

(2018) 11 CAL CK 0004

In the Calcutta High Court

Case No : Criminal Revision No. 3259 Of 2018

In the matter of: Sujit Mondal @APPELLANT@Hash

Date of Decision : 01-11-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 119, 120B, 384, 385, 389, 403, 409, 411, 467, 468, 471
Prevention of Corruption Act, 1988 — Section 13(1)(c), 13(1)(d), 13(1)(e), 13(2)
Constitution of India, 1950 — Article 21, 32

Citation : (2018) 11 CAL CK 0004

Hon'ble Judges : Protik Prakash Banerjee, J

Bench : Single Bench

Judgement

A curious case has been brought before me during the vacation. The urgency is no longer germane, since leave was given to move it on grounds of

urgency by a coordinate bench. The questions raised are.

In respect of the self-same allegation in the self-same criminal case the co-accused of the petitioner has moved the Honâ??ble Supreme Court and

the Honâ??ble Supreme Court has passed an order on October 1, 2018 that the said petitioner shall not be arrested in connection with any of the

cases mentioned in prayer (i) of the petition before the Honâ??ble Supreme Court. The petitioner before this Court submits that he is similarly

situated as the said petitioner before the Supreme Court referred to at page 49.

On October 11, 2018, an application for anticipatory bail was moved by the present petitioner before the Honâ??ble Division Bench of this Hon'ble

Court. There, only on the basis of the said order of the Hon'ble Supreme Court dated October 1, 2018, a prayer was made for anticipatory bail. It was

rejected by the Hon'ble Division Bench on October 11, 2018 on a clear finding that considering the nature of the allegations against the petitioner it

would be extremely imprudent to excuse the petitioner from custodial interrogation and facilitating the petitioner with tamper with evidence or

intimidate witnesses or destroy the morale of the complainants even before the trial had commenced. It was held to be against public interest.

These are strong words. Normally, even weak words of the Hon'ble Division Bench "inter partes" bind a Single Bench of the same Court.

These words, though spoken by a bench which so far as the provisions of the appeal are concerned is coordinate with the present Single Bench

which is exercising revisional jurisdiction "are however too strong to ignore if the relief prayed before me was based on the same submission.

However, the learned counsel for the petitioner has placed his case on a higher pedestal and has couched his submissions on the basis of rights under

Part III of the Constitution of India which can neither be waived, nor held to be subject matter of a technicality of estoppel, whether by records,

judgment or conduct.

Mr. Banerjee, learned counsel for the petitioner submits that the interim order in favour of the co-accused was passed by the Hon'ble Supreme Court

on October 1, 2018 as above not on an application for anticipatory bail but in a petition under Article 32 of the Constitution of India. He says that his

client also wants to move the Hon'ble Supreme Court, but when a petitioner moves the Hon'ble Supreme Court under Article 32 of the Constitution of

India he has to show, as a pre-condition, that he has acted equitably.

According to the petitioner's learned advocate, already a warrant of arrest has been issued against the petitioner and a proclamation was issued

on September 3, 2018 by the jurisdictional criminal court. The petitioner is shown as absconding and now that his prayer for anticipatory bail

has been refused a day before this court went into recess for the Long Vacation, if the petitioner wants to move the Hon'ble Supreme Court, he has to

do so as a proclaimed offender who is absconding. Therefore, if he personally visits the registry of the Hon'ble Supreme Court, and is allowed to

affirm the proposed petition, without being arrested at the same time, it would also be against public policy.

On this basis, the learned counsel for the petitioner makes a submission which is appealing at first glance. He submits that the Fundamental and other

rights guaranteed under Part III of the Constitution of India become illusory

unless the means to exercise the said rights are also protected. The right to protection of the means to exercise such fundamental or statutory rights, is also fundamental and/or basic and is required to be declared as existing by necessary implication. Several rights which are required for exercising fundamental or statutory rights, have grown silently and without legislation, as those which are necessary and basic, for exercising the statutory or fundamental rights, and some of these have been declared or interpreted to exist by amplifying the meaning of existing rights. In a country with a vibrant democracy like India, and universal adult suffrage and a comparatively catholic right to be elected, it has become a sad fact of life, criminal cases are registered against people as pressure tactics and often for political or other gain. In some cases, the pressure is indirect — such as where an apparently insignificant person (such as the petitioner) is made the ostensible target, but in the sights is someone much more influential. If their right to legal recourse by filing writ petitions, to secure their fundamental right to personal liberty or life, is threatened by arrest the moment that they reach the highest court in the land, then it makes the right of legal recourse illusory. This liberty to reach the court physically to affirm an affidavit to file the petition, is part of the right to legal recourse, which, though not spelled out in so many words, is a part of — due process — and that — due process — is a part of Article 21 of the Constitution of India has been itself held by interpretation by the highest court in the country though the said words are not enacted in or part of Article 21 of the Constitution of India.

Even though the application of the present petitioner for anticipatory bail has been turned down since the petitioner wants to move the Hon'ble Supreme Court, his learned advocate submits that a chance should be given to him to do so without the reasonable fear that he would be arrested the moment that he appears in public to affirm the writ petition before the Hon'ble Supreme Court and identify himself, in view of the above warrant and proclamation. This question had not been raised before the Hon'ble Division Bench and indeed, until the application for anticipatory bail was rejected, the question of moving the Hon'ble Supreme Court under Article 32 had not arisen, and so this court, he submits, is not forbidden, either by law or by judicial propriety from considering the submissions and passing the orders sought under its inherent powers. Mr. Banerjee asks me to ignore the

prayers actually made in his petition and the allegations made in it, but to proceed on the basis of the substantive rights of the parties. On my raising a slight doubt about whether such questions can be raised under the provisions of Section 482 of the Code of Criminal Procedure, and/or the criminal

revisional jurisdiction, he submits that a court proceeding under the said Code has not been forbidden from looking at the Constitution of India. He

submits that a criminal court should not be allergic to the Constitution of India and when the basic law of the land is involved, a mere adjectival code

cannot be used to oust the overriding effect of the Constitution of India.

After that rather inspiring submission on constitutional law, Mr. Banerjee reiterates that the right to judicial review in the matter of safeguarding the

fundamental right under Article 21 of the Constitution cannot be read in isolation. If a person who is a lowly constable is in threat of arrest even if he

wants to move the Honâ??ble Supreme Court then the right to approach the Court becomes illusory. If this was the case where the co-accused had

not been given the order as I have referred to above the situation would have been different, but the petitioner is not a named accused in the original

first information report registered by the Daspur Police Station but was falsely implicated in the case by false evidence.

It is true that the application for anticipatory bail was refused by a Division Bench of this Court on October 10, 2018. It is also true that as on that date

the order dated October 1, 2018 had been passed by the Honâ??ble Supreme Court and was considered by the Division Bench. But on such date the

present petitioner had wanted an anticipatory bail on the basis of the said interim order passed in the case of the co-accused from the High Court and

had not expressed his desire to move the Honâ??ble Supreme Court.

Now the petitionerâ??s case is that for the reasons aforesaid, if he is not given some respite from arrest and the proceedings pending against him,

charges will be framed against him, and he will have no right to move the Hon'ble Supreme Court under Article 32 of the Constitution of India to

complain of the deliberate violation of his fundamental rights, just to take action against someone more influential, by the State, through the government

of the day.

Therefore, Mr. Banerjee submits that judicial process cannot be used to force a person to move the Honâ??ble Supreme Court as an absconder and

some indulgence must be given to him so that he can properly exercise his right under Article 32 of the Constitution without fear of arrest.

The matter has to be heard on notice to the other side. Though the Learned Public Prosecutor is Present in Court, as is the Learned Additional Public

Prosecutor, under Chapter XI of the Appellate Side Rules, they have not intervened. This is not a case where there is a mandate to put the State on notice before the application is moved.

Accordingly, let usual notices be issued and the petitioner shall serve copy of the application on the opposite parties within one week after the

reopening of the long vacation.

Let the matter appear before the regular Bench two weeks after reopening of Court after long vacation.

There will be an order staying all further proceedings of the concerned criminal cases against the petitioner for a period of eight weeks or until further

orders whichever is earlier. The petitioner shall not be taken into custody by the police authorities for the allegation in connection with Daspur Police

Station 27 of 2018 dated 01.02.2018 under Sections 384/385/389/119/403/120B/411/467/468/471/409 of the Indian Penal Code and under Sections

13(1)(c)/13(1)(d)/13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988 for the said period of 8 weeks or further order,

whichever is earlier, provided that the petitioner approaches the Honâ??ble Supreme Court on or before the expiry of the said period of 8 weeks. In

the event that the petitioner approaches the Honâ??ble Supreme Court, the question of the petitionerâ??s arrest shall abide by whatsoever decision

is taken by the Honâ??ble Supreme Court. If no step is taken by the petitioner to approach the Honâ??ble Supreme Court within the period

aforesaid, naturally, the interim order granted herein shall stand automatically vacated on the expiry of 8 weeks, unless varied or vacated by an order

of this court passed earlier in terms of the above. No liberty is given to the petitioner to apply to this court for extension of the interim order on the

self-same application.

LATER:

I had passed the above order in open court, but before it was transcribed, and after the learned counsel for the petitioner had left the court room, Mr.

Rana Mukherjee, learned Advocate and Additional Public Prosecutor mentioned the matter seeking that I recall the above order because according to him, certain material facts apparent on the face of the records were not placed before me by the learned counsel for the petitioner, though these were part of the order dated October 11, 2018. He submitted, respectfully, that due to the tremendous chaos attending the vacation bench, and the haste in which the matter was being heard, these pages in the petition which were not placed before the court, had escaped my notice. He submitted that he also had not been instructed until he mentioned the matter, to appear or intervene. I granted liberty to him to come back with the learned counsel for the petitioner, since it was not possible for me to recall an order passed in open court after I had passed it, when the petitioner's learned advocate who was present had left, in the absence of the learned advocate for the petitioner. He could not do so, and before I rose at 7:15pm he mentioned the matter again. Accordingly, let the present matter be listed before me as "To Be Mentioned (Correction/Recall)" on November 15, 2018, at the first sitting of the court and as the first item, regardless of part heard, to be mentioned or any other matter.