

Aniben and Others Vs. Krishnankutty and Others

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Court : Kerala

Decided On : Mar-13-2012

Judge : P.S. Gopinathan

Appeal No. : CRL. MC. NO. 30 OF 2012

Appellant : Aniben and Others

Respondent : Krishnankutty and Others

Judgement :

ORDER

1. Petition under Sections 439(2) and 482 of the Code of Criminal procedure. Petitioners are the injured in Crime No. 487 of 2011 of the Puthencruz Police Station for offences under Sections 143, 147, 148, 324, 308 and 427 r/w Section 149 of the Indian Penal Code. They would seek an order to quash Annexure H order whereby the First Additional Sessions Judge, Ernakulam, in Crl. M.C. No. 2093 of 2011, granted pre-arrest bail to respondents 1 to 4 who are accused 1 and 3 to 5 in the above case. The plea of the petitioners is that despite the serious nature of the crime including attempt to commit culpable homicide and without considering the objection raised by the prosecution, the Additional Sessions Judge granted pre-arrest bail.

2. Going by the First Information Statement contained in Annexure- A, I find that the allegation against the accused are that at about 10.30 p.m. on 14.1.2011, the

accused formed themselves into an unlawful assembly and being members of unlawful assembly, they were armed with deadly weapons like iron rod, pick axe etc., committed rioting and assaulted the petitioners by beating with iron rod and hacking with pick axe at head and neck in furtherance of the common object of the unlawful assembly and attempted to commit culpable homicide and in that attempt the petitioners sustained grievous hurt. The accused also committed mischief against a car by damaging it. Going by the First Information Statement, I find there are very serious allegations against respondents 1 to 4. Annexure D, the certificate of the Neuro Surgeon would show that the 3rd petitioner, who is aged 76 years, sustained left parietal and interhemispheric traumatic subarachnoid hemorrhage which is an injury of grievous nature.

3. Going by Annexure H order, I find that the Sessions Judge had not at all considered the serious nature of the offence alleged. Even the objection raised by the prosecution was not considered. Neither the antecedents of the accused nor the chance of they fleeing from justice was considered. For a correct appraisal, I find that it would be relevant to read Section 438 of the Code of Criminal Procedure, which is extracted below:

438: Direction for grant of bail to person apprehending arrest.-

(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:--

(i) The nature and gravity of the accusation;

(ii) The antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail;

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application. (Rest omitted as not relevant)

The above provision would show that the Sessions Court or the High Court, as the case may be, while granting pre-arrest bail, shall take into account of the nature and gravity of the accusation, the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence, the possibility of the applicant fleeing from justice and whether the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested.

4. The apex Court in *Kalyan Chandra Sarkar V. Rajesh Ranjan* ((2004) 7 SCC 528 = 2004 SCC (Cri) 1977) at Para 11, has held as follows:

"The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh (2002)3 SCC 598 = 2002 SCC (Crl.) 688) and Puran v. Rambilas (2001) (6) SCC 338 = 2001 SCC (Crl.) 1124)."

5. Therefore, the legal position is well settled. While allowing the application of respondents 1 to 4, the Additional Sessions Judge has ignored the settled law. There is total lack of application of mind. Therefore, especially having due regard to the nature of the offence alleged, I find that the impugned order is not sustainable and liable to be interfered.

6. The argument advanced by the learned counsel for the respondent is bi- fold. First argument is that there is no circumstance prevailing to cancel the bail already granted by the Sessions Judge. The other argument is that this Court shall not act upon the petition filed by the defacto complainant for cancelling bail and that the petitioners, in case they are aggrieved, should have approached the Sessions Judge under Section 439(2) Cr.P.C. The learned counsel for the respondents relied upon the decision reported in Mahant Chand Nath Yogi v. State of Haryana ((2003) 1 SCC 326), Manjit Prakash v. Shobha Devi (2008(3) KLT SN 71 (C.No. 87)SC, Thulaseedharan Nair v. State of Kerala (2006 (4) KLT 471) and Chellappan v. State of Kerala (1987 (1) KLT 435) in support of his argument that bail once granted cannot be cancelled and very cogent and overwhelming circumstances are necessary for issuing an order directing cancellation of bail. In support of the argument that petitioners had to approach the Sessions Judge, the decision in Mohammed Kunju v. State of Kerala (2012(1) KLT 487) was also relied on.

7. On the other hand, the learned counsel for the petitioners relied upon the decisions in Gurcharan Singh and others v. State (Delhi Administration) [AIR 1978 SC 179(1], Superintendent of Police v. P.V.Vijayaraghavan (1984 KLT 47), Superintendent of Police v. Vijayaraghavan and others (1984 KLT 687), R.Rathinam v. The State and another (AIR 2000 S.C.1851); Puran v. Rambilas and another [(2001)6 SCC 338]; State of Kerala v. Suraj (2004(1) KLT 72; Shiji

P.Antony v. State of Kerala (2006(1) KLT 331); Dinesh M.N(S.P) v. State of Gujarat [(2008)5 SCC 66]; Prasad Jacob and others v. State of Kerala and others (2010(1) KLD 611); State of Kerala v. Moidheen Kunji (2012(1) KLT 203).

8. Fifth respondent State supported the argument of the petitioners.

9. Before referring to the precedents, I find that it would be appropriate to go through the statutory provision. Section 439 (2) of the Code of Criminal Procedure is the relevant provision which enables the High Court or Court of Session to direct any person who has been released on bail to be arrested . Section 439(2) reads as follows:

439(2): A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody. A plain reading of the above provision would show that the High Court as well as the Sessions Court can exercise powers under sub clause 2 of Section 439 and a person who has been released on bail can be ordered to be arrested. It does not matter as to whether the bail was granted by the Sessions Court or the High Court. The plea of respondents 1 to 4, as stated earlier, is that the aggrieved person has to approach the Sessions Court which granted bail and this court shall not entertain such application by an aggrieved person. Going by Section 439(2), I find little merit in the argument advanced.

10. In Gurcharan Singh and others v. State [AIR 1978 SC 179(1)] at paragraph 16 it is held thus:

"16. Section 439 of the new Code confers special powers on High Court or Court of Session regarding bail. This was also the position under S.498 Cr.P.C. of the old Code. That is to say, even if a Magistrate refuses to grant bail to an accused person, the High Court or the court of Session may order for grant of bail in appropriate cases. Similarly under S.439(2) of the new Code, the High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed to custody. In the old Code, S.498(2) was worded in somewhat different language when it said that a High Court or Court of Session may cause any person who has been admitted different language when it said that

a High Court or Court of Session may cause any person who has been admitted to bail under sub-section (1) to be arrested and may commit him to custody. In other words, under S.498(2) of the old Code, a person who had been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power of entertainment of an application for committing a person already admitted to bail, to custody, is lifted in the new Code under S.439(2). Under S.439(2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any Court including the Court of Session to custody, if it thinks appropriate to do so. It must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court. If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The state may as well approach the High Court being the superior Court under S.439(2) to commit the accused to custody. When, however, the state is aggrieved by the order of Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court."

In P.V.Vijayaraghavan,s case, (1984 KLT 47), at paragraph 13, it is held:

"[T]he undoubted power of the High Court to cancel or modify an order of the Sessions Court enlarging an accused on bail, is corrective in its content, original in character and not appellate or revisional in nature and scope."

In Vijayaraghavan's cases (1984 KLT 687), at paragraph 10, it is held thus:

"[W]here supervening factors are alleged, the investigator can move the Sessions Court which granted bail or even the High Court. Where there are no

circumstances that have cropped up, when the State is aggrieved by the order of the sessions Court granting bail, it may be futile for the State to move the Sessions Court for cancellation of bail; it is competent to move the High Court for such relief."

In Rathinam's case(AIR 2000 S.C.1851) at paragraph 8 it is held:

"[I]t is also open to the High Court to cancel the bail if the High Court feels that the reasons stated in the petition are sufficient enough for doing so."

In Puran's case in [(2001)6 SCC 338] at paragraph 10, it is held:

"[O]ne such ground for cancellation of bail would be where ignoring material and evidence on record a perverse order granting bail is passed in a heinous crime of this nature and that too without giving any reasons. Such an order would be against principles of law. Interest of justice would also require that such a perverse order be set aside and bail be cancelled." In Suraj's case [(2004(1) KLT 72] referring to Puran's case (supra) it was held:

"[I]f the bail is granted ignoring the material evidence on record, the same is liable to be quashed."

11. In Shiji P. Antony v. State of Kerala (2006(1) KLT 331) also the decision in Puran's case (supra) was relied on and it was held that anticipatory bail can be cancelled on the application by the defacto complainant. In Dinesh's Case (2008)5 SCC 66 at paragraph 23, it is held:

"[E]ven though the reappraisal of the evidence as done by the court granting bail is to be avoided, the court dealing with an application for cancellation of bail under Section 439 (2) can consider whether irrelevant materials were taken into consideration. "

In Prasad Jacob's case (2010(1) KLD 611) at paragraph 7 it is held:

"[T]he law is now well settled after the three Judges' Bench verdicts of the Supreme Court that if the order granting bail is perverse for the reason that irrelevant material of substantial nature was taken into account or relevant material

omitted from consideration, the superior Court would be justified in cancelling the bail."

The same view was adopted in *State of Kerala v. Moidheen Kunji* (2012 (1) KLT 203). In the light of the above precedents, the argument of the learned counsel for respondents 1 to 4 that this Court shall not act upon the application of the defacto complainant to cancel the bail is without any merits. For invoking Section 439 (2) Cr.P.C., I fail to find anything to show that different yardstick is to be adopted for application by the State and the aggrieved person. In other way, the aggrieved person as well as State can approach this Court for cancelling the bail granted by the Sessions Judge, provided ground exist. The argument that for cancelling bail, the aggrieved person has to approach the Sessions Judge is devoid of merits. The decision of this Court in *Moidheen Kunji's case* (2012 (1) KHC 487) (*supra*) relied on by respondents 1 to 4 was rendered without noticing the decision of the Apex Court mentioned above. In the above circumstances, I am not following the decision in *Moidheen Kunji's case* relied on by respondents 1 to 4.

12. Learned counsel for respondents 1 to 4 would further submit that the second accused was granted bail by the committal court though his application for pre-arrest bail was rejected by this Court and in the above circumstances, the bail granted to respondents 1 to 4 shall not be cancelled. The criteria for granting bail under Section 439 and granting an order under Section 438 Cr.P.C. are entirely different. Therefore, the granting of regular bail by the committal court to the second accused wouldn't stand in the way of invoking Section 439 (2) Cr.P.C. Respondents 1 to 4 may be entitled to be released on bail under Section 439 Cr.P.C. But that may not entitle them to get a pre-arrest bail under Section 438 Cr.P.C.

In the above circumstance, I find that the petitioners shall succeed. Annexure H order impugned in this petition would stand cancelled. The committal court shall issue arrest warrant and commit respondents 1 to 4 to custody. However, respondents 1 to 4 are at liberty to surrender before the committal court and apply for regular bail which the committal court shall dispose of on merits with due notice to the Assistant Public Prosecutor.

