

Choutmall Sarogi Vs. the State

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Court : Kolkata

Decided On : Jan-04-1974

Reported in : 1974CriLJ1134

Judge : N.C. Talukdar and ;A.N. Banerjee, JJ.

Appellant : Choutmall Sarogi

Respondent : The State

Judgement :

N.C. Talukdar, J.

1. This is an application for bail on behalf of the second-applicant, . Choutmall Sarogi alias Agarwalla, arising out of orders dated the 28th December, 1973 and the 29th December, 1973, passed by the learned Chief Presidency Magistrate, Calcutta, in Section G. Case No. 851 dated 27-12-1973 under Rules 43 (5) and 36 (6) (i) of the Defence of India Rules, 1971 read with Section 120-B of the Indian Penal Code. The application is with notice to the State and is opposed.

2. The facts leading on to the application can be put in a short compass. The accused-applicant is stated to be a Director of M/s. Shree Bajrang Commercial Co. (P.) Ltd. having its office at 13, Brabourne Road. Calcutta and he resides at 11-B, Jatindra Mohan Avenue, Calcutta. On the 27th December 1973 he was arrested by the police on the charge that he, in collusion with three other directors of the

company, has been withholding the unloading of salt brought by ships berthed at the Calcutta Port from Saurashtra and Tuticorin with a view to create an artificial scarcity of salt and a case, being Section G Case No. 851 dated 27-12-1973, was started under Rules 43 (5) and 36 (6) (i) of the Defence of India Rules, 1971 read with Section 120-B of the Indian Penal Code. The investigation is still pending. The accused-applicant was produced on 28-12-1973 before Shri R. P. Choudhury taking up the file of the learned Chief Presidency Magistrate, Calcutta and on an application for bail being moved on his behalf, the learned Magistrate, by his order of the same date while directing the accused-applicant to be in police custody till 3-1-1974 refused the prayer for his bail at that stage and issued notice on the learned Public Prosecutor to appear on the date fixed for hearing. By a later order passed on the same date on an application made by one Saiian Kumar Agarwalla, the learned Magistrate further directed that the seized salt be returned to the owner or owners on an indemnity bond of Rs. 1, 00, 000/- after proper verification. The prayer for bail was reiterated on the 29th December, 1973, when Shri Dibvindu Dutt, who was taking up on that date the file of the learned Chief Presidency Magistrate, Calcutta, rejected the prayer for bail at that stage but observed that the matter would be further heard on the date fixed, when the case diary was to be placed before him. These orders were impugned and the present application for bail was moved in the High Court during the Christmas Vacation on Sunday, the 30th December 1973. Our learned brother Mr. Justice N. C. Mukherjee was pleased, by his order of the same date, to direct that the accused-applicant be released on an interim bail of Rs. 16, 000/- with two sureties of Rs. 8, 000/- each, subject to confirmation by the Division Bench: that the matter be placed on 3-1-1974 before the Division Bench for hearing; and that the office was to inform the learned Deputy Legal Remembrancer. The matter has now appeared before us for confirmation. During the hearing an additional affidavit on behalf of the accused-applicant affirmed on 3-1-1974 was filed on 4-1-1974, with copy thereof served on the State.

3. Mr. Ashoke Kumar Sen, Senior Advocate (with Mrs. Moniula Bose and Messrs Dilip Kr. Dutt, Nawal Kishore Choudhury and P. B. Chakraborty, Advocates) appearing in support of the application on behalf of the accused-applicant made a submission of three dimensions. Firstly, that the offence was not a grave one

committed in the backdrop of an emergency, inasmuch as as per the existing arrangements, a reserve of ten per cent of the imported salt has to be kept in the Salt Gola at Salkia, ruling out thereby any possibility of shortage giving rise to an emergency and attracting the provisions of the Defence of India Act or the Rules framed thereunder; secondly, that the subject-matter of the offence, not being 'food', does not come within the definition of an essential commodity within the purview of Rule 36 (3) of the Defence of India Rules 1971, and thirdly that in view of the strike by the All India Boatmen's Association, holding up the unloading operations during the material period from the 22nd December, 1973 to the 27th December, 1973, the offence complained of does not come within the ambit of a prejudicial act as defined under Rule 36 (6) (i) of the Defence of India Rules. 1971 and as such the penalty enjoined under Rule 43 (5) of the said Rule is not attracted. Mr. Promode Rani an Roy Junior Government Advocate, appearing on behalf of the State joined issue on all the points and raised further a preliminary objection to the maintainability of the application for bail and the interim order passed on it, because of a purported non-conformance to Rule 184 of the Defence of India Rules 1971.

4. We will take up for consideration in the first instance the preliminary point raised by the learned Junior Government Advocate. Rule 184 of the Defence of India Rules. 1971 contains special provisions relating to bail in offences under the Act. The Rule, which corresponds to Rule 155 of the Defence of India Rules, 1962 and Rule 130-A of the Defence of India Rules, 1939, provides inter alia as follows:

Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), no person accused or convicted of a contravention of these rules or orders made thereunder shall, if in custody, be released on bail on his own bond unless--

(a) the prosecution has been given an opportunity to oppose the application for such release, and

(b) where any such provision of these rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is (not) guilty of such contravention.

The sine qua non of the aforesaid Divisions, therefore are that the prosecution is to be given an opportunity to oppose the application for the release of the accused; and that the Court is to be satisfied that there are reasonable grounds for believing that the accused is not guilty of such contravention. Anything short of that would be long off the mark. Mr. Roy's objection is that no notice has been served either on the State as required under the Rules or even on him personally, to afford the prosecution an opportunity to oppose the application and the ex parte order for interim bail passed on the 30th December 1973. Dr. Asoke Kumar Sen. appearing on behalf of the accused-applicant submitted that in view of the shortage of time and urgency, his learned Junior rang up the learned Junior Government Advocate to inform that the bail application would be moved before the Vacation Judge on the 30th December. 1973 and. that in addition to the same the Assistant Registrar (Court) also rang up Mr. Roy's residence on the date of the hearing. Mr. Roy however submitted that this is not service within the bounds of the rules, and that in any event, as he could not appear and oppose the application for bail, for want of notice the interim order for bail as passed should not be confirmed.

5. It is abundantly clear however that the order for interim bail as passed on the 30th December, 1973 was not passed on the footing that no such notice was necessary but proceeded on the footing, as was submitted, that there was such a service on the learned Advocate for the other side. In view of the submissions made before us and in the facts and circumstances of the case, no notice appears to have been served on the State in the manner as prescribed under the Rules and consequently there is a prima facie non-compliance with the provisions of Rule 184 of the Defence of India Rules, 1971. We have accordingly to consider whether such non-compliance has resulted in a non-conformance to the procedure established by law: and if so, whether it has vitiated the order for interim bail as passed on that date. The position in law on the point is by now quite clear. A reference in this context may be made to Crawford's 'Statutory Construction' wherein it has been stated in Chapter XIX. Section 195 that

As a general rule, in the interpretation of statutes, the mention of one thing implies the exclusion of another thing (*Expressio Unius Est Exclusio Alteriue*).

It has further been stated that

If the statute directs that certain acts shall be done in a specified manner or by certain person their performance in any other manner than that specified, or by any other person than one of those named is impliedly prohibited.

In the well known case of *Taylor v. Taylor*, reported in (1876) 1 Ch D 426 Jessel, M. R. observed at P. 431 that When a statutory power is conferred for the first time upon a Court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted....

The said principles were approved of and applied by their Lordships of the Judicial Committee in the case of *Nazir Ahmad v. King Emperor*, reported in 63 Ind App 372 : 37 Cri LJ 897 : AIR 1936 PC 253 (2). Lord Roche, delivering the judgment of the Judicial Committee, observed at pages 381 and 382 that

the rule which applies is a different and not less well recognized rule viz., that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

In a later decision the Supreme Court again reiterated the said principles when in the case of *State of Uttar Pradesh v. Singhara Singh* reported in : [1964]4SCR485 , A. K. Sarkar J. (as his Lordship then was) delivering the judgment of the Court observed at p. 361 that

the rule adopted in (1876) 1 Ch D 426 is well recognized and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power is to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted'.

We respectfully agree with the principles laid down above.

6. The point that now arises for consideration is whether at this stage and in the facts and circumstances of the case, for such a non-conformance the order for interim bail should be confirmed. It has to be noted in this context that the present application for bail has not come up before us for being entertained in the first instance but was already considered by the High Court and an interim order was passed on it. It has now come up for confirmation and final disposal. There is a line of decisions on the point that when the High Court has entertained an application or issued a Rule and the entire matter is before the High Court, it should be disposed of on merits, if the ends of justice so demand, and not dismissed on a preliminary objection. A reference in this context may be made to the case of *Bholanath v. Gour Gopal* reported in : AIR1953 Cal777 wherein Mr. Justice Sen delivering the judgment of the Court observed that

It has been held in some cases where the High Court issued a Rule, the matter should be disposed of on merits.' A reference also may be made to the case of *Bon Behari v. Bhusan Chandra* reported in : AIR1969 Cal287 wherein it has been observed that Practice is but the hand-maiden of law and cannot be allowed to override the latter and be her jealous mistress. The High Court is indeed the palladium of justice and its stream must remain unfettered.

A reference again may be made to the decision of the Supreme Court in the case of *Talab Hazi Hussain v. M. P. Mondkar*. reported in AIR 1958 SC 376 : 1958 Cri LJ 701 wherein Mr. Justice Gajendragadkar (as his Lordship then was) observed at P. 381 that

After all procedure whether criminal or civil must serve the higher purpose of justice.

We respectfully agree. In any event, to rule out the non-conformance complained of and the consequent prejudice, we have allowed the prayer to file an additional affidavit with relevant annexures, with due notice to the State and have thereafter proceeded to hear both the parties in details on merits before passing the final order. The preliminary objection raised as accordingly disposed of.

7. Coming now to the three dimensions of Mr. Sen's contention, we hold that it is neither possible to determine the first dimension at this stage on the materials before us nor is it necessary to do so. The steps of Mr. Sen's reasoning in this behalf are that Under the existing agreement 10% of the imported salt has to be kept in reserve at the Government Gola at Salkia and as a result of that the stock must have mounted up considerably, ruling out thereby any apprehension of shortage and possibility of emergency. The learned Junior Government Advocate however pinpointed that the intention of the legislature in this behalf is not that the mere quantum of the article concerned would attract or rule out the provisions of a piece of emergency legislation but that the king-pin of such consideration is whether the distribution of any essential commodity has been tinkered with. We have already observed that it is neither possible nor necessary for Us to decide the same on the materials available and the point raised is accordingly disposed of.

8. The second dimension of the contention raised on behalf of the accused applicant relates to whether salt is an essential commodity within the bounds of Rule 36 (3) of the Defence of India Rules, 1971. Mr. Sen contended in this behalf that under the said provision an essential commodity means food, water, fuel and power or any other thing essential for the existence of the community which is notified by the Government. He proceeded to contend that salt is not food or water etc. as referred to therein but could only come within the latter part of the provision relating to any other thing for the existence of the community. The same however is qualified by the words 'which is notified in this behalf by the Government'. As there was no notification by the Government, salt is not an essential article for the existence of the community coming within the second Part of the Rule 36 (3) of the Defence of India Rules, 1971 and therefore Rule 36 (6) (i) has no application ruling out the penalty provided for in Rule 43 (5) of the Defence of India Rules, 1971. The learned Jr. Govt. Advocate joined issue and submitted that salt is a food coming within the definition of an essential commodity under Rule 36 (3) and that the contention of Mr. Sen in this behalf is more technical than real. Food according to him means any article used as food or drink for human consumption and it includes an article which ordinarily enters into or is used for the composition or preparation of human food. Salt therefore is an article which is indispensable as a

component of food and therefore essential for the existence of the community. There is a considerable force behind the submissions of the learned Junior Government Advocate and the second dimension of Mr. Sen's contention accordingly fails.

9. This brings us to a consideration of the third and last dimension of Mr. Sen's argument relating to interpretation of Rule 36 (6) (i) of the Defence of India Rules, 1971. To be more precise, Mr. Sen's contention is that in order to attract the penalty under Rule 43 (5) there must be an interference with the supply or distribution of essential commodity by the accused concerned establishing the ingredient enjoined under Rule 36 (6) (i) of the Defence of India Rules, 1971. He further contended that this case does not come within the bounds thereof inasmuch as there was a strike by the All India Boatmen's Association holding up the unloading of the salt from the M. V. Lokshevak between the 22nd December, 1973 to 27th December, 1973 and as such the purported failure is already due to circumstances beyond the control of the accused-applicant. . Mr. Promode Ranian Roy, Jr. Govt. Advocate joined issue and submitted that the factum of a strike has not been established: and that in any event the unloading might have been stopped for two days only- Mr. Sen filed an additional affidavit containing relevant annexures. viz. the daily report by the Union Weighment Co. to the unloading from the M. V. Lokshevak and also the certificates from the Shipping Corporation of India Ltd. and the Mogul Line Ltd. to the effect that there was a strike from the 22nd December, 1973 up-til 27th December 1973. Certain papers relating to the demurrage suffered thereby have also been attached. The Court at this stage, for the purpose of enlarging an accused on bail or not need only be satisfied prima facie on relevant Points in order to decide either way and a proper determination of the issue raised must ultimately depend on the materials adduced at the proper stage in course of the trial or enquiry that may take place. It is pertinent in this contexts however to refer to the words used by the legislature in Rule 36 (6) of the Defence of India Rules, 1971 whereby a prejudicial act means any act which is intended or is likely to etc. The use of the words 'intended or is likely' would connote and predicate the requirement of a blame-worthy mind or mens rea. It is in short not a statutory offence requiring no mens rea. A strike resulting in withholding of supplies, Mr. Sen contended, would rule out any such possible

intention-and the failure to unload on ultimate-analysis was only due to this unforeseen development. There appears to be a considerable force behind these submissions but as already observed we need not determine the point finally at this stage, but on a prima facie consideration of the circumstances placed before us. we up hold on merits the order for interim bail granted earlier.

10. The learned Jr. Govt. Advocate finally contended that proper conditions should be imposed to ensure that the investigation by the police may not suffer. There is a considerable force behind this submission. At the stage of investigation the High Courts in India should not interfere with the same excepting on grounds attracting the provisions of Article 226 of the Constitution or under Section 491 of the Code of Criminal Procedure. We therefore agree that reasonable conditions should be imposed on the order of bail already granted.

11. In the result, we allow the application and confirm the interim order for bail, modifying the same as follows:

(a) that while on bail, the accused-applicant shall report to the Assistant Commissioner, Enforcement Branch at 32, Shakespeare Sarani Calcutta, twice a week between 2 and 3 P. M on Mondays and Saturdays for a fortnight from date; and

(b) that thereafter, he shall continue to so report once a week, between 2 and 3 p. m. on each Saturday, until further orders.

12. Let the ordering portion of the judgment go down forthwith.

13. The additional affidavit filed in Court today on behalf of the accused-applicant may be kept on the record.

A.N. Banerjee, J.

14. I agree.