

Bimal Adak and ors. Vs. State

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Court : Kolkata

Decided On : Oct-08-1996

Reported in : (1997)1CALLT94(HC)

Judge : Samir Kumar Mookherjee and ;Rabin Bhattacharyya, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 437, 438 and 439

Appeal No. : Crl. Misc. Nos. 612 and 690 of 1996

Appellant : Bimal Adak and ors.

Respondent : State

Advocate for Def. : M. Das, Adv.

Advocate for Pet/Ap. : K. Safiullah, Public Prosecutor;Dilip Sen and ;D.K. Banerjee, Advs. in Crl Misc. No. 690 of 1996 and ;B.K. Mukherjee, ;J.K. Dutta and ;S. Sen, Advs. in Crl Misc. No. 612 of 1996

Disposition : Application dismissed

Judgement :

Rabin Bhattacharyya, J.

1. The point came to be debated at the bar is whether the submission of charge-sheet of a non-bailable offence entails forfeiture of right to anticipatory bail. The

rival contention is that, that submission of the charge-sheet does not preclude or disentitle any petitioner to anticipatory bail merely because the charge-sheet has seen the light of the day.

2. In adjudging the rival contentions, it is worthwhile to mention, since loaded with legion of judicial precedents that there is a sharp distinction and difference between Sections 437 & 438 of the Cr. P.C. The considerations of granting post arrest bail and pre-arrest bail are mutually exclusive of each other impelling the court to consider the circumstances when such bail could be granted, Section 437 is fastened with discretion of the court which is patently absent in considering the application for anticipatory bail by court objectively.

3. In the matter of according the prayer for bail, the court should be circumspect when the offence complained of is non-bailable, in particular, where the trial has not yet commenced and, therefore, the court is, saddled with an obligation to take into consideration a variety of factors and circumstances about the gravity of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of a witness being tampered with, the larger interests of the public or the State and similar other considerations. The above was endorsed by the apex court in *State v. Jashpal Singh Gil* : 1984 CriLJ1211 . Thus, the matter in connection with the grant or refusal of bail invites judicious exercise of discretion by the court on merits. The upshots of the judicial decisions have established that the court in granting bail must consider the serious nature of the offence along with other associated factors listed above. The same view has not been disturbed by any other decision of the courts of our country.

4. Reverting to pre-arrest bail, Section 438 of the Cr. P. C. contemplates an application to be made by a person apprehending arrest of an accusation of having committed a non-bailable offence. It is indicative of the fact that an application for anticipatory bail is pivoted on an apprehension of arrest which invites the exercise of power under Section 438. The expressions, 'in the event of arrest' have much dominance in the shrine of Section 438.

5. In the background of the above noted two sections, it appears from the threshold of Section 438 that an ordinary order of bail is distinguished from an order of anticipatory bail in that the former is granted after the arrest and, therefore, means release from the custody of the police after having resorted the provisions of Section 437 of the Cr.P.C. So far Section 438 is concerned the anticipatory bail is granted in anticipation of arrest and, is, therefore, effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for having committed non-bailable offences. The parade of the anticipatory bail continues till a person is arrested. It is an insurance against police custody following upon arrest for offence or offences in respect of which the order was issued. The Apex Court in the above manner has drawn a thin line of distinction between an ordinary bail and anticipatory bail to avoid any confusion in the forensic war.

6. To begin with, this court is not slow to hold that an order of anticipatory bail is a panacea to cure all non-bailable offences. Nor it is an antidote to commission of non-bailable offences. It does not accord any immunity against commission of non-bailable offences.

7. With that end in view, there could be no scope or ground to refuse on the part of the court to admit a person or a petitioner to an anticipatory bail is rather seriously ill and in need of radical surgery. Accordingly, it requires a decision wealth of details without any mole on it which is pregnantful of justice projecting on the liberty of the individual. It is the shield to thwart the powerful processes of criminal law that can be pervaded for achieving extraneous ends. The law does not encompass with the progress of the modern Jurisprudence that respectable persons should be often paraded in handcuffs, apparently on way to courts of justice. The submission of charge-sheet can never denude that right of a petitioner to be enlarged on anticipatory bail, however, the nature of non-bailable offence there could be.

8. The expression 'reason to believe' or reasonable apprehension of arrest, a term substitute for each other is the governing factor to let off a person on anticipatory bail where submission of charge-sheet, is an idle parade. This is the most

explosive argument made by the learned Advocates for the respective petitioners which has created a ripple.

9. In order to swim the river, the learned Advocates for the petitioners have filed a batch of petitions, to excavate the anticipatory bail after submission of charge-sheet. It is hotly debated at the bar that submission of charge-sheet does not silence the claim of any petitioner to be enlarged on anticipatory bail having committed a non-bailable offence. The right of the petitioner, according to the learned Advocates, still survives. The submission of the charge-sheet is not a lock gate for the petitioner to be enlarged on anticipatory bail but it ensures generation of apprehension of arrest.

10. The learned Advocate for the State has crossed his sword with his opponents on the ground that the claim of the petitioner to be released on anticipatory bail after submission of charge-sheet is a futile exercise of right. The anticipatory bail is not a universal medicine for release of a petitioner on anticipatory bail when a non-bailable offence has been committed. The learned Public prosecutor inspired by the above concept has back fired the claim of the learned Advocates for the petitioners that their right to be enlarged on anticipatory bail upon submission of charge-sheet has no legal scenario.

11. In developing the lone contention, the learned Advocate for the petitioners has made a research in his argument that Section 438 of the CrPC maintains an unnatural silence that anticipatory bail could not be granted for the submission of charge-sheet. He has exercised in his oratorical skill blended with dexterity that the words and languages employed in Section 438 of the CrPC do not at a moment foreshadow any inhibition on the court to enlarge a petitioner on an anticipatory bail for submission of charge-sheet. The court is to consider, in the background of the allegations, as to whether it fosters any reasonable apprehension of arrest when filing of the charge-sheet cannot be a ground to refuse the prayer for anticipatory bail, as the court is saddled with an obligation to dispose of the application objectively.

12. In support of contention, Mr. Mukherjee has laid foundation in his argument having its pedestal on various decisions of the courts that the judicial precedents

have much persuasive value for other courts which should be followed in letter to dispose of the issue. Mr. Mukherjee has been inspired by a large number of decisions to explore relief. He has laid much stress on *Gurbaksh Singh Sibbia v. State* 1980 SCC (Cri) 465 to contend that the principle of law laid down by the apex court generates ample support for a petitioner to be enlarged on anticipatory bail.

13. In the perspective of the above, the claim of the State that submission of charge-sheet negatives the right of the petitioners to be enlarged on anticipatory bail is more imaginary than real. The court, according to the above decision, is well fortified and armed with Jurisdiction to release a person on anticipatory bail after submission of charge-sheet.

The filing of the charge-sheet can never be the cynosure of the matter. The court, if does not weild its Jurisdiction in line with the principle of law laid down by the apex court, there would be an invasion on liberty of an individual where individual will be sacrificed at the altar of Justice.

14. The weighty factor, according to the learned Advocates for the petitioner governing the decision of the apex court, is confined to 'reason to believe' expelling from its consideration that filing of charge-sheet could never formulate the decision.

15. The next case cited by the learned Advocate for the petitioner is *Khasim Bi v. State of Andhra Pradesh* : AIR 1986 AP345 to contend that their Lordships upon analysis of Section 438 and other provisions of the Code came to the conclusion, 'filing of a charge-sheet and issuance of a warrant are certainly the grounds which make the person not only to believe that he would be arrested but also to move the court under Section 438(1)'. The same view has been endorsed by their Lordships in the entire gamut of the decision.

16. To strengthen a claim for anticipatory bail upon submission of charge-sheet, the learned Advocate for the petitioner has relied on *Shekh Alim and Ors. v. State of West Bengal* 1993 C Cr Lr 137 to contend that the prayer for anticipatory ball 'cannot be disallowed merely a ground on submission of charge-sheet because it

is not permissible to import anything which is not in the section as thereby the liberty of a person may be jeopardised. Such a course might be vulnerable constitutionally as indicated in Gurbaksh Singh case'. The decision under reference falls in line with Shekh Khasim Bi v. State (supra).

17. The combination of the aforesaid decisions and the law laid down therein, according to Mr. Mukherjee, has emphasised the right of a petitioner to be released on anticipatory bail even upon submission of chargesheet. The section itself when maintains a silence which is conspicuous that submission of charge-sheet does not dethrone a claim of a petitioner to be enlarged on anticipatory bail, the court cannot take any other view. The Judicial climate has not undergone any profound mutation to alter the view.

18. In the background of the aforesaid immaculate view, the court cannot over-emphasize that Section 433 of the CrPC does not envisage that the petitioner is stripped of right to be enlarged on anticipatory bail upon submission of charge-sheet when there are decisions of apex court, which have a sign of relief for the petitioner. If it does, it would be a strain on the language and the power exercised by the court could never be an over-generous infusion of constraint and condition which are not patent in Section 438. Mr. Mukherjee has argued with much labour and industry that the court, if harbours a different view, it is saddled with an obligation to refer the matter to a larger bench for a uniform decision to dominate the field. According to the learned Advocate, therefore, the issue should be referred to the larger bench for a decision in the event a contrary view is taken by the division bench. Nobody could raise his finger of protest about the proposition of law.

19. We are not unmindful that the persuasive value of judicial precedents is a guiding factor to reach a conclusion as the issue since settled by a higher court where the identical question sprang up for decision.

20. Mr. Mukherjee has relied on a number of decisions *Atmaram v. State of Punjab* : AIR 1959 SC519 , *Union of India v. Godfray Philips India Ltd* : [1986]158ITR574(SC) to contend that decision by a larger bench is the last asylum to avoid a conflicting decision of a coordinate bench. Thus, the law laid down in

Salauddin Samad Shaikh v. State of Maharashtra 1996 SCC (Cri) 198 is devoid of context as the same is not weighty in number.

21. The learned Public Prosecutor of the State Mr. Safiulla has refuted the claim of the petitioner that submission of charge-sheet is the last nail on the coffin on the claim of the petitioner to be enlarged on an anticipatory bail upon submission of charge-sheet. He has thoroughly argued the scheme and object of the section which never for a moment gained any momentum when the offence committed is non-bailable and the allegations are prima facie true. If both the sections namely 437 and 438 are brought on the common platform, the legislature in its ample wisdom would never legislate such a provision in the statute book, the object of which is manifestly different. 'Reason to believe' or apprehension of arrest for having committed a non-bailable offence does not grant any licence to any wrong-doer to be enlarged on anticipatory bail. Submission of charge-sheet, according to him, is to hold the ground where the 'reason to believe' is tainted.

22. Undoubtedly, it is an umbrella ensuring liberty to an individual against arrest entitling him to be released on anticipatory bail. But this cannot be a universal formula to enlarge an offender to be admitted to an anticipatory bail for having committed a non-bailable offence. He has borrowed wisdom from Salauddin Abdul Samad Shaikh (supra) to repel the contention of the learned advocates for the petitioners. According to him it is not the plurality of the number of the learned Judges that governs the decision. It is the stare decise that becomes the patent governing factor which in any event cannot be shrugged off. No court can frown its eyes with it nor can take any oblique view.

23. In making evaluation of the contentions, if we go through the creeds of the decision under reference, the decision in Gurbaksh Singh (supra) by the apex court read with Section 438 of the CRPC does not interweave latently or patently that the apex court dealt with the right of the petitioner to be enlarged on anticipatory bail upon submission of charge-sheet. A dispassionate reading of the decision manifests incurable wounds and bruises of the advocates' contentions beyond repair.

24. The Supreme Court in analysing the scope of anticipatory bail remarked in paragraph 31 that 'the nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and 'the larger interests of the public or the State' are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in *State v. Captain Jagjit Singh*, : [1962]3SCR622 which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail'. The presumption of innocence is *prima facie* lost for submission of charge-sheet.

25. Only the application of mind of the court is imperative to consider the anticipatory bail objectively as it should be the germane for consideration while disposing of the prayer for anticipatory bail.

26. The astute reflection of mind if the Supreme Court as embodied in paragraph 35 of the said decision is the vanishing point of an anticipatory bail. The Supreme Court held that Section 438 lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has 'reason to believe' that he may be arrested for a nonbailable offence. The use of the expression 'reason to believe' shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not belief; for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non bailable offence, must be capable, of being examined by the court objectively, because it is then alone that

the court can determine whether the applicant has reason to believe that he may be so arrested. Section-438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm one self in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.

27. Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned under Section 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438.

28. Thirdly, the filing of an FIR is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is filed, so long as the applicant has not been arrested.

29. Fourthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of 'anticipatory bail' to an accused who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

30. Upon walking through the corridors of Gurbaksh Singh, we repeat once again that the Supreme Court never dealt with the issue involved in this case as to whether the submission of the charge-sheet forecloses the right of a petitioner to be enlarged on anticipatory bail for having committed a non-bailable offence. The decision is conspicuously silent about the fate of a petitioner after submission of the charge-sheet against him charged with the commission of a non-bailable offence.

31. In our view, neither Section 437 nor 438 of the CRPC is a supplemental provision to each other nor the same can be interpreted to be a proviso to each other. They are independent of each other having different field for their applicability. Section 438 of the Code of Criminal Procedure has no universal application which only could be applied in the restrictive field. It does not provide any discretion for the court to enlarge a petitioner on anticipatory bail which is available in Section 437.

32. The learned advocates for the petitioners are very much eloquent and vociferous in his submission in Interpreting the expression 'reason to believe' which, according to them, is the potent factor for the petitioners to be released on anticipatory bail. The said expression in the body of the Section 438 affords an unbridled right to be enlarged on bail having committed a non-bailable offence.

33. According to the rule of construction, the expression 'reason to believe' should be construed with the aim, object and scheme of Section 438. The inflammatory allegations having their pedestal on falsity, malafide, and motive afford considerable grounds to be enlarged on anticipatory bail as the object of it is to protect an individual from humiliation and harassment. Thus, the expression 'reason to believe' must be the belief of reasonable mind where the petitioner or the individual is immune. The 'reason to belief' never contemplates nor it accords any licence to any individual to commit the offence and to seek protection within the realm of Section 438. The expression 'reasonable belief' fosters a belief of genuine belief apprehension of arrest of an allegation which prima facie is insubstantial and made with a sinister motive, the object being to malign a person where his arrest by prosecuting agency is immediate than remote. But when a non-bailable offence has been committed by an accused, such 'reason to believe' or apprehension of arrest can never be equated with the genuine belief of apprehension of arrest proceeding from prima facie substantial material entitling him to pre-arrest bail. The section can never be used by any individual to cultivate his rights when he is prima facie liable for an accusation and does not commensurate with his innocence. Reasonable belief is not colourable belief.

34. Thus, the legislature in its ample wisdom has couched the section in a manner distinct from the concept of post-bail to suit the ends. It does not afford any key for a petitioner to be enlarged on anticipatory bail against whom charge-sheet has already been submitted for having committed a non-bailable offence.

35. In our view, the 'reason to believe' is the genuine inflexible belief which is implicit in it. But not the tainted 'reason to belief emanating from commission of a prima facie non-bailable offence. The demand for bail upon submission of charge-sheet is therefore, smacks of logic.

36. The Supreme Court in *Salauddin Abdul Samad Shaikh v. State of Maharashtra*, 1909 SCC (Cri) 198 upon consideration of the prayer for bail arrived at a decision that the filing of the charge-sheet should put an end to the right of the petitioner to be enlarged on anticipatory bail which must be left to the care of the regular court which is to deal with the matter on an appreciation of the evidence placed before it after the investigation made progress or the charge-sheet has been submitted.

37. In the advent of the said decision, it does not project any shadow on the law laid down by the Supreme Court in *Gurbaksh Singh* (supra) and forfeits the right of an accused to be enlarged on anticipatory bail. Therefore, in our view, we cannot afford to accept that the right of an accused still survives to be enlarged on an anticipatory bail after submission of the charge-sheet. The apex court, as it appears from the decision, when deep into the matter where their Lordships observed that the regular court should not be by-passed by the court granting anticipatory bail. It should not substitute itself for the original court which is to deal with the offence. The same, according to the apex court, is the correct procedure to be followed because it must be realised the court of Session or High Court is granting anticipatory bail granted at a stage when the investigation is incomplete, and, therefore, does not inform about the offender. The above conclusion does not run counter to the principle of law laid down by the apex court in the - celebrated decision. The life of investigation is the breathing space for a petitioner who may be admitted to anticipatory bail which loses its sting after submission of charge-sheet.

38. In the context, we cannot but hold that the right to be enlarged on anticipatory bail if allowed to remain alive even after the submission of the charge-sheet, Section 437 of the CRPC will be the vanishing point of the existing Code of the Criminal Procedure.

39. Another side fact of importance has been canvassed by the learned advocates for the petitioners on the footing that judicial precedents must be followed and obeyed. The coordinate Jurisdiction will run into rough weather if there are conflicting decisions where the judicial decision and judicial discipline are sure to crumble down. We can only say that the principle of law is applicable to a decision of the same court. But when the decision is rendered by the superior court, as in this case by the apex court, the Judicial discipline can never run into rough wheather when the areal legal atmosphere is serene and placid. Therefore, the argument is ill founded.

40. It does not warrant any long debate to hold that the anticipatory bail continues during the life tenure of the investigation or during the period of investigation which immediately comes to an end upon submission of charge-sheet which is a part of the. investigation.

41. Section 438 of the Code of Criminal Procedure 1973, does not postulate the weilding of jurisdiction by a court in granting anticipatory bail upon submission of charge-sheet as the investigation comes to an end. The filing of the charge-sheet is an indicia prima facie commission of a non-bailable offence and, therefore, it does not behove resurrection of Jurisdiction of the court over which it had already lost jurisdiction.

42. So far the case of Bimal is concerned, we are unable to persuade ourselves that he is entitled to anticipatory bail upon the submission of charge-sheet prima facie having committed an offence of abstraction of electricity under Section 379 of the IPC. Therefore, the claim of Bimal is not maintainable. The petitioner cannot ride on the back of anticipatory bail upon termination of investigation which included amongst others the submission of charge-sheet. Therefore, submission of charge-sheet is the trauma for a petitioner to be released' on such bail. For the foregoing reasons, we cannot accept the contentions of Mr. Mukherjee and Mr.

Sen and reject them and uphold the contentions of the learned P.P. The learned advocates deserves commendation for their due assistance to the court. In fine, this application fails.

Samir Kumar Mookherjee, J.

43. I concur respectfully with the very reasoned Judgment of my learned brother. The reasonings, in my view, clearly bring out the grounds and necessity for the difference in language of Sections 437 and 438 of the Code of Criminal Procedure. 'Reason to believe' or 'in the event of arrest', he has Justifiably held, refers to an expected state of affair or that an affair which is yet to occur, to wit, apprehended arrest, which is yet to take place. The objects and reasons, as stated by the Law Commission, for enacting the section, coupled with the presumption that Legislature does not waste words, the provisions made by it for enjoyment of liberty by a person at pre-arrest and post arrest stages cannot be construed to overlap each other. Submission of a chargesheet, being the beginning of the later stage, should, therefore, be construed to bring an end to the right to pray for anticipatory bail.

44. Court--In view of the pendency of the present case, a large number of anticipatory bail applications, in which similar point as regards maintainability of an application under section 438, after submission of charge-sheet has arisen, were disposed of or dealt with fixing the life of the interim or final order in such cases till a week after the disposal of the instant case. In view of disposal of the present application, the concerned Criminal Department of our Court is directed to note, whenever such other applications having such fixed life period, are requisitioned by Courts, to bring to the notice of the learned Judge/Judges through its report in the order book, the fact of disposal of the instant case, so that the orders passed conform to appropriate legal end.

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