

(2023) 12 GAU CK 0007

In the Gauhati High Court

Case No : Criminal Petition No. 1186 Of 2023, I.A.(Crl.) No. 1147 Of 2023

Kamal Sabharwal

APPELLANT

Vs

State Of Assam And Anr.

RESPONDENT

Date of Decision : 06-12-2023

Acts Referred:

Constitution Of India, 1950 — Article 21

Code Of Criminal Procedure, 1973 — Section 55, 437, 438, 439, 482

Citation : (2023) 12 GAU CK 0007

Hon'ble Judges : Arun Dev Choudhury, J

Bench : Single Bench

Advocate : A M Bora, K N Choudhury

Final Decision : Allowed

Judgement

1. Heard Mr. A M Bora, learned senior counsel assisted by Mr. M More appearing on behalf of the petitioner. Also heard Mr. M Phukan, learned Public Prosecutor appearing for the respondent No.1 and Mr. K.N Choudhury, learned senior counsel assisted by Mr. D J Das, learned counsel appearing on behalf of the respondent No.2.

2. The present application under section 482 of the Cr.P.C. is filed assailing an order dated 26.10.2023 passed by the learned Additional Sessions Judge, No.2, Kamrup (M) Guwahati in anticipatory bail application being AB No.352/2023 filed by the respondent No.2 in connection with CID PS Case No.16/2023. By the impugned order the Learned Court called for the case diary.

3. The basic ground of challenge to such order is want of jurisdiction of the learned Additional Sessions Judge in entertaining an application under section 438 Cr.P.C on the alleged background that the respondent No.2 was arrested prior to filing of such application and he was only allowed transit bail by the learned court of learned Chief Metropolitan Magistrate (South), District Court, Saket to appear before the jurisdictional Magistrate.

4. This court while issuing notice of motion in the criminal petition stayed the impugned order dated 26.10.2023 until further orders.

5. The respondent No.2 has filed an interlocutory application for modification/vacation of the interim order dated 26.10.2023 passed by this Court, which is registered as I.A(Crl) 1147/2023.

6. The learned counsel representing the parties had advanced arguments on the merit of the criminal petition and accordingly, instead of determining the I.A, the entire criminal petition was taken up for final disposal on the agreement of the learned counsel for the parties.

7. The background facts:

Before determining the merit of the case, let this court record in a nutshell, the background facts leading to the filing of the present case, which are as follows:

I. The respondent No.2 herein lodged an FIR before the CID Police station, Assam against the respondent No.2 and some others, which was registered as CID PS Case No.16/2023.

II. The basic allegation as discernible from the aforesaid FIR is that the petitioner herein introduced the other co accused to be Government Officials under the State of Assam having a position to help the petitioner in obtaining certain Government Contract Works, however, the other co accused are not Government Officials and the accused No.2 and the other accused conspired with each other to impersonate and create a false impression that accused No.2 is a Government Official. Subsequently, fake work orders of crores of rupees were given to the petitioner, on the basis of which materials were supplied. However, subsequently, when bills were not cleared, on enquiry, the petitioner came to learn that the work orders were fake and the materials supplied were stolen. Amongst others the following allegations are made against the present petitioner.

"Shri Khushdeep Bansal claimed that he has good contacts with extremely resourceful officials at the top echelons of the Government of Assam and can be instrumental in getting the project for them. He claimed that the contract value for the aforesaid commodities is Rs.260,66,40,000 (rupees Two Hundred and Sixty Crores Sixty Six Lakhs and Forty Thousand only). He through WhatsApp also forwarded a snapshot of the requirement of the aforesaid products and images of approved products, previously sourced by the Government of Assam through Matak Autonomous Council, through other vendors....."

"That Shri Khusdeep Bansal was the mastermind behind the entire conspiracy as it was him who was looking for victims to be defrauded with aid and assistance of the other accused persons. Evidently, it was Shri Khushdeep Bansal and Shri Harish Bansal, who claimed to personally know Shri Partha Bhardwaj and also vouched for his position in the Matak Autonomous Council....."

III. The learned CJM, Kamrup (M) Guwahati by its order dated 13.10.2023 issued

a search warrant against the respondent No.2 and some other accused to search the houses, offices, warehouses and premises of the accused persons.

IV. Thereafter, the respondent No.2 was arrested at Delhi in connection with the aforesaid case by the Additional IO of the case and the respondent No.2 was thereafter produced before the court of learned Chief Metropolitan Magistrate, South Delhi, Saket with a prayer for 7 days transit remand and to produce before the jurisdictional court of CJM, Guwahati Kamrup Assam. Along with the said application, the accused was produced and the ground of arrest was also shown with a further prayer not to release the accused on bail.

V. The respondent No.2 filed an application under Section 437 Cr.P.C. to release him on bail. On the basis of such production and application, the learned Chief Metropolitan Magistrate under its order dated 20.10.2023 allowed the respondent No.2 transit bail for 7 days on furnishing of bail bond in the sum of Rs.50,000/- along with one surety of like amount. After furnishing of bailbond and having the satisfaction, the accused was directed to join the proceeding pending before the learned CJM, Guwahti Kamrup Assam within a week from 20.10.2023.

VI. Thereafter, on 25.10.2023, the IO of the case filed an application before the learned Chief judicial Magistrate, Kamrup (M) seeking police remand of accused respondent No.2.

VII. On the same date i.e.25.10.2023, the respondent No.2 filed an application under section 438 of the Cr.P.C praying for anticipatory bail before the learned Additional Sessions Judge, which is subject matter of the present petition.

8. Arguments Advanced on behalf of the petitioner:

Mr. AM Bora, learned senior counsel submits that the respondent No.2 was arrested by the police and was produced before the learned Chief Metropolitan Magistrate Saket and the respondent No.2 had also filed an application under section 437 of the Cr.P.C seeking bail and therefore, after such arrest and release on transit bail with a condition to appear before the jurisdictional Magistrate, no application under section 438 Cr.P.C shall be maintainable and therefore, the learned Additional Sessions Judge could not have exercised its jurisdiction under section 438 Cr.P.C and that being the position, the impugned order issuing notice in the application filed under section 438 Cr.P.C by the respondent No.2 is liable to be interfered and the entire proceeding arising out of the said application needs to be quashed being without jurisdiction.

In support of such contention, Mr. Bora learned senior counsel relies on the judgment of the Hon'ble Apex Court rendered in the case of Shri Gurbaksh Singh Sibbia and others Vs. State of Punjab reported in (1980) 2 SCC 565.

9. Arguments Advanced on behalf of the State:

Mr. M Phukan, learned Public Prosecutor submits that once an accused is arrested and released on transit bail for a specific period, the option left with such

accused is to appear before the jurisdictional Magistrate and seek regular bail under section 437 or 439 Cr.P.C and no application under section 438 Cr.P.C shall be maintainable.

10. Arguments Advanced on behalf of Respondent No.2.

Per contra Mr. K N Choudhury learned senior counsel argues the following:

a. The entire proceeding of arrest is vitiated by mala fide intention of the arresting authorities inasmuch as in the process the right of the respondent No.2 under Article 21 has been violated.

b. Referring to the order of the learned Chief Metropolitan Magistrate, Saket, it is argued that it is crystal clear from the said order that while producing the accused, neither the IO was present nor the case diary was produced and the petitioner was arrested without any warrant of arrest. Therefore, the deprivation of the petitioner from his personal liberty is without procedure established under law.

c. The investigating authority had mislead the learned Metropolitan Magistrate, Saket while producing the accused that the accused is required to be produced before the jurisdictional court of CJM, Guwahati Kamrup, Assam and accordingly, the learned Metropolitan Magistrate has directed the accused to join in the proceeding pending before the learned CJM, Guwahati Kamrup, however, no case is pending before the CJM, Kamrup, Metro and therefore having no alternative the petitioner had to approach the learned Additional Sessions Judge seeking bail under section 438 Cr.P.C inasmuch as there was no case pending before the learned CJM Kamrup to comply with the order of the learned Chief Metropolitan Magistrate, Saket. According to him, in the given facts of the case, the petitioner cannot be made remediless.

d. The issue of jurisdiction as has been raised can very well be determined by the learned Additional Sessions Judge who is in seisin of considering the application filed by the respondent No.2 under section 438 Cr.P.C and therefore, the matter may be remanded back to the learned additional sessions judge to decide as per law.

e. Mr. Choudhury, in support of his contention places reliance upon the judgment of the Hon'ble Apex Court rendered in the case of Satendra Kumar Antil Vs. CBI reported in (2022) 10 SCC 51 to show that the provision of section 55 Cr.P.C has been violated. He further relies on the decisions of the hon'ble Apex Court Madhu Limaye, In re 1969 1 SCC 292, Arnesh Kumar Vs. State of Bihar reported in (2014) 8 SCC 273, Lalita Kumari Vs. State of Uttar Pradesh reported in (2014) 2 SCC 1.

11. Determination:

A. This Court has given anxious considerations to the arguments advanced by the learned Senior counsels and also the Learned Public Prosecutor. Also perused

the materials available on record.

B. Under section 438 of the Cr.P.C, the Court of Sessions and High Court are empowered to allow a person to seek pre arrest bail in anticipation of being arrested for a non bailable offense. The purpose of such provision is to safeguard individuals from the possibility of being arrested with malicious intent. Therefore, anticipatory bail must be sought before an arrest is made. Once a person is arrested and produced before the jurisdictional Magistrate, the arrest is complete and at that stage, in the considered opinion of this court said person can no longer apply for anticipatory bail inasmuch as such process should be initiated before the arrest.

C. In the case in hand, there is no dispute that the respondent No.2 was arrested in connection with CID PS Case No.16/2023 from South Delhi on 20.10.2023 and that he was produced before the jurisdictional Metropolitan Magistrate at New Delhi by the arresting authority seeking a transit remand. The forwarding report also reflects that the grounds of arrest were disclosed and custody of the accused during the transit period for a period of 7 days was sought for. It is also on record that the accused respondent No.2 had filed an application before the learned Chief Metropolitan Magistrate, Saket under section 437 Cr.P.C for releasing him on bail, however, the learned Metropolitan Magistrate has granted transit bail to the respondent No.2 for seven days to join the proceeding pending before the learned CJM, Guwahati Kamrup. Therefore, for all meaning and purport prior to filing of the application on 25.10.2023 under section 438 Cr.P.C, before the learned Additional Sessions Judge, the accused respondent No.2 was already arrested and was released on transit bail only. Therefore, in the considered opinion of this court, no application under section 438 Cr.P.C shall be maintainable subsequent to his arrest and grant of transit bail on 20.10.2023 inasmuch as in the given facts of the present case, there cannot be any anticipation of arrest when the respondent No.2 was already been arrested and was released on bail for a specific period conditionally to make him available before the CJM, Guwahati, Kamrup. The only option left with the accused petitioner was to appear before the learned CJM, Guwahati, Kamrup within time granted by the learned Chief Metropolitan Magistrate, Saket and to seek regular bail.

D. Accordingly, this Court is having no hesitation to hold that the proceeding pending before the learned Additional Sessions Judge, No.2 Kamrup (M) in AB No.352/2023 under Section 438 was without jurisdiction and therefore, the same is set aside and quashed being not maintainable.

E. The argument of Mr. Choudhury, learned senior counsel that the investigating authority has misled the Metropolitan Magistrate at Saket Court and that there was no case pending before the CJM, Kamrup, also do not find favour of this court. A perusal of the record reveals that the Additional IO of the case submitted before the learned Metropolitan Magistrate that the jurisdictional Magistrate in the case is "Chief Judicial Magistrate, Guwahati, Kamrup". As there

are two judicial districts by name "Kamrup, having its head office at Amingaon and having the Court of Chief Judicial Magistrate situated at Amingaon and other District being Kamrup (metro), having the Court of Chief Judicial Magistrate at Guwahati, therefore, for all necessary purport and meaning, Chief Judicial Magistrate Guwahati shall mean Chief Judicial Magistrate Kamrup (Metro). Yet, another aspect of the matter is that the application under section 438 Cr.P.C has been filed in the Sessions division of Kamrup (Metro) and not under Kamrup. Therefore, it cannot be said that either IO has misled the learned Chief Metropolitan Magistrate, Saket or the respondent No.2 was not aware that the jurisdictional judicial district is Kamrup (Metro).

F. Further, though an argument has been advanced that the petitioner went to the Chief Judicial Magistrate Kamrup at Amingaon and having not found any case approached the learned Additional Chief Judicial Magistrate, Kamrup Metro seeking anticipatory bail, however, a perusal of the anticipatory bail application which is part of the record nowhere discloses such fact and Rather the anticipatory bail has been filed on the ground that the petitioner is not involved in the offence alleged. Therefore such contention also stands rejected.

G. Now coming to the question of violation of the respondent's right under Article 21, this court is of the view that there are allegations of commission of offences for which punishments are life imprisonment. There is also allegation that the respondent No.2 conspired with the other accused in commission of the offences. That being the position, the respondent No.2 is alleged to be an abettor in commission of those alleged offences and prescribed imprisonment for such offence is life sentence. That being the position, no warrant of arrest is required to be issued prior to the arrest of the respondent No.2 and therefore, there cannot be any violation of procedure in arresting the respondent by not issuing prior warrant of arrest.

H. The other allegation of violation of the respondent right as urged by the learned counsel for the respondent that the IO was not present at the time of production of the respondent No.2 before the Magistrate and he has not delegated his power to any authority to produce the accused before the Metropolitan Magistrate, Saket also do not find favour of this court inasmuch the respondent No.2 was produced before the Metropolitan Magistrate, Saket by the Additional IO. Another aspect of the matter is that the respondent No.2 has not raised such procedural violation at the hands of the investigating authority before any competent court and this court dealing with the criminal petition filed by the informant, in the considered opinion, cannot adjudicate and grant relief to the grievances of the respondent regarding violation of his right under article 21 of the constitution of India.

I. While dealing with the prayer of Mr. K.N. Choudhury, learned senior counsel that the respondent No.2 can very well raise the question of jurisdiction of the learned Additional Sessions Judge before the learned Additional Sessions Judge itself and the learned Additional Sessions Judge is not powerless to determine its

jurisdiction and therefore, the petitioner shall not be deprived of his right to file an application under section 438 Cr.P.C on the ground of jurisdiction and that till such determination is made by the learned Additional Sessions Judge, the respondent No.2 is required to be protected from arrest and the matter should be remanded back to the learned Additional Sessions Judge, also do not find favour of this Court.

J. It is well established that if any statute confers jurisdiction upon a Court or authority to decide any dispute, such jurisdiction is to be exercised by the said authority and within its limit as conferred by the statute.

K. It is equally well settled that, a jurisdictional fact is a fact, which must exist before a court to assume jurisdiction. A jurisdictional fact is one, on existence or non-existence of which, depends the jurisdiction of the said court. If such jurisdictional fact does not exist, the court cannot act. If a court assumes jurisdiction without the existence of such fact, such order can very well be questioned before a superior court. The underlying principle is that by erroneously assuming the existence of such a jurisdictional fact, no court can confer upon itself jurisdiction, which it otherwise does not possess [vide Arun Kumar & Ors Vs. Union of India & Ors, reported in (2007) 1 SCC 732]. The jurisdictional fact to exercise a power under section 438 Cr.P.C is an existence of fact that there is an anticipation of being arrested for a non bailable offence(s).

L. In the case in hand, as discussed hereinabove, it was available in the record of the proceeding before the learned Additional Sessions Judge that the petitioner was arrested on 20.10.2023 and was released on transit bail on furnishing of bail bond on 20.10.2023. That being the position, the jurisdictional fact of anticipation of arrest was not available before the learned Additional Sessions Judge to assume its jurisdiction under Section 438 Cr.P.C.

12. Directions:

- a) The impugned order dated 26.10.2023 passed in AB No.352/2023 is set aside and quashed.
- b) The impugned proceeding under section 438 Cr.P.C registered as AB No.352/2023 pending before the learned Additional Sessions Judge No.2, Kamrup (M), Guwahati is set aside and quashed, being not maintainable.
- c) Accordingly, the present criminal petition stands allowed and the I.A(Crl) 1147/2023 stands dismissed.

13. Parting observation:

- a) While parting with the records, it is made clear that this order may not be treated as a comment on the merit of allegations made against the respondent No.2 in the FIR lodged by the petitioner inasmuch as the allegation in the FIR is not a subject matter of the present criminal petition.
- b) The observations made in this order is for the purpose of determining whether

in the given facts of the present case an application under section 438 Cr.P.C was maintainable and therefore, such observation shall not influence any Magistrate/ Court in considering any bail application/other applications in connection with the FIR in question that may be preferred by the respondent No.2 and such application(s) if any, pending or to be filed shall be decided on its own merit without being influenced by any of the observations made in this order. With the determination and observations made hereinabove the present criminal petition stands allowed. Parties to bear their own cost.