait-jacket formula can be laid down.

8. A perusal of the view expressed by the Law Commission indicates that 'sometimes influential persons try to implicate their rivals in false cases'. Thus, the need for making a provision regarding grant of anticipatory bail was recognized. The obvious object was to protect a person who was apprehending arrest at the instance of an 'influential' opponent. The purpose was to save him from humiliation and harassment. The provision was made to ensure that he must get an opportunity to approach the Court and save himself from harm to his reputation. He was, thus, given the choice to approach the Court of Sessions or the High Court.

9. The learned Judge has taken the view that considerations of convenience, expediency, inexpensive justice and saving time of the superior court for 'sublime pursuits' are relevant. Thus, there is need to adopt the salutary principle of self-imposed restraint.

10. It is undoubtedly true that the provision in Sections 438 and 439 confer jurisdiction on the Sessions Judge to entertain an application for anticipatory as well as regular bail. It is also true that the Court should respect institutional hierarchy. The higher court must show faith and respect for the lower court. However, it is equally important to remember that in matters of personal liberty, the right conferred on a citizen has to be liberally construed. A restricted meaning can defeat the very objective of the provision. It can happen that a person living in a remote village may be accused of a serious offence on account of wholly extraneous considerations. He may be involved in a totally false case with the sole object of harming his reputation and humiliating him publicly. In the normal course, he shall rush to the nearest court. He would not want to undergo avoidable

expense. But, in a given situation, he may consider it more appropriate to approach the highest Court so that his right to personal liberty is not jeopardized. It may even be that his location is such that the highest Court is nearer than the Sessions Court. Should he be denied the right to choose? The provision does not restrict the choice. It gives him the right to 'apply to the High Court or the Court of Sessions'. We are of the view that his right must be respected. It should not be 'cribbed, cabined or confined'. He must be given the liberty to choose the forum that he wants to approach. Since the statute places no restriction, we are unable to find any reason to add an embargo.

11. It is undoubtedly true that there is a heavy burden of cases in the High Courts. There is a long pendency. The arrears are mounting. However, even in the subordinate courts, the situation is not very encouraging. Persons remain in custody for long time before the trials commence: In this situation and taking all the facts cumulatively into consideration, we do not think that on the plain language of the statute, there is any warrant for imposing the strict restrictions that have been laid down in Usman's case (*supra*).

12. In this context, it may also be noticed that even under Section 439, the Legislature has conferred power to grant bail on the High Court as well as the Court of Sessions. The two provisions do not even remotely suggest that the petition has to be filed before the Sessions Court first and then before the High Court. The power to grant bail has been conferred equally on both the Courts. It is clearly concurrent. The citizen has the opportunity to approach the Court of Sessions and then the High Court. It gives him a second chance to seek bail. However, in a case where he chooses to come directly to the High Court, he cannot be thrown out merely on the ground that he has failed to approach the Sessions Court. The petition is clearly maintainable. Equally, it cannot also be said that he must make out an 'exceptional' case before his petition for bail can be entertained. Acceptance of the view as laid down by the Court in Usman 's case may result in defeating the right to liberty as guaranteed under the Constitution.

13. It is undoubtedly true that the courts have not commended 'frog leaping'. This view was expressed in *Mathew Zacharia v. State of Kerala*, 1974 KLT 472, while

examining a petition under Section 497. The Court was obviously considering a matter before Section 438 had been brought on the Statute book. The obvious reason was that the Code did not confer the right to choose. Even otherwise, the Courts respect the principle of hierarchy. This, however, cannot mean that the doors of this Court shall be shut out to a person whose liberty is under an imminent threat and he will be allowed entry only after the bail has been declined by the Sessions Court. Accepting this principle may result in denial of liberty. We need to remember that for a majority of people, the sight of prison is painful. The thought of the trauma is terrifying. It creates a terror in the mind. The court cannot be mindless of such a person's plight. The need to save him from the shame and shock has to be kept in view.

14. Thus, it is no surprise that the statute has given the applicant a choice. On a plain reading of the statutory provisions, it is clear that the right to choose the forum is with the person who is apprehending arrest or has been actually arrested. This right should not be curtailed by any self-imposed restraint. Such restrictions, as mentioned in the order, can result in more harm than good and defeat the object with which the provision was introduced.

15. It is true that coming to the High Court may be more expensive for the person. He may have to travel a longer distance also. However, these are matters, which have to be considered by the individual. These cannot be considerations for restricting the right given by the statute.

16. The counsel have brought to our notice various precedents. There is divergence of judicial opinion. In *Onkar Nath v. State*, 1976 CrL.J. 1142 and *Mohan Lal v. Prem Chand*, AIR 1980 H.P. 36, the Full Benches of Allahabad and Himachal Pradesh High Courts have upheld the right of the applicant to choose the forum. Similarly, in *Y. Chendrasekhara Rao v. Y.V. Kamala Kumari*, 1993 CrL.J. 3508, a Division Bench of the Andhra Pradesh High Court has upheld the right of the citizen. On the other hand, a restricted view has been taken in certain Single Bench decisions by the High Courts of Rajasthan, Punjab and Bombay. These cases are *Hajialisher v. State of Rajasthan*, 1976 CrL.J. 1658; *Chhajju Ram Godara and Ors. v. State of Haryana and Anr.*, 1978 CrL.J. 608;

Jagannath v. State of Maharashtra, 1981 Crl.LJ. 1808 and K.C. Iyya v. State of Karnataka, 1985 Crl.L.J. 214. However, on consideration of the matter, the view taken by the two Full Benches and the Division Bench commends itself to us. We respectfully follow it.

17. In view of the above, we are of the opinion that the provisions of Sections 438 and 439 do not call for a restricted interpretation. The citizen has the right to choose. His application should be considered. Each case should be examined on its own merits. If it is found that the ground for grant of bail is not made out, the Court has the full jurisdiction to deny relief. Equally, if a case is made out, the citizen's liberty should not be allowed to be curtailed. However, we do not find any ground to deny the citizen's right to choose the forum to approach the Court and to make a prayer. This is not warranted by the provision.

The reference is accordingly answered. The matter shall now be listed before the learned Single Judge.

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