

State Vs. Om Parkash Etc.

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Court : Himachal Pradesh

Decided On : Jul-07-1972

Reported in : 1973CriLJ824

Judge : Chet Ram Thakur, J.

Appellant : State

Respondent : Om Parkash Etc.

Judgement :

ORDER

Chet Ram Thakur, J.

1. This is a revision petition filed by the State against the order. dated 31.5.1972. passed by the Special Judge. Mandi granting anticipatory bail to Sarvshri Puran Chand and Dr. Om Parkash respondents.

2. The respondents had surrendered themselves on 2.5.1971 before the Special Judge, Mandi and they had contended before him that a case under Sections 420, 467. 468. 471 and 120-B of the Indian Penal Code and Section 5(d) of the Prevention of Corruption Act had been registered against them and that the police was likely to arrest them at any moment and that the warrants to secure their arrest had also been obtained by the police. The learned Special Judge granted interim bail to the applicant-respondents and issued notice to the State and the

case was ultimately heard by Shri A.H. Bhoil, successor of Shri Ram Pal Singh, who has since been transferred from Mandi to Dhara-msala. Before the learned Special Judge, it was contended that the petitioners were Government employees and there was little likelihood of their absconding or tampering with the evidence and that the case against them had admittedly been registered and, their arrest was imminent and since both the Petitioners were respectable Government employees it would put them to unnecessary ridicule in the public and. therefore, their release on bail was essential in the interest of justice. This application was opposed by the learned Public Prosecutor, who contended that anticipatory bail could not be granted and he placed reliance on various authorities, which find reference in the impugned order made by the learned Special Judge. The learned Special Judge distinguished all those authorities and held that the offences for which the cases against the petitioners had been registered were non-bailable and cognizable. According to him, issuance of any warrants of arrest was not necessary and the police could at any time arrest the Petitioners which would mean causing unnecessary harassment to them. And further that from the ruling reported in 1971 Cri LJ 572 (Orissa), it was apparent that there was a conflict between different High Courts regarding the grant of anticipatory bails and hence he observed that each case has to be decided on its own peculiar facts and he held that in view of those facts, the petitioners were entitled to be enlarged on bail and he accordingly enlarged them on their personal bail bonds of Rs. 2000/- with one surety each in the like amount to the satisfaction of any Magistrate 1st Class.

3. The learned Advocate-General contends that this order is wholly erroneous, inasmuch as there is no provision in the Code for the grant of anticipatory bail and that the question of bail arises only when a person is under custody or when a warrant of arrest is issued and that there is nothing of the kind in the instant case and that the lower Court has transgressed its jurisdiction in granting the bail to the persons against whom no warrants of arrest had been issued. The simple registration of the case particularly when the officer investigating it could not investigate the same without the permission of the Magistrate could not entitle the respondents to seek bail, and he relied on:

Amir Chand v. Crown AIR 1950 EP 53 (FB) : State v. Dalhu Punia AIR 1954 Madh B (113) : Juhar Mal v. State : Amiad Sheik v. The State : AIR1955 Cal141 : Public Prosecutor v. Manikya Rao : AIR 1959 AP639 : State v. Narayan Prasad : AIR 1963 MP276 : State v. Baswa Nath Rao AIR 1966 Mvs 71 : 1966 Cri LJ 267 : Pulinthanam v. State : AIR1967 Ker189 : State v. Jagannath Swain 1971 Cri LJ 572(Orissa).

in support of his contention, that there was no Provision for anticipatory bail. None has appeared for the respondents because the petitioners have already been challaned and admitted to bail and so, the question of anticipatory bail has now become academic add the learned Advocate-General wants that this Court should decide the Question whether anticipatory bail can be granted in law.

4. I have considered the arguments of the learned Advocate-General for the State. The question that arises for determination by this Court, therefore, is whether bail can be granted to persons who have not yet been arrested for an actual charge of any offence or even on suspicion of their complicity in any offence.

5. Section 496 relates to the grant of bail to Persons accused of offences other than non-bailable offences. It provides that when such a person is arrested or detained without warrant by a police officer, or appears or is brought before the Court and is Prepared at any time while in the custody of such officer or at any stage of the proceedings before the Court to give bail, then the person shall be released on bail. The first proviso to Section 496 further lays down that if the Police officer or a Court thinks fit, then instead of taking bail from such person he may be discharged 'on his executing a bond without sureties for his appearance as hereinafter provided', Section 497 deals with the powers of the trial Court to grant or refuse bail to persons accused of non-bailable offences. Sub-section

(1) of this section refers to a stage when the person accused of or suspected of the commission of an offence first appears or is brought before the Court. At this stage there is little or no evidence for a Court to act upon and the matter of granting bail is entirely in the discretion of the Court subject to the restriction that if there are reasonable grounds for believing that the accused is guilty of an offence punishable with death or transportation for life, the accused shall not be released

on bail except when the accused is a minor under sixteen years of age or a woman or a sick or an infirm person in which case he may be released on bail. Under Sub-section

(2) if the accused is not released at the initial state on his appearance in the Court, he may still be released subsequently during investigation, enquiry or trial if there are no reasonable grounds for believing that he has committed a non-bailable offence but that there are sufficient grounds for further inquiry into his guilt. Under Sub-section

(4) of this section, if after the conclusion of the trial before delivery of judgment the Court is of the opinion that there are reasonable grounds for believing that the accused is not guilty of any non-bailable offence, then the Court shall release the accused if he is in custody. on the execution by him of a bond without sureties for his appearance to hear the judgment delivered. Thus from the provisions of this section, it would follow that it is at the discretion of the trial Court to order the release on bail in cases of non-bailable offences subject to the restrictions mentioned in Sub-sections (1)(2), (3-A) and (4). Section 498 deals with three matters, namely

(1) fixing the amount of bond:

(2) the power of the High Court and the Court of Session to admit any person to bail in any case, whether there be an appeal on conviction or not: and

(3) the Power of the High Court and the Court of Session to reduce the bail required by a police officer or a magistrate. Thus it would disclose that this section invests the Court of Session and the High Court with wide powers in the matter of granting or refusing bail. Besides this it also provides for concurrent jurisdiction with the trial Court and the powers of this Court to grant bail is not fettered by any conditions or limitation imposed in Section

497. The unfettered powers of the Court under Section 498 relate to granting of bail in cases relating to offences punishable with death or transportation for life. But it does not cover the grant of anticipatory bail to a person accused of or suspected of the commission of an offence if he is not in custody. As would be

apparent from *Jairamdas v. Emperor* AIR 1945 PC 94 : 46 Cri LJ 662 which says that Sections 496 and 497 Provide for the grant of bail to accused persons before trial, and the other sections in Chapter XXXIX deal with matters ancillary or subsidiary to those provisions-Therefore, the power under Section 498 is clearly supplementary or subsidiary to those two sections. This implies that Section 498 does no confer any extraordinary powers not possessed by a Court while acting under Section

497. It had been pointed out by their Lordships in the aforesaid case that Chapter XXXIX contains a complete and exhaustive statement of the Powers of a High Court in India to grant bail and excludes the existence of any additional inherent power in a High Court relating to the subject of bail. So, the question whether a person who is not in custody or who is not required in the absence of any order of arrest against him can at all be granted bail must, therefore, be determined only with reference to the terms of Sections 496 and 497 and not on consideration of difficulties in police investigation or of harassment to person accused of or suspected of commission of an offence. A Full Bench of the East Punjab High Court has; discussed this matter at some length in *Amir Chand v. The Crown* AIR 1950 EP 53 : 51 Cri LJ 480(FB) and reached the conclusion that Section 498 Cr.P.C. does not empower the High Court or the Sessions Court to grant bail to a person, who was not Put under some restraint by arrest or otherwise. In that case, the meaning of 'bail' is even as contained in Wharton's Law Lexicon as also in Stroud's Judicial Dictionary. On the basis of the definition as given in these dictionaries, the etymological expression contemplates release from custody or restraint, which in other words means 'to set free or liberate a person arrested or imprisoned on taking security for his appearance.' If, therefore, the grant of bail to person presupposes that he is in custody of the police or of the Court or if not already in such custody is required to surrender to such custody then it is unreal to talk of any person who is not under such restraint being granted bail as held in *Varkey Paily Madathikudivil Pulinathanam v. State of Kerala* : AIR1967 Ker189 . In Tomlins' Law Dictionary it has been stated that the word 'bail' is used in each common law for the freeing or setting at liberty of one arrested or imprisoned for an action civil or criminal on surety taken for his appearance on a day and at a place certain. The reason why it is called bail is because by this means the party

arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required in order that he may be safely protected from prison. Similarly the word 'bail' has been defined in Jowitt's Dictionary of English Law. as has been discussed in State of Madhya Pradesh v. Narayan Prasad Jaiswal AIR 1963 Madh Pra 26 : 1963

(2) Cri LJ

375. This meaning of the word has been adhered to in the Code of Criminal Procedure also as would be clear from a reference to Sections 57, 59, 62, 63m, 64, 169, 170, 496 and 497 giving to the police the power to release on bail and Sections 76, 86, 91, 186, 217, 426, 427, 432, 438, 496 and 497 dealings with the power of the Court to grant bail and to the forms prescribed for bailable warrants and for bail bonds which are to be executed when bail is given. This makes it very clear that where a person is granted bail he is released from restraint. If, therefore, the grant of bail to a Person presupposes that he is in the custody of the police or of the Court, or, if not already in such custody is required to surrender to such custody. then it is unreal to talk of any person, who is under no such restraint, being granted bail.

6. The learned Special Judge has held that the case against the petitioner has been registered and the same is non-bailable and cognizable and the issuance of any warrants of arrest is not necessary and the police can at any time arrest them, which would mean causing unnecessary harassment to them. But this finding of his does not appear to be reasonable, inasmuch as mere registration of a case and the apprehension of the petitioner-respondents that they are likely to be arrested is not enough. As would have been noticed from the aforesaid various provisions of the Act as also from the authoritative pronouncement of the Privy Council and the observations as made in AIR 1950 E.P. 53 : 51 Cri LJ 480(FB) which are to the following effect:

If I may say so. it would be an absurd position that the Court should put a person under restraint when he is a free man and there is no charge against him excepting perhaps something contained in the first information report which may or may not be sufficient for the apprehending of that person. I cannot imagine that the

Code would have conferred any such power on the Court. To my mind this would be an intolerable position that although a Person was quite free when he came to Court he should be put in jeopardy of arrest and of the commitment to bail although no charge may have been levied against him or he might have been arrested or on interrogation he might have been able to prove to the satisfaction of the Police officer, who was going to arrest him. that as a matter of fact he had not committed any offence for which he could be arrested.

Thus from this it would appear that it would not be proper for a Court to place a person under restraint against whom there is no warrant of arrest or who is not required to surrender into any custody for having committed any offence when he comes to Court for bail complaining that he has not committed any offence and there is no ground for his arrest in future, That way the Court would be interfering with the police in the matters which are within the Province of the police and which interference has been deprecated by the Privy Council in *Emperor v. Nazir Ahmad* AIR 1945 P.C. 18 : 46 Cri LJ 413 which is to the following effect:

Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged. so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise in its own function.

It is true that the police can arrest a person for a non-bailable offence without a warrant being issued by the Magistrate, but the instant is a case under the Prevention of Corruption Act. The police cannot arrest the accused unless

permission is taken from the Magistrate because under the Prevention of Corruption Act, a police officer not less than the rank of a Deputy Superintendent of Police is competent to investigate a case unless permission in that behalf has been obtained from the Magistrate and there is nothing on the record to testify to this fact or to show that in a cognizable case the police officer has issued an order as required under Section 56 of the Code of Criminal Procedure to his subordinate for the arrest of the accused. So, in the absence of that the apprehension of the petitioner that they were likely to be arrested any-humiliated were illusory. It appears that the court below has interpreted the word 'appears' to confer the powers upon the Court to enlarge a person on bail as soon as he surrenders himself in the Court and alleges that a case has been registered against him and the police is likely to arrest him in that case. But the, word 'appears' as has been interpreted in the various authorities relied upon by the learned Advocate-General has been taken to mean to surrender to custody under an order of arrest made against him and not the appearance of a free person who is not under arrest or who merely apprehends a possible arrest and that the addition of the words 'or suspected of the commission of' in Section 497 by the amending Act No. 26 of 1955 does not in any way enable the Court to grant anticipatory bail to a free person. These words and the words 'in any case' and 'any person' occurring in Section 498 do not wise out the above-stated meaning of the words 'appears' and 'bail.' The words 'any person' in Section 498 mean a person accused of or suspected of the commission of any offence, who has been arrested or detained or who is required to surrender to custody under an order of arrest against him. The words 'in any case' as explained by the Privy Council in the case of *Jairamdas*. AIR 1945 PC 94 : 46 Cri LJ 662 (supra) have relation to the words 'whether there be an appeal on conviction or not' and have been used to indicate that all the accused persons are within Section 498 whether their case is boilable on conviction or not. There is no justification whatsoever for reading the words 'in any case' as giving power to the High Court or the Court of Session to grant bail to persons who are neither under arrest nor required to surrender any custody under an order of arrest.' Thus from the above it would appear that none of these Sections empowers the Court to grant bail to a free person in anticipation of his possible arrest for some offence and in the absence of any order of arrest against

him. A similar view has been taken in other cases cited and relied upon by the learned Advocate-General and from these authorities, it would, therefore, appear that the consensus of the judicial opinion is that there is no provision for any anticipatory bail and the cases which are in favour of granting anticipatory bail are very few and need not be referred to because I have come to the conclusion after going through the authorities that there is no Provision and no anticipatory bail can, therefore, be granted and the observations of the learned Special Judge that the case has been registered against the respondents and that it was non-boilable and cognizable is not correct, unless they had actually been arrested or out under restraint by issue of warrant or by order for their arrest as is required under Section 56 of the Code, of Criminal Procedure. But there is nothing to show if there was any such their. Therefore, the learned Special Judge had erred in allowing an-divinatory bail to the respondents in the absence of any Provision. Hence the petition is decided accordingly.