

(1986) 09 OHC CK 0002

In the Orissa High Court

Case No : Criminal Miscellaneous Case No"s. 257 and 309 of 1986

Durel Behera

APPELLANT

Vs

Suratha Behera and Another
 State of Orissa Vs
Suratha Behera

RESPONDENT

Date of Decision : 25-09-1986

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 209, 309(2), 436, 437

Citation : (1986) 62 CLT 605 : (1986) 2 OLR 536

Hon'ble Judges : H.L Agrawal, C.J;R.C. Patnaik, J

Bench : Division Bench

Advocate : Arjit Pasayat, S. Khuntia and S. Palkray in Criminal Misc. Case No. 257/86 and Additional Government Advocate in Criminal Misc. Case No. 309/86, for the Appellant; S.K. Patnaik, (O.P.1), Additional Government Advocate (I) (O P. 2) in Crl. Misc. Case No. 257/86 and P.K. Ray and G. Bohidar, in Crl. Misc. Case No. 309/86, for the Respondent

Final Decision : Allowed

Judgement

R.C. Patnaik, J.—Does an earlier illegal detention render a later valid detention invalid and entitle the accused for grant of bail ?

This question came to the fore in course of hearing of these two petitions filed u/s 439(2) of the Code of Criminal Procedure (for short, "the Code") for cancellation of bail granted by the learned Sessions judge, Puri, to Suratha Behera on the authority of D. Bhaskar Rao v. State of Orissa, 60 (1985) CLT 228 Mr. S. C. MohaPatra, J. who doubted the correctness of the aforesaid decision, referred the matter for hearing by a larger Bench. This is how the matter has come before us.

2. On an FIR lodged on 11-10-1985 at the Tangi Police Station in the district of Cuttack. containing allegation of commission of offences Under Sections 302/323/325/347/147/148/149/379 of the Indian Penal Code, Suratha Behera (opp. party in Crl. Misc. Case No. 309/86) and others were arrested and

produced in Court on 15-10-1985 and were remanded to custody till 28-10-1985. Neither were the accused produced in Court on 28-10-1985 nor was there any direction remanding them to custody. Suratha Behera was produced in Court on 4-11-1985 and was remanded to custody till 18-11-1985. He was produced in Court on 18-11-1985 and thereafter on 2-12-1985 and 18-12-1985. On 8-1-1986, charge-sheet was filed and cognisance was taken. On 10-1-1986, Suratha Behera was produced in Court and was remanded till 24-1-1986. His prayer for bail was rejected both by the Court of Session and by this Court.

3. On 25-4-1986, an application was filed by Suratha Behera before the learned Sessions Judge for grant of bail. It was contended that the detention of the petitioner Suratha Behera beyond the period of 15 days from 15-10-1985 and from 18-11-1985 without any order of remand had rendered his detention invalid and unauthorised. The subsequent orders of remand could not cure the invalidity and he was entitled to be released on bail. Reliance was placed on a decision of this Court in *D. Bhaskar Rao v. State of Orissa* (supra) and it was contended that the earlier rejection of his prayer for bail both by the Court of Session and by this Court could not operate as impediment. His detention being invalid, he was entitled to be released on bail. The learned Sessions Judge accepted the contention following *D. Bhaskar Rao*'s case and released him on bail.

4. The State and the informant have moved this Court in these two applications for cancellation of bail.

5. The provisions as to remand of an accused to custody are contained in Sections 167, 209 and 309 of the Code of Criminal Procedure.

Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station of the police officer making the investigation, if he is not below the rank of Sub-Inspector, shall forthwith forward the accused to the nearest Judicial Magistrate. The Magistrate may authorise the detention of the accused in custody for a term not exceeding 15 days on the whole. Where investigation cannot be completed within 15 days, as aforesaid, the Magistrate may authorise the detention of the accused in custody for a total period not exceeding 90 days where the investigation relates to an offence punishable with death, or imprisonment for life or imprisonment for a term not less than ten years and 60 days where the investigation relates to any other offence. If the investigation is not completed within the aforesaid period, the accused shall be released on bail if he is prepared to and does furnish bail. This is the gist of the provisions as to remand of an accused during investigation contained in Section 167 (1) and (2) of the Code, Section 309(2) makes provision for remand of an accused for a term not exceeding 15 days at a time during enquiry or trial. Section 209 provides for commitment of an accused to custody upon commitment of the case to the Court of Session.

The provisions as to grant of bail are contained in Chapter XXXIII (Secs. 436 to 439). Apart from the provisions contained in Chapter XXXIII relating to bail, Section 167(2) under the new Code also provides for grant of bail to an accused during investigation if investigation is not completed within a period of 60 days or 90 days, as the case may be, depending on the nature of the offence, if the accused is prepared to and does furnish bail, Clauses (i) and (ii) of Proviso (a) to Section 167(2). The person released on bail u/s 167(2) shall be deemed to be so released under the provisions of Chapter XXXIII, that is to say, he shall enjoy the same rights and suffer the same liabilities as a person released under Chapter XXXIII. There is no other provision apart from Section 167(2) and those contained in Chapter XXXIII for grant of bail. In *State of Uttar Pradesh Vs. Lakshmi Brahman and Another*, , the Supreme Court observed that it was not permissible to introduce "a stage of compulsory bail not envisaged by the Code " In *Mahesh Chand v. State of Rajasthan and etc.* (1985) Cri. L. J. 301, a Full Bench of the Rajasthan High Court has held that the illegality of an order remanding a person accused of non-bailable offence to custody u/s 167(2) or Section 309(2), does not per se entitle the accused to be released on bail. There is no warrant to hold that: in all cases in which at some anterior date the detention of the accused was illegal, the accused is entitled to be released on bail even if the detention is legal at the time when the bail application is filed or it comes for consideration. If the detention of the accused is legal when the application for bail is preferred his previous illegal detention should not be considered.

In *Rabindra Rai Vs. State of Bihar*, , a Full Bench of the Patna High Court has held. "There is an impression in some section that if an accused was entitled to bail under Proviso (a) to Sub-section (2) of Section 167 at one stage, or if for some time his detention was not under a valid order of remand, then he can enforce his right to be released on bail even at a later stage of the proceeding. This is a misconceived stand."

6. So far as this Court is concerned, it was held in *Rajani Kanta Meheta Vs. State of Orissa*, , a case where there was default on the part of the police to produce the accused in accordance with the provisions contained in Section 57, as follows :

"...If the petitioner had come before the Court challenging his detention without compliance of Section 57 of the Code, he should have certainly been set at liberty; but as it transpires he has been already produced before a Magistrate and police custody has come to terminate and judicial custody has replaced it. What was illegal detention beyond 24 hours of arrest has now become legalised and the present detention cannot be attacked on the footing of the detention at an earlier point of time being illegal."

7. To lay down a rule that an earlier invalid detention entitles an accused to bail despite his valid detention pursuant to orders of remand at the time of making the application for bail, would be introducing a new provision for grant of bail not

contemplated by the Legislature. I am, therefore, of the view that an earlier unauthorised or illegal detention of an accused does not invalidate his subsequent valid detention. If the detention of an accused is unauthorised or invalid because of infringement of provisions contained in Section 167(2), 209 or 309(2) of the Code, he may make an application for habeas corpus or pursue remedies as are available to him under the law but he cannot seek bail on the mere ground that at some earlier point of time his detention was unauthorised. Bail implies release from valid custody of Court. "Granting of bail is not to set the accused free but to release him from the custody of the law and to entrust him to the custody of his sureties" Halsbury's Laws of England, 3rd Edition at page-373.

8. Now to D. Bhaskar Rao's case, which guided the learned Sessions Judge to release Suratha Behera on bail. In that case cognisance of offences, u/s 395 and 457 read with Section 75 of the Indian Penal Code was taken on 25-10-1984. Bhaskar Rao surrendered in Court on 9-4-1985, - Bail was refused, but he was kept in custody without orders of remand from time-to time; even till the matter was heard by this Court. It was contended before this Court that his continued detention in violation of the provisions contained in Section 309(2) was illegal. This Court relying upon a decision of the Karnataka High Court in Gyanu Madhu Jamkhandi and Others Vs. The State of Karnataka, observed :

"..In the absence of valid orders of remand, the detention of the petitioner in custody for the period referred to above was illegal and so he is entitled to be enlarged on bail, though not on appreciation of facts relating to the charges brought against him, but purely on legal grounds."

With respect I express my dissent,, illegal detention, by itself and taken alone, is no ground for bail and has not been recognised as such by the Code. Bail is no remedy and has never been conceived or intended in law to be a remedy for illegal detention. To hold otherwise would "introduce a stage of compulsory bail not contemplated by the Code". To be entitled to be released on bail the accused must show that his case is either covered by Clause (i) of proviso to Section 167(2) or by the provisions of Chapter XXXIII of the Code. If the detention is illegal by reason of infringement of Section 309(2), the remedy is not an application for bail but an application for a writ of habeas corpus. {See Mahesh Chand's case, paragraphs 25, 27 and 29}.

Where an accused succeeds on an application for a writ of habeas corpus on the ground of illegal detention, he may be re-arrested and remanded to custody having regard to the gravity and the nature of the offence alleged to have been committed by him. If, however, he is released on bail on the ground that his detention was illegal, his bail can be cancelled only on the ground that he has misused the privilege of bail.

The question posed at the outset is, therefore, answered in the negative.

9. Learned counsel for Suratha Behera (O. P. No. 1) vehemently urged relying

upon State (Delhi Administration) Vs. Sanjay Gandhi, that review of a decision granting bail would be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial, that is to say, if he has misused or abused the privilege of bail. This, however, is one aspect of the matter. The other aspect is the undoubted jurisdiction of the Court of Session and of the High Court to cancel bail u/s 439(2) where the Subordinate Court has granted bail contrary to well-settled principles. Ordinarily the Court of Session or the High Court will not exercise its discretion to interfere with an order of bail granted by the Subordinate Court. A cautious approach is called for. Where the Court of Session or the High Court is satisfied that having regard to the nature and seriousness of the offence, the character of the offender, circumstances which are peculiar to the accused, likelihood of the accused fleeing from justice, or of repeating the offence, or of jeopardising his own life being faced with the grim prospect of the conviction in the case, reasonable apprehension of witnesses being tampered with, interest of the public and the State, bail ought not to have been granted and there exists valid ground for cancellation of bail, there is no limitation on the discretion of the Court u/s 439(2) to cancel bail.

10. Where bail has been granted on an untenable ground, the principles laid down in Sanjay Gandhi's case (supra) are not attracted. It is not then a case of cancellation of bail granted to an accused on the ground of misuse of the privilege of bail but a case of bail having been granted illegally. I have already noted that the prayer of Suratha Behera for grant of bail had been rejected on merits not only by the Court of Session but by this Court.

11. Having reached the conclusion that Suratha Behera was released on bail on an untenable legal ground, I set aside the order of the learned Sessions Judge, Puri passed in Criminal Misc. Case No. 284 of 1986 and direct that steps be taken forthwith to take the accused into custody.

Both the criminal miscellaneous cases are accordingly allowed.

H.L. Agrawal, C.J.

I entirely agree.