

(1993) 04 AHC CK 0080

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 15857 of 1993

Haji Peer Bux and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 13-04-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 19, 21, 226
Criminal Procedure Code, 1973 (CrPC) — Section 125, 437, 438, 439
Explosives Act, 1884 — Section 3, 5
Penal Code, 1860 (IPC) — Section 307, 394

Citation : (1993) AWC 1427 : (1993) CriLJ 3574

Hon'ble Judges : Virendra Saran, J;N.L. Ganguly, J

Bench : Division Bench

Advocate : Shanker Suan, for the Appellant;

Final Decision : Disposed Of

Judgement

Virendra Saran, J.—Petitioners Haji Peer Bux alias Saleern Lala and Fazloo alias Saghir Haji alias Saghir Jamal who are father and son respectively have filed this petition for quashing the First Information Report dated 18-3-1993 lodged by Mohd. Saleem and registered as Crime No. 45 of 1993, u/s 394/307, IPC of P.S. Chaman Ganj, District Kanpur Nagar and Section 3/5 Explosive Act.

2. We have gone through the First Information Report and other materials placed on the record and have heard learned Counsel for the petitioners and the learned Standing Counsel.

3. We are of the opinion that it is not a fit case in which this Court may exercise its discretion under Article 226 of the Constitution to quash the FIR.

4. Learned counsel for the petitioners, however, prayed that a direction be issued by this Court that when the petitioners surrender and make application for bail, their bail application may be considered on the same day and in case the hearing or the disposal of the bail application is adjourned, the petitioners may be

released on their executing personal bond till such adjourned date. Learned Counsel for the petitioners has pointed out that the FIR allegations that the petitioners committed robbery have been found to be false on investigation by the police. Annexure"2"to the petition contains the conclusion of the Investigating Officer in the following words:

"Vivechana Se Dookan Hotal Ranjis Bhi Hai. Ukta Chatana Barah Charah Kar Lykliai Gai Hai Koie Bhi Loot Pat Nahi Huie Hai."

5. Learned counsel has further drawn our attention to other infirmities in the prosecution version and has submitted that the case against the petitioners is a pure concoction and the FIR has been lodged with the ulterior purposes so that the petitioners may go to jail for some days pending disposal of their bail application. Learned counsel has also pointed out that the injuries alleged to have been suffered by the informant are superficial and there is no bomb injury. Learned counsel for the petitioners has submitted that the subordinate courts deal with bail applications in a most routine manner and the accused, are, without exception, sent to jail pending consideration of their bail applications which linger on for several weeks.

6. The perennial stream of writ petitions filed in this Court seeking the directions, for early disposal of the bail applications lend countenance to the grievance made by the learned counsel for the petitioners. The right to speedy trial which includes the right to speedy disposal of the bail matter has been held to be a part of the right of personal liberty under Article 21 of the Constitution. Unfortunately we have noticed that bail applications are not being expeditiously disposed of by the Courts below and remain pending for a long time.

7. We would like to emphasise that in all cases it is not necessary to send the accused to jail without judicial scrutiny by way of consideration at the stage of bail application. It is common knowledge that false cases are sometimes concocted to humiliate and disgrace innocent persons and cause harm to them mentally or otherwise. It is equally true that sometimes accused are sent to jail for offences of trivial nature in which they ought to have been released on bail at the very threshold. In our opinion, the power to release the accused on personal bond pending consideration of the bail application is implicit in the language of Sections 437 and 439 of Code. The word procedure in Article 21, no doubt, means procedure which is reasonable, just and fair. Thus a procedure which requires a citizen to go to jail irrespective of the fact whether he is guilty or not and whether his going to jail is purposeful or not can hardly be regarded as fair. In our Constitution there is no express "due process Clause" as is found in American Constitution. The Supreme Court has, however, held that the said Clause will be read in our Constitution. (See R.C. Cooper v. Union of India (1970) 1 SCC 268 , Sunil Batra Vs. Delhi Administration and Others etc., and Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, The erudite judicial expressions of the Supreme Court in the above cases mark a watershed in the evolution of our Constitutional Law and have undoubtedly enlarged the area of

Articles 14, 19 and 21 of the Constitution and thus a variety of inchoate rights which are necessary for protecting human dignity and promoting social justice such as the right to bail, the right to speedy trial, right to human treatment in prison, right to compensation for custodial torture and right to know have been held to be a part of right to life and personal liberty. (See *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, , *Sunil Batra Vs. Delhi Administration and Others etc.*, , *Sunil Batra Vs. Delhi Administration and Others etc.*, In *Bachan Singh Vs. State of Punjab*, *Bhagwati J.* observed :

"The word "procedure" in Article 21 is wide enough to cover the process by which deprivation is effected and that would include not only adjectival but also the substantive part of the law. Every facet of the law which deprives a person of his life or personal liberty would therefore have to stand the test of reasonableness, fairness and justness in order to be outside the inhibition of Article 21."

8. In this way a provision of law which spells out unreasonableness or arbitrariness would be violative of Articles 14 and 21 of the Constitution. In our opinion, if Sections 437 and 439 of the Code are to be interpreted to mean that an innocent and a guilty person are to be treated alike and are required to be sent to jail as necessary concomitant of the lodging of an FIR the provisions might have to be struck down as unreasonable and arbitrary being violative of Articles 14 and 21 of the Constitution. It is, however, the duty of the Court to interpret the provisions so as to sustain their constitutionality. In a very recent case of *Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc.*, while considering the validity of the provisions relating to Sales tax, the Supreme Court in para 91 of its judgment observed :

".....Where two interpretations are possible, one which sustains the constitutionality and/or effectuates its purpose and intendment and the other which effectively nullifies the provisions, the former must be preferred, according to all known canons of interpretation."

9. We are of the opinion, that the power to release an accused on personal bond pending scrutiny of the case by the courts below at the stage of bail is implicit and is built in Sections 437 and 439 of the Code. It is no doubt true that Sections 437 and 439 of the Code, if given a narrow interpretation do not contain a specific provision of interim bail but it is equally true that whenever the strict interpretation of a statute gives rise to an unjust situation and spells out hardship or injustice, the courts have to remedy the evil by reading words in, if necessary, so as to give force and life to the written words of the statute. In England where the literal rule held firm ground till 19th century and early 20th century, it came under sharp criticism by noted jurists. Laski remarked:

"his worth noting that both legal philosophy and the study of legal administration in this Country and at least a generation behind their condition in the United States or in France... the legal profession has displayed no interest in developing

law comparable to that medical profession in developing medical science or engineering profession in developing, historically it has been the least social minded of all social professions."

(See Parliamentary Government in England by Harold J. Laski Chapter VII).

10. Lord Denning while emphasising on the need of reading words in to give life to the statute made the following remarks:

"At one time the Judges used to limit themselves to the bare reading of the statute itself to go simply by the words, giving them their grammatical meaning and that was all. That view was prevalent in the 19th century and still has some supporters today. But it is wrong in principle....."

".....it must be remembered that it is not within the human powers to foresee the manifold sets of facts which may arise, and even if it were, it is not possible to provide for them in terms free from all ambiguities. The English language is not an instrument of mathematical precision....."

".....A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsman have not provided for this or that, or have been guilty of some or other ambiguity....."

(See Lord Denning "Discipline of Law.")

11. In the case of *M.V. Alisabeth v. Harwan Investment* 1992 (2) JT 65, the Supreme Court has made following observations in para 18 of its judgment:

"Legislation has always marched behind time, but it is the duty of the Court to expound and fashion the law for the present and the future to meet the ends of justice."

In para 88 the Supreme Court observed :-

".....Where statute is silent and judicial intervention is required, courts strive to redress grievances according to what is perceived to be principles of justice, equity and good conscience."

12. We may usefully quote the observations made by this Court in the case of *Issma v. State of U.P.*, 1963 ACC 14 (para 11) to the following effect:-.....

"The question which remains to be considered is whether the Subordinate Courts, i.e., the courts of Sessions and the court of Magistrates can release an accused on personal bond for a short period pending the disposal of a bail application. It is well settled that when a court has jurisdiction to grant a relief such jurisdiction includes the power of granting ancillary or limited relief, short of the ultimate and final relief. In *Income Tax Officer v. M. K. Mohd. Khuni* AIR 1969 SC 430, the question arose whether the Income Tax Appellate Tribunal had the power to grant stay in the absence of a specific provision regarding the same. The Supreme Court observed: -

"In our opinion, the appellate tribunal must be held to have power to grant stay as incidental or ancillary relief to its appellate jurisdiction."

13. In the case of Charan Lal Sahu Vs. Union of India, the provisions of Bhopal Gas Disaster (Processing of Claims) Act came for consideration before the Supreme Court. There was no specific provision for payment of interim compensation to the disaster victims in the Act. The Supreme Court held that even-though there was no such specific provision, a provision to that effect must be read into the Act to make the law meaningful and efficacious. Similarly in the case of Savitri Rawat Vs. Govind Singh Rawat, the provisions of Section 125 of the Code regarding maintenance came up for consideration. Section 125 of the Code does not provide for any interim maintenance and on the other hand maintenance can be granted by, a Magistrate "upon proof of such neglect or refusal". The Supreme Court held that having regard to the nature of jurisdiction exercised by a Magistrate u/s 125, the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing the payment of a reasonable sum by way of interim maintenance. The Supreme Court observed that a contrary view is likely to result in grave hardship. Thus it would be seen that the effort of the courts should be to interpret the law in a manner which makes it efficacious and meaningful and not in a manner which may bring about hardship.

14. Unfortunately there are still some supporters of the outmoded concept that the accused must be put in prison before their bail applications are considered. The word "custody" occurring in Section 439 of the Code simply implies that the person seeking bail should not be a fugitive. An accused who has surrendered in court and has been released on personal bond very much remains in the custody of the court. In the case of Niranjana Singh and Another Vs. Prabhakar Rajaram Kharote and Others, the Supreme Court held that when the accused has appeared and surrendered before the learned Sessions Judge, the Sessions Judge would have the jurisdiction to consider his bail. The Supreme Court further observed that an accused can be in custody not merely when the police arrests him, produces him before the Magistrate and gets a remand to judicial custody or other custody. He can be stated to be in judicial custody, when he surrenders before the court. Thus when the accused surrenders or appears before the court and makes an application for bail it is open to the court to consider his bail application.

15. The mere fact that Section 438 of the Code has been repealed in this State by U.P. Act No. 16 of 1976 does not alter the situation. Section 438 contained a provision which is commonly known as "anticipatory bail". Anticipatory bail can be granted at a stage when an accused is yet to be arrested. This provision has been withdrawn due to repeal of Section 438 in this State. Section 437 and Section 439 of the Code speak of consideration of bail at an entirely different stage when the accused has either been arrested by the police or has submitted to the jurisdiction of the court by surrendering in the court, The repeal of the

provision of grant of bail prior to arrest has no impact on the provision much (which) empower the court to grant bail at a different stage.

16. Our attention has been drawn to the case of Dr. Hidayat Hussain Khan Vs. State of Uttar Pradesh and Others, . We have gone through the judgment of the Division Bench and in our opinion the question whether the power to release an accused on interim bail is implicit and inbuilt in Sections 437 and 439 of the Code was not at all considered. The Division Bench simply held that subordinate courts cannot exercise the power indiscriminately or unilaterally in all cases. The Division Bench also did not consider the various pronouncements of the Supreme Court cited above. There is yet another decision the case of Noor Mohammad v. State of U.P. (Writ Petition No. 919 (MB) of 1992) wherein the Lucknow Bench of this court has made some observations. With profound respect we would like to observe that the anchorsheet of reasonings given by the Lucknow Bench is the case of A.K. Gopalan Vs. The State of Madras, in which the scope of Article 21 had been considered. The case of A. K. Gopalan (Supra) has been specifically overruled by the Supreme Court in the case of R.C. Cooper (supra) and the view expressed in R.C. Cooper's case has been reiterated in a number of subsequent decisions of the Supreme Court. However, the question before the Lucknow Bench was whether the High Court can issue directions for consideration of the bail application on the same day and to direct that in case the disposal of the bail application is adjourned the accused may be released on personal bond. The Lucknow Bench held that High Court cannot issue such a direction in the exercise of its jurisdiction under Article 226 of the Constitution. With utmost respect we are unable to subscribe the view taken by the Lucknow Bench in the case of Noor Mohammad (supra) but it is not necessary to articulate on the subject in detail because the question has already been referred to a Full Bench. The Lucknow Bench has observed that the superior courts cannot lay down law. The latest articulation of the Supreme Court on the point is to be found in the five Judge Constitution Bench case of Mrs. Sarojini Ramaswami Vs. Union of India and others, wherein Supreme Court in para 93 of its judgment has observed (at page 2256 of AIR) :-

"93. In this context, it is also useful to recall the observations of R.S. Pathak, C.J., speaking for the Constitutional Bench in Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., about the nature and scope of judicial review in India. The learned Chief Justice stated thus : ".....It used to be disputed that Judges make law. Today, it is no longer a matter of doubt that a substantial volume of the law governing the lives of citizens and regulating the functions of the state flows "There was a time", observed Lord Reid, "when it was thought almost indecent to suggest that Judges make law - they only declare it.....But we do not believe in fairy tales any more. In countries such as the United Kingdom, where Parliament as the legislative organ is supreme and stands at the apex of the Constitutional structure of the State, the role played by judicial law - making is limited....."

And Unquoted Thomas, J., in *Cheney v. Conn* referred to a Parliamentary statute as the highest form of law..... which prevails over every other form of law". The position is substantially different under a written Constitution such as the one which governs us. The Constitution of India, which represents the Supreme Law of the land, envisages three distinct organs of the State, each with its own distinctive functions, each a pillar of the State..... The range of judicial review recognised in the superior judiciary of India is perhaps the widest and the most extensive known to the world of law.... with this impressive expose of judicial power, it is only right that The superior courts in India should be conscious of the enormous responsibility which rest on them. This is specially true of the Supreme Court, for as the highest court in the entire judicial system the law declared by it is by Article 141 of the Constitution, binding on all courts within the territory of India."

".....This need for adapting the law to new urges in society brings home the truth of the Holmesian aphorism that "the life of the law has not been logic it has been experience and again when he declared in another study that the law is forever adopting new principles from life at one end", and "sloughing off old ones at the other. Explaining and conceptional import of what Holmes had said, Julius Stone elaborated that it is by the introduction of new extra-legal proposition emerging from experience to serve as premises, or by experience-guided choice between competing legal propositions, rather than by the operation of logic upon existing legal propositions, that the growth of law tends to be determined.

Legal compulsions cannot be limited by existing legal proposition, because there will always be, beyond the frontiers of the existing law, new areas inviting judicial scrutiny and judicial choice making which could well affect the validity of existing legal dogma. The search for solutions responsive to a changed social era involves a search not only among competing propositions of law, or competing versions of a legal proposition, or the modalities of an indeterminacy such as "fairness" or "reasonableness", but also among proposition from outside the ruling law, corresponding the empirical knowledge or accepted values of present time and place, relevant to the dispensing of justice with the new parameters."

At another place, the Lucknow Bench has observed :

"By directing the Magistrate to immediately release a person on personal bond, this court would be innovating a procedure not providing by law."

17. The observation quoted above runs contrary to the observations of the Supreme Court made in the case of *Janta Dal v. H.S. Chowdhary* (1992) 4 SCC 307 in which the Supreme Court has reiterated the view of P.N. Bhagwati, J. (as he then was) in one of his articles contributed under the caption "Social Action Litigation : The Indian Experience" to the following effect:-

"The judiciary has to play a vital and important role not only in preventing and remedying abuse and misuse of power but also in eliminating exploitation and injustice. For this purpose it is necessary to make procedural innovations in order

to meet the challenges posed by this new role of an active and committed judiciary. The summit judiciary in India, keenly alive to its social responsibilities and accountability to the people of the country, has liberated itself from the shackles of Western thought, made innovative use of the power of judicial review, forged new tools, devised new methods and fashioned new strategies....."

18. We are of the opinion that in view of the latest pronouncements of the Supreme Court, the courts to possess jurisdiction to release an accused on interim bail pending final disposal of the bail application. It is not possible to lay down any hard and fast rule regarding exercise of the jurisdiction. However, we consider it proper to give some illustrations where it would be proper to exercise the discretion for such a release:-

(1) Offences of trival nature in which bail applications are generally granted by courts.

(2) Women, Children, minors and aged persons of 70 years or more should invariably be released on interim bail.

(3) Students whose examination are to conference should also be given benefit of interim relief.

(4) Cases in which the accusations appears to be frivolous or mala fide.

19. At the same time it may not be desirable to grant relief in cases punishable with death except to women, children, minors and aged persons, as mentioned earlier, offences under T.A.D.A. cases of Narcotic Drugs, offences committed by organised gangs of criminals or by habitual criminals and the like. But there shall always be the discretion open to court to extend the benefit if it feels satisfied that the accusations are wholly frivolous and not sustainable. It is not possible to give an exhaustive list and the courts concerned should apply their mind to leach case. We, however, make it clear that the release of an accused on interim bail by itself is no ground for grant of bail. The final disposal of the bail application has to be made after considering the entire merits.

20. Our attention has also been drawn to the fact that subordinate courts give uncalled for latitude to the prosecuting agency and keep on granting time for seeking instructions. It is the duty of the courts below to dispose of the bail application with least possible delay. It is highly undesirable for any subordinate court to give undue latitude to the prosecuting agency. Accordingly we direct that in cases where the investigation is being conducted by the district police not more than five or six days should be allowed for the report of the police station concerned. Time should not be repeatedly given for obtaining report from the police station as the same encourages corrupt practices.

21. Adverting to the present case, we direct the learned courts below to proceed in accordance with the observations made above obviating necessity of sending the petitioners to jail.

22. With the above observations/directions, this writ petition is finally disposed of.

23. A certified copy of this order shall be supplied to the learned counsel for the petitioners on payment of usual charges as soon as possible.