

Ashoke Kumar Kabra Vs. Smt. Kamala Devi Shaw and ors.

Ashoke Kumar Kabra Vs. Smt. Kamala Devi Shaw and ors.

SooperKanoon Citation : sooperkanoon.com/878728

Court : Kolkata

Decided On : Jun-28-1995

Reported in : 1996CriLJ38

Judge : N.K. Bhattacharyya, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 340, 401, 437, 438 and 482; ;Indian Penal Code (IPC) - Sections 120B, 409 and 420; ;Criminal Law

Appeal No. : Crl. Revn. No. 584 of 1995

Appellant : Ashoke Kumar Kabra

Respondent : Smt. Kamala Devi Shaw and ors.

Advocate for Def. : Sekhar Bose and ;Debasish Roy, Advs. for O.P. Nos. 1 and 2

Advocate for Pet/Ap. : S.P. Talukdar, ;A.K. Pal and ;A.K. Adhya, Advs.

Disposition : Application allowed

Judgement :

ORDER

N.K. Bhattacharyya, J.

1. Heard the submission of the Ld. Advocate for the petitioner Mr. S. P. Talukdar appearing with Mr. A. K. Pal & A.K. Adhya and the Ld. Advocate for the O.Ps. 1 &

2 Mr. Sekhar Bose appearing with Mr. Debasish Roy. None is appearing on behalf of the State. Considered the materials on record.

2. By the instant revision Under Sections 401/482 of the Cr. P.C. the de facto complainant has challenged the order dated 16-3-95 passed by the learned Sessions Judge, Howrah in CrI. Misc. Case No. 97/95 whereby the Ld. Sessions Judge granted anticipatory bail to the accused persons, opposite party Nos. 1 and 2 herein and by that order also directed that in the event of arrest of the accused persons or their surrender before the appropriate authority, they shall be enlarged on bail by furnishing a bond of Rs. 1,00,000/- each with two sureties of Rs. 50,000/- each on the terms as contained in the said order. In challenging the said order being order No. 11 dated 16-3-95 in CrI Misc. Case No. 97/95 Mr. Talukdar submitted on behalf of the petitioner that the order is illegal, improper and incorrect. Inasmuch as, earlier, an application before this High Court was moved before the Division Bench Under Section 438 of the Cr. P.C. by the accused persons and the matter was heard at length and thereafter on the prayer of the Ld. Advocate for the accused persons, the matter was not proceeded with and it was treated as not pressed. The said fact was suppressed before the Ld. Sessions Judge and as a result of which the Ld. Sessions Judge entertained the application of the accused persons Under Section 438 of the Cr. P.C. and granted anticipatory bail to the said two accused persons who are O.Ps. 1 and 2 herein. Appearing for the accused-persons, Mr. Sekhar Bose candidly and very fairly submitted that he has no point to argue but beseeched the Court to look upon the case with mercy as the accused persons are ladies and house-wives. Before considering the respective submissions on behalf of the parties, a brief resumption of the fact is necessary to appreciate the arguments of the Ld. Advocates for the parties.

3. The de facto complainant, who is the petitioner herein, lodged an FIR in Shibpur P.S. which was registered as Shibpur P. S. Case No. 273/94 dated 16-9-94, Under Sections 409, 420, 120B of the I.P.C., on which a G.R. Case was started being G. R. Case No. 1976 of 1994 in the Court of the Ld. S.D.J.M. Howrah, the two accused persons made two applications before this Court for anticipatory bail Under Section 438 of the Cr. P.C. and the said two applications were contested. The Division Bench, after hearing the parties at length, when was about to pass an

order which might not be favourable to the accused persons, a submission was made on behalf of the accused persons by their Ld. Advocate that the accused-persons would not press that applications of the said two applicants and they were treated as not pressed. Accordingly, the Division Bench passed such order on such submission that the said two applications be treated as not pressed and rejected the same. But in that order the Division was pleased to record that the matters were heard at length and the arguments advanced by both the parties.

4. Thereafter, the accused persons in suppression of the said fact made an application Under Section 438 of the Cr. P.C. praying for anticipatory bail. During the interregnum period between rejection of their application Under Section 438 by the Division Bench of this Court and filing of the application by them Under Section 438 of the Cr. P.C. before the Ld. Sessions Judge, another application was moved by the accused persons before a Single Bench of this Court Under Section 482 of the Cr. P.C. for quashing of the F.I.R. The said application was dismissed on the ground of default on 30th of January, 1995.

5. As indicated earlier, thereafter, on 7th February, 1995, the accused-persons moved the Sessions Judge for anticipatory bail by filing an application Under Section 438 of the Cr. P.C. which was registered as Crl. Misc. Case No. 97/95. The factum that the accused persons earlier moved this High Court for anticipatory bail was suppressed before the Ld. Sessions Judge. The de facto complainant in his show cause application disclosed that fact. During the continuance of the hearing of that application Under Section 438 of the Cr. P.C. as the accused persons felt it difficult in gaining a favourable order from the court, they misdirected the court by filing an affidavit which was affirmed by the accused persons wherein they have stated, inter alia, as follows:

'Para. (1) That we have filed an anticipatory bail application before the Hon'ble High Court at Calcutta in connection with Shibpur P.S. Case No. 273/94, Under Sections 409, 420, 120B of the I.P.C. (dt. 16-9-94) dated 27-7-94.

Para (2) That we have not moved the said application through or with the help of any Advocate on any date and it was resulted as not pressed.

Para (3) That we have been first moving this petition of anticipatory bail before the District and Sessions Judge, Howrah vide. CrI. Misc. Case No. 97/95, vide filing date 7-2-95.' (Sic).

6. After hearing both the parties and considering the materials on record including the affidavit as indicated above, the Ld. Sessions Judge passed the order impugned and ordered in the ordering portion that in the event of arrest of the accused persons or on their surrender before the appropriate authority they shall be enlarged on bail of Rs. 1,0000/- each with two sureties of Rs. 50,000/- each. Thereafter, the Ld. Sessions Judge specified the conditions. Mr. Talukdar submitted that the suppression did not end there. The accused persons also suppressed the fact that they moved this Court before a Single Bench challenged the F.I.R. Under Section 482 of the Cr.P.C. Thereafter the said two accused persons, C.P. Nos. 1 and 2 herein, surrendered before the Ld. S.D.J.M. at Howrah in connection with the Shibpur P.S. Case No. 273/94 dated 16-9-94 Under Sections 409, 420 and 120B of the I.P.C. G. R. Case No. 1976/94 and they also made there an application for bail. In view of the order of the Ld. Sessions Judge, bail was granted to them on the conditions as contained in the said order of the Ld. S.D.J.M-in-Charge, Howrah dated 5-4-95. In view of the submission of Mr. Talukdar for the petitioner that in spite of an order by a Division Bench of this Court rejecting the applications Under Section 438 of the Cr. P.C. made by the accused persons, the Ld. Sessions Judge entertained the application of the accused persons Under Section 438 of the Cr. P.C. An explanation was called for by this Court from the Ld. Sessions Judge who appeared before this Court and submitted his explanation wherein the Ld. Sessions Judge, in paragraph 2 stated as follows:

'Smt. Kamala Devi Shaw, one of the petitioners before the completion of the hearing of the application Under Section 438 of the Cr. P.C. submitted an affidavit alleging that they filed an application for anticipatory bail before the Hon'ble High Court, Calcutta in connection with that case in question i.e. Shibpur P.S. Case No. 273/94 Under Sections 409/420/120B of the I.P.C. But that application was never moved before the Hon'ble High Court. So, that application was not pressed. She further stated in the affidavit that they were moving the petition (Under Section 438

of Cr.P.C) for anticipatory bail for the first time before the District & Sessions Judge, Howrah through Crl. Misc. Case No. 97/95. The xerox copy of the said affidavit is made annexure-A of the application. I have already mentioned that to watch the proceeding the de facto complainant Sri Asoke Kumar Kabra engaged one Ld. Lawyer and through him he filed an application on 21-2-95 in the said Crl. Misc. Case No. 97/95 wherein the said petitioner/de facto complainant in paragraph-6 clearly stated that the petitioners, namely, Smt. Kamala Devi Shaw and Smt. Kanika Devi Shaw had earlier moved an application Under Section 438 of Cr. P.C. before the Hon'ble High Court at Calcutta and subsequently on 27-9-94, the same was rejected, as the said application was not pressed by the then Ld. Advocate of the petitioners. A xerox copy of the petition filed by the de facto complainant Sri Asoke Kumar Kabra in Crl. Misc. Case No. 97/ 95 is made annexure-'B' of the petition.'

The said explanation was accepted by this Court and the Ld. Sessions Judge was exonerated. The de facto complainant, as petitioner also filed a supplementary affidavit wherein in paragraph 4 of that affidavit it has been stated that the accused-petitioners filed a further application Under Section 438 of the Cr. P.C. before the Ld. Sessions Judge suppressing the order dated 27-9-94 and the said affidavit was affirmed by one Nurul Islam who identified himself as Tadbirkar'. It has been further stated in the said affidavit that the accused O.P. filed a supplementary affidavit in the Crl. Rev. No. 543/95 before this High Court. It has also been disclosed in the said supplementary affidavit that the said Nurul Islam is a surety of the accused persons who affirmed this affidavit to the application Under Section 438 of the Cr. P.C. before the Ld. Sessions Judge and also on behalf of the accused persons in their application for revision before this High Court as 'Tadbirkar' of the accused persons.

7. Having heard the Ld. Advocates appearing for the parties and considering the materials on record, I am of the view that the order impugned cannot be sustained in law for two-fold reasons.

8. As superior Court having rejected the application for anticipatory bail of the accused persons after hearing the matter at length as argued by both the parties

and as the matter was not pressed to prevent harsh orders from this Court a subordinate Court cannot grant and/or entertain an application for anticipatory bail under Section 438 Cr.P.C. from the explanation of the learned Sessions Judge it is clear that he was given to understand and believe that no application for anticipatory bail was moved before this Court by the accused persons. They were simply filed and withdrawn. In the second place the order of anticipatory bail is not sustainable in law as passed by the learned Sessions Judge on the ground that in case of grant of anticipatory bail there cannot be any question of surrender before any subordinate Court. But while granting anticipatory bail to the accused persons, the learned Sessions Judge, inter alia, directed that in case of their surrender before an appropriate authority they should be enlarged on bail. A Division Bench of this High Court has already held that in case of anticipatory bail there cannot be any question of surrender. In that case, the order impugned is not sustainable in law. Moreover, after enjoying the anticipatory bail, the accused persons surrendered before the learned Sub-Divisional Judicial Magistrate and again obtained bail by filing an application under Section 437 Cr.P.C. So, that bail order is also not sustainable in law. It appears to me in consideration of the materials on record that the accused persons played a fraud upon the learned Sessions Judge by suppressing the fact that earlier their applications under Section 438 Cr.P.C. was rejected by this Court after hearing the parties at length. As it was not pressed thereafter in order to prevent the court from passing a harsh order, it is accordingly directed in the interest of justice and for ends of justice that the learned Sessions Judge shall take appropriate action according to law against the accused persons and pass an order for their arrest immediately. The learned Sessions Judge is also directed to take appropriate steps against the surety/tadbirkar Mr. Nur Islam and proceeding should be launched against him by the learned Sessions Judge and the learned Sessions Judge is directed to take appropriate steps for launching a proceeding against the accused persons and the said Nur Islam under Section 340 Cr. P.C.

9. The learned Sessions Judge is further directed to cancel the surety-ship of Nur Islam so that in any other case he should not be allowed to stand as a surety. The learned Sessions Judge is also directed to take another appropriate legal step according to the Criminal Law and under the Indian Penal Code for taking and

launching appropriate criminal proceedings against the accused persons and the said Nur Islam. With this direction I set aside that order of granting anticipatory bail to the accused persons, the order of granting bail to the accused persons under Section 437 Cr.P.C. and direct to forfeit the bond as furnished by the accused persons through Nur Islam.

10. The revisional application is accordingly allowed.

11. Let a copy of this order be sent down to the Court of the learned Sessions Judge forthwith and the department is directed to take immediate steps for the same. The petitioner is also given liberty to communicate this order to the Court of the learned Sessions Judge and the learned Sessions Judge is directed to act on such communication.

12. If certified xerox copy of the order is applied for by the petitioner, the department should take steps for supplying the same as early as possible.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com