
(2016) 06 CAL CK 0018
In the Calcutta High Court
Case No : C.R.R. No. 56 of 2016

Debnarayan Sen @ Tilak Sen

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 06-06-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 4(2), 41, 438, 482
Penal Code, 1860 (IPC) — Section 323 427 379 506
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(i)(iv)(v)(x)

Citation : (2016) 3 AICLR 786 : (2016) 3 CalCriLR 516

Hon'ble Judges : Joymalya Bagchi, J.

Bench : Single Bench

Advocate : Mr. Tapas Kumar Ghosh and Mr. Tanmoy Chowdhury, Advocates, for the Appellant; Mr. Sabir Ahmed, Advocate. and Mr. Ranadeb Sengupta, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Joymalya Bagchi, J.—Proceeding registered in Suri P.S. Case No.448 of 2015 dated 17th December, 2015 under Section 323/427/379/506 of the Indian Penal Code and under Section 3(i)(iv)(v)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereafter referred to as Act of 1989) has been assailed. The allegations in the application under Section 156(3) of the Cr.P.C. which were treated as F.I.R. in the instant case is to the effect that the defacto-complainant and his family members are members of the Scheduled Caste Community. It has been claimed that the family members of the defacto-complainant were carrying on pisciculture in the pond in question for the last 50 years. On 20.3.2015 at about 8 A.M., the petitioners attacked the defacto-complainant and assaulted him and took away fishes from them. The petitioners also abused the defacto-complainant by referring to their caste. When the family members of the defacto-complainant objected, they were further abused and it was stated that the petitioners shall not permit them to enter the pond as they

were members of low caste. The petitioners had also threatened that they would kill and/or destroy fishes which were raised by the defacto-complainant in the pond.

2. The petitioners have assailed the impugned proceeding, inter alia, on the ground that the uncontroverted allegations in the first information report do not disclose the ingredients of the alleged offences. There is no averment in the first information report that the petitioners are not members of the Scheduled Caste and Scheduled Tribes Community and that the question of dispossession of the defacto-complainant from the pond does not and cannot arise at all inasmuch as they were not in possession of the pond at all and it was the petitioners who were carrying on pisciculture in the said pond.

3. Mr. Ghosh appearing for the petitioner argued that a complaint was lodged against the defacto-complainant for committing theft in the said pond on 20.3.2015. He further drew my attention to the fact that although there was a lease executed in favour of the defacto-complainant to carry on pisciculture in the pond in question but the said lease had expired long ago and since then the petitioners themselves were carrying on such activity in the pond. It is also brought to my notice that a preemption suit is pending by and between the parties. In the backdrop of the aforesaid facts, it is submitted that the allegations of dispossessing or preventing the defacto-complainant from entering the pond on account of their caste appears to be patently absurd and inherently improbable. Provisions of the Act of 1989 has been invoked to harass and humiliate the petitioners particularly petitioner no.3 who is an employee of Central Government. Reliance has to be placed on (2009) 1 SCC (Cri) 446 (Gorige Pentaiah v. State of Andhra Pradesh & Ors.) and 2013 (1) Supreme 257 (Ravinder Singh v. Sukhbir Singh & Ors.)

4. Mr. Ahmed, appearing for the defacto-complainant opposite Party no.2, submitted that the petitioners were in possession of the pond and were carrying on pisciculture therein since time immemorial. He relied on the report filed on behalf of the B.L.&L.R.O. in a proceeding under Section 144 Cr.P.C. instituted by and between the parties in support of such claim. Copy of the said report is kept with the record. He also submitted that a co-sharer had sold a portion of the pond in favour of his client which further probabilises their presence in the pond in question. He submitted that the allegations prima facie disclose ingredients of the alleged offences and interference at the stage of investigation is unwarranted in law.

5. Mr. Sengupta appearing for the State submitted that investigation is in progress in the instant case.

6. I have considered the materials on record. Prima facie, there are allegations of dispossession or theft from members of Scheduled Caste Community and also abuses and insinuations were levelled against members of such community in a public place referring to their caste. Investigation is in progress and truthfulness

of such allegations cannot be decided in exercise of inherent jurisdiction of this Court and it must be left to the investigating agency in the first place. Reliance on (2009) 1 SCC (Cri) 446 appears to be misplaced in the factual backdrop of this case. In the aforesaid report the land in question was admittedly in the possession of the defacto-complainant. Such issue appears to be a disputed one in the instant case. It is nobody's case that the petitioners are also members of any Scheduled Caste or Schedule Tribe Community and, therefore, mere absence of allegation in the FIR that they are not members of such community does not render the commencement of investigating agency impermissible in law. I am unable to accept the contention of learned counsel for the petitioner that the aforesaid report invariably lays down any such proposition in law. With regard to 2013 (1) Supreme 257, the Apex Court had quashed the proceeding in view of the fact that there was an acquittal of the accused persons on self-same allegations. The ratio of the said report is clearly inapplicable to these facts. Coming to issue as to the prior enmity or pending litigation's by and between the parties, I am of the opinion that such facts do not render the allegations in the F.I.R patently absurd or inherently improbable so as to justify interference. The issues raised in this petition are factual in nature and require to be investigated by the police in the course of the ensuing investigation. However, registration of the first information report and the commencement of investigation cannot be said to be without jurisdiction in view of the uncontroverted allegations as reflected in the first information report. Hence, I do not wish to interfere with the registration of first information report and or the investigation ensuing therefrom in the factual matrix of the case. All the issues herein may be looked into in the course of such investigation. It is submitted that the police authority shall harass the petitioner with arrest by misusing their powers of investigation in view of the fact that there is no remedy available by way of pre-arrest bail.

7. It is true that there is no provision for pre-arrest bail under the provisions of the Act of 1989. Arrest is an integral part of investigation and it is within the subjective discretion of the investigating agency to decide whether or not to exercise such power. However, merely because a police officer has a power to arrest it is not lawful for him to arrest in the course of investigation without justifiable and reasonable cause.

8. Such view is eloquently ventilated in *Joginder Kumar v. State of U.P.*, (1994) 4 SCC 260, wherein the Apex Court held:-

"20.The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen

and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do."

9. Similarly in *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694, the Court held that arrest should be the last option and reason must be expressly cited in the case diary before or immediately after the arrest. It held:-

"113. Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

118. In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer."

10. Similar view is reiterated in *Bhadresh Bipinbhai Sheth v. State of Gujarat*, (2016) 1 SCC 152.

"25.2. The gravity of charge and the exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases, the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court."

11. Power of arrest in respect of offences under the Act of 1989 is not provided under the special Law. It is derivable from the provisions of the Code in view of section 4(2) of the said Code. Power to arrest under the Code is provided in section 41 thereof. In order to regulate the unbridled power of the police to arrest persons accused of offences punishable with imprisonment up to seven years, the aforesaid provision was amended by the Act 5 of 2009 and objective

parameters were laid down so as to regulate such power.

Relevant provisions of the Code (as amended upto date) in this regard are as follows:

"41. When police may arrest without warrant.

- (1) any police officer may without an order from a Magistrate and without a warrant, arrest any person -

(a);

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognisable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:-

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary -

(a) to prevent such person from committing any further offence;

or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing:

[Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest]"

.....

"41A. Notice of appearance before police officer. - (1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed cognisable offence, to

appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice."

12. The aforesaid provisions fell for interpretation in *Arnesh Kumar v. State of Bihar*, (2014)8 SCC 273, and in paragraphs 11 to 12 of the said report, the Apex Court directed as follows:-

"11. Our endeavour in this judgment is to ensure that police officers do not arrest the accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following directions:

11.1. All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 CrPC;

11.2. All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);

11.3. The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

11.4. The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

11.5. The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.6. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing;

11.7. Failure to comply with the directions aforesaid shall apart from rendering

the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before the High Court having territorial jurisdiction.

11.8. Authorising detention without recording reasons as aforesaid by the Judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court.

12. We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498-A IPC or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine." (emphasis supplied)

13. It is clear from the ratio in *Arnesh Kumar* (supra) that the stipulations laid down therein shall apply not only to offences under section 498A IPC but also to other offences which are punishable up to imprisonment for 7 years. Hence, in the matter of arrest in the course of investigation of cases involving offences punishable with imprisonment less than 7 years including those under the Act of 1989, the police officer is to exercise the power of arrest subject to the parameters laid down in sections 41(1)(ii) and 41A of the Code and in the light of the guidelines laid down in paragraphs 11 to 12 of *Arnesh Kumar* (supra), as aforesaid.

14. In the instant case, all the offences including those under the Act of 1989 are punishable with imprisonment less than 7 years. Therefore, the investigation agency in the instant case is directed to conduct the investigation keeping in mind the aforesaid directions and in a fair and proper manner and to conclude the same at an early date.

15. With the aforesaid directions the petition is disposed of. Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.