

(2010) 03 KL CK 0105
In the High Court Of Kerala
Case No : B.A. No. 1163 of 2010

Koshy

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 01-03-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438, 82, 83
Information Technology Act, 2000 — Section 65, 66, 66(1), 66(2), 77B
Penal Code, 1860 (IPC) — Section 419, 420

Citation : (2010) 2 ILR (Ker) 481 : (2010) 1 KLT 945 : (2011) 6 RCR(Criminal) 2444

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : P. Vijaya Bhanu, Vipin Narayan and Thomas Anakallunkal, for the Appellant; K. Ramakumar Vineeth Malhotra, A.A.G. (Punjab), Rajan Vellloth, Saijo Hassan, A.S. Sabu, Benoj C. Augustin, V.K. Rafeek, Abraham K. John and Public Prosecutor, for the Respondent

Judgement

K.T. Sankaran, J.—This is an application for anticipatory bail u/s 438 of the Code of Criminal Procedure, filed by Dr. K.A. Koshy and Dr. Serena, who are two accused persons among the accused in Crime No. 30 of 2010 of Rajpura City Police Station, Patjala District, Punjab.

2. The petitioners apprehend arrest in Crime No. 30 of 2010, where the offences alleged, going by Annexure A First Information Report, are under Sections 65 and 66(1) and (2) of the Information Technology Act, 2000. After hearing all the counsel and the learned Additional Advocate General of the State of Punjab, it is fairly clear that the offences alleged against the accused include the offences under Sections 419 and 420 of the Indian Penal Code as well.

3. In the Bail Application, the offences under Sections 419 and 420 of the Indian Penal Code were not mentioned. When the Bail Application came up for admission, the undertaking made by the learned Public Prosecutor appearing for respondents 1 and 3 that the petitioners will not be arrested for a period of two

weeks was recorded and urgent notice was ordered to respondent No. 2, the S.I. Of Police, Rajpura City Police Station, Patiala, Punjab. It is brought to my notice that the offence under Sections 65 and 66 of the Information Technology Act is bailable in view of Section 77B of the Information Technology Act. Section 77B was introduced by the Information Technology (Amendment) Act, 2008 (Act 10 of 2009). Section 77B provides that notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offence punishable with imprisonment of three years and above shall be cognizable and the offence punishable with imprisonment of three years shall be bailable. The learned Counsel for the petitioners submitted that he inadvertently omitted to notice Section 77B of the Information Technology Act. However, the learned Counsel for the petitioners submitted that as non bailable offences under Sections 419 and 420 of the Indian Penal Code are also involved, though the petitioners were not aware of the same and though it was not mentioned in the Bail Application, the interim order could be legally sustained and the Bail Application could be maintained.

4. From Annexure A F.I.R. and also from the affidavit sworn to by the authorised representative of the de facto complainant Company, it is seen that one of the offences alleged against the accused is u/s 66(1) and (2) of the Information Technology Act. Section 66 of the Information Technology Act was substituted by Act 10 of 2009. After the amendment, Section 66 does not contain Sub-sections (1) and (2).

5. The gist of the prosecution case is the following: The de facto complainant, M/s Jay Polychem (India) Limited, a company registered under the Companies Act, 1956, having its Corporate Office at D-143, Defence Colony, New Delhi, is primarily engaged in the business of trading and distribution of petrochemicals in India and overseas. The Company has a foreign clientele. The Company has a web site, namely, "www.jaypolychem.com". On 30.11.2009, one of the Directors of the Company noticed a web site under the name and style www.jaypolychem.org" containing defamatory and malicious contents against the Company and its Directors. That web site was neither created nor set up by the Company. It is alleged that the same was set up by Samdeep Mohan Varghese @ Sam, a disgruntled and dismissed employee of the Company, in conspiracy with Amardeep Singh @ Amy, who was also an employee of the Company and certain other persons such as Preeti and Charanjeet Singh @ Channi and the sister and brother-in-law of Sam, who are based in Cochin. They did so with a view to cause wrongful loss to the Company and wrongful gain to them. They did so as a result of the collusion and conspiracy among them. It is alleged that the accused persons sent various emails from fake email accounts to many of the customers of the Company. The said defamatory emails were made with a view to cause loss of reputation and loss to the Company and its Directors. There was a larger conspiracy among the accused persons, which requires to be unearthed during investigation. The defamation campaign run by the accused persons had caused immense damage to the name and reputation of the Company. The Company had suffered loss of several crores of rupees. It is alleged that Samdeep Mohan

Varghese and Amardeep Singh, in collusion with the other accused, had impersonated different individuals and had used forged electronic records, created false email accounts, sent false and offensive information causing loss to the Company and had deceived the addressees. It is alleged that Samdeep Mohan Varghese had been passing on and exchanging confidential information of the Company to the other accused and third parties and those persons include his sister and brother-in-law (the petitioners herein). The sister and brother-in-law of Samdeep Mohan Varghese had financed a trip to Amardeep Singh and his wife to Cochin and Munnar. The accused persons had parted with information relating to the Company with a view to cause wrongful loss to the Company and wrongful gain to them. The accused, in collusion with each other, dishonestly cheated the Company, committed acts of forgery, blackmailed the Company and its Directors and tried to extort money. All the accused persons had a common intention to commit the offence. The accused persons made unauthorised access to the Company's electronic data which caused great prejudice to the Company.

6. The First Information Report was registered on 5.2.2010 as F.I.R., No. 30 of 2010.

7. It is stated that the first petitioner, Dr. K.A. Koshy, is an Anesthetist, working in Lakshmi Hospital, Divans Road, Ernakulam. The second petitioner, wife of Dr. K.A. Koshy, is a Pediatrician working in Krishna Hospital, Divans Road, Ernakulam. Annexures B and C certificates issued by Lakshmi Hospital and Krishna Hospital show that Dr. K.A. Koshy and Dr. Serena were working from 21.6.2009 and 1.7.2009 respectively till date in the respective hospitals. The learned Counsel for the petitioners submitted that the petitioners are absolutely innocent of the allegations levelled against them. They are not in any way connected with the offence. It is stated in Ground 3 of the Bail Application thus:

3. The brother of the 2nd applicant, Mr. Samdeep Mohan Varghese was an erstwhile employee of Jay Polychem India Ltd. He resigned the said office due to differences with the company management. The reason for differences was that the company, one which dealing with petrochemicals was engaging in lot shady and illegal activities. The company management feared these inside information, which Mr. Samdeep is fully aware of, if divulged would cause danger attracting legal prosecutions endangering the company and its directors. The said complaint making the sister and her husband as accused is only to harass Mr. Samdeep.

8. Crl. M.A. No. 934 of 2010 was filed by the petitioners to raise additional grounds, wherein it is stated that the petitioners apprehend imminent arrest and detention by the personnel of the Punjab Police in Kerala on the allegation of having committed non-bailable offences and the petitioners apprehend serious threat to their lives at the hands of the Police Personnel from Punjab. The petitioners have also filed Crl. M.A. No. 1004 of 2010 to accept Annexures B and C certificates.

9. Heard Sri. P. Vijaya Bhanu, the learned Counsel for the petitioners, Sri. K. Ramakumar, Senior Advocate, and Advocate Sri. Vineeth Malhotra, on behalf of the de facto complainant, the learned Additional Advocate General of the State of Punjab appearing for the second respondent (S.I. of Police, Rajpura City Police Station, Patiala District, Punjab) and the learned Public Prosecutor appearing for respondents 1 and 3 (State of Kerala and Commissioner of Police, Ernakulam City).

10. Sri. K. Ramakumar submitted that there is no averment in the Bail Application that the petitioners apprehend arrest on an accusation of having committed non-bailable offences and, therefore, the application u/s 438 of the Code of Criminal Procedure is not maintainable. Sri. Ramakumar also submitted that there is also no mention in the Bail Application that the petitioners apprehend arrest in the State of Kerala. It is submitted by the counsel that the petitioners cannot improve the situation by filing a petition, which now the petitioners have done. It is also submitted by Sri. K. Ramakumar and also by Sri. Vineeth Malhotra that two of the accused who were arrested had confessed that they had handed over huge amounts to the petitioners. The case involves a multi crore scam. It is stated that the laptops belonging to the petitioners would be good piece of evidence and if the petitioners are granted anticipatory bail, they might tamper with it. Sri. Ramakumar relied on the Supreme Court decision in *Joginder @ Jindi v. State of Haryana* 2008 (4) KHC 294 (SC), which states that a petition u/s 438 of the Code of Criminal Procedure in relation to a bailable offence would be misconceived. He also relied on the decision in *Rajeevan v. State of Kerala* 2008 (4) KLT 98 : 2008 (4) KHC 70 in support of the contention that when a non-bailable arrest warrant is issued against an accused person, his remedy is not to file an application for anticipatory bail.

11. In the affidavit filed by Sri. Pawan Kumar, the Sub Inspector of Police, Rajpura City Police Station, it is stated that during the investigation, two accused persons, namely, Amardeep Singh and Rahul were arrested by the police and they are in judicial custody. It is stated that the investigation revealed "a deep rooted conspiracy of committing grave white collar crime of embezzlement of crores of rupees". To unearth the fraud, custodial interrogation of the petitioners is necessary and inevitable. In the affidavit, it is also stated that the Judicial Magistrate, Rajpura, Patiala District, Punjab, having jurisdiction of the matter had issued non-bailable warrants to arrest the petitioners. Annexures R2(a) and R2(b) are said to be the copies of the arrest warrants. It is also stated that Samdeep Mohan Varghese has fled to Singapore and it is reasonably apprehended that the petitioners are also likely to abscond.

12. The learned Additional Advocate General, State of Punjab submitted that the petitioners are also involved in the multi crore scam and they have also played their own part in the crime. It is pointed out that the petitioners, who filed the Bail Application on 19.2.2010, could secure a copy of the First Information Report, which was registered on 5.2.2010. Still the petitioners have not

surrendered before the appropriate court and sought for reliefs. That shows that they are not prepared to co-operate with the investigation. Custodial interrogation of the petitioners is essential in the case. This is not a fit case for exercising the discretionary jurisdiction u/s 438 of the Code of Criminal Procedure by this Court.

13. Sri. Vijayabhanu submitted that Annexures R2(a) and R2(b) warrants are not in Form No. 2 appended to the Code of Criminal Procedure. The warrant is not addressed to any particular police officer within the jurisdiction of the learned Magistrate. In Annexure R2(a) warrant, the name of the accused is shown as "Doctor son in law of Mariama R/o Cochin". In Annexure R2(b) warrant, the name of the accused is shown as "Mrs. Sareen Daughter of Mariama R/o Cochin". In the warrants, it is noted thus: "Accused may not be arrested in case any anticipatory bail or arrest stay order passed by any competent authority is produced by the accused." The counsel submitted that on 21.2.2010, the first petitioner was dragged out from Lakshmi Hospital by the police officer from Punjab and in spite of showing to him the interim order passed by this Court on 19.2.2010, the first petitioner was not released. He was forcibly taken to the office of the City Police Commissioner. Later, he was allowed to go.

14. Sri, Vijayabhanu, learned Counsel for the petitioners submitted that the petitioners have no objection in searching their residence and office premises by the Punjab police at any time, even before disposing the Bail Application. He submitted that the Bail Application need be disposed of only after such search, if the Court so orders. The learned Counsel appearing for the de facto complainant and the learned Additional Advocate General did not make any positive response to this submission.

15. It is apposite to point out that the Bail Application and the application filed by the petitioners to raise additional grounds do not contain the relevant facts. The Bail Application is cryptic and bereft of necessary facts and details. The right of the accused not to disclose his defence does not extend to such an extent that he need not state the relevant facts in the Bail Application. If the petitioner in a Bail Application relies on any particular fact not borne out by the Case Diary, necessarily, it has to be pleaded by him. It cannot be said that the accused is entitled to put forward anything on facts in the arguments without any supporting data on record. Any contention can be raised on the basis of the factual matrix available. However, on undisclosed factual background, I do not think that the accused is entitled to put forward imaginary arguments, without any risk of contradiction or without committing anything. Facts especially within the knowledge of the party should be pleaded by him. It should not be misunderstood that the above view is to the effect that Bail Application should contain the pleadings as in an Appeal or Revision in a civil case. But the necessary facts, not borne out by the F.I.R., remand report and Case Diary, on the basis of which the petitioner in a Bail Application desires the court to grant relief, should be stated by him in the Bail Application. However, in the facts and

circumstances of the case, I do not propose to decline relief to the petitioners on this ground.

16. Now, I shall consider the contention that the Bail Application is not maintainable, since the arrest is sought to be made on the basis of a warrant issued by a competent Court. In *Bharat Chaudhary and Another Vs. State of Bihar and Another*, , the Supreme Court held that Section 438 of the Code of Criminal Procedure can be invoked even after charge sheet is filed and cognizance is taken. It was held:

From the perusal of this part of Section 438 of Cr.P.C., we find no restriction in regard to exercise of this power in a suitable case either by the Court of Session, High Court or this Court even when cognizance is taken or a charge sheet is filed. The object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a court has either taken cognizance of the complaint or the investigating agency has filed a charge sheet, would not by itself, in our opinion, prevent the courts concerned from granting anticipatory bail in appropriate cases.

17. In *Vineeth Somarajan v. State of Kerala* 2009 (3) KLT 576 : 2009 (3) KHC 471, after filing the charge sheet, non bailable warrant was issued by the court for the arrest of the accused. The accused moved the High Court u/s 438 Cr.P.C. Referring to *Bharat Chaudhary's* case and *Salauddin Abdulsamad Shaikh Vs. State of Maharashtra*, , it was held:

6. It is true that going by the decision in *Bharat Chaudhary's* case, there is no bar in entertaining an application u/s 438 of the Code of Criminal Procedure after the charge sheet is filed. However, it is not a general rule that the power u/s 438 of the Code of Criminal Procedure could be exercised in each and every case, where charge sheet is filed. Exceptional circumstances may arise in which exercise of the power by the Sessions Court or the High Court u/s 438 may be warranted and the fact that the charge sheet was filed in the case would not be a bar to entertain such an application u/s 438 of the Code of Criminal Procedure. Ordinarily, when a charge sheet is filed, it is for the Court which has to try the case that has to deal with the application for regular bail. Whether bail should be granted in the facts and circumstances of the case, has to be considered by the Court which is expected to try the case.

18. In *Vineeth Somarajan's* case, warrant was issued after the charge sheet was filed. In *Rajeevan v. State of Kerala* 2008 (4) KLT 98 : 2008 (4) KHC 70, proceedings under Sections 82 and 83 Cr.P.C. were taken against the accused and non bailable warrant was issued. In the present case, it would appear that warrant was issued by the Court on the request of the investigating officer pending investigation. In the light of the decisions referred to above, I am not inclined to accept the contention put forward by Sri. Ramakumar that the Bail Application is not maintainable since the petitioners are sought to be arrested in execution of a non bailable warrant.

19. In *C.I. Mathew v. Government of India* 1984 KLT 942, Justice Bhaskaran Nambiar considered the question whether the High Court has power to grant anticipatory bail in respect of offences committed outside the jurisdictional limits of that High Court and held in the affirmative. It was held thus:

11. If arrest is sought to be prevented, the place where the arrest is effected gives reasonable nexus for the exercise of jurisdiction u/s 438. The court, whether it is the High Court or the Sessions Court, within whose jurisdiction the arrest is sought to be effected can naturally have jurisdiction to decide whether it thinks fit to grant anticipatory bail. The arrest is made with reference to a crime, at the behest of the police or Magistrate within whose jurisdiction the offence is alleged to be committed. Thus the court within whose jurisdiction the offence is alleged to have been committed is, without doubt, a court competent to exercise the powers to grant anticipatory bail.

12. If thus there are two courts of concurrent jurisdiction empowered to grant anticipatory bail,- the court within whose jurisdiction the offence is committed, and the court within whose territory the person is sought to be arrested - conflict of decision has to be avoided and inherent limitation is thus implicit in the exercise of this jurisdiction u/s 438. The anticipatory bail granted by the High Court or Sessions Court within whose jurisdiction the offence is committed will enure beyond the territorial limits of that court as the arrest sought to be made is within reference to that specific crime or offence and the police can pursue the offender beyond its jurisdiction to enforce the arrest. In granting anticipatory bail in a State where the applicant is sought to be arrested, the High Court naturally has to restrict the relief and direct that in the event of the appellant's arrest in that State, he will be released on certain conditions. In the latter case, the High Court will not extent relief to arrests made beyond that State. In this view the residence of the accused may not be a relevant factor to fix jurisdiction for this purpose.

20. In the light of the decision of the Punjab and Haryana High Court in *Ravinder Mohan v. State of Punjab* 1984 Cri. LJ. 71 taking a contrary view, the question was considered by a Division Bench of this Court in *Madhusoodanan v. Superintendent of Police* 1992 (2) KLT 83. The Division Bench confirmed the decision in *C.I. Mathew v. Government of India* 1984 KLT 942.

21. In *Shree Baidyanath Ayurved Bhawan Pvt. Ltd. Vs. State of Punjab and Others*, , it was held:

For the purpose of grant of anticipatory bail, the Court of Session or the High Court must take into consideration the ingredients therefore as laid down in Section 438 of the Code of Criminal Procedure. Ordinarily, an order granting anticipatory bail should not be for an indefinite period, particularly when the F.I.R. had been in a police station of another State.

22. In the light of the decisions referred to above, there cannot be any doubt that this Court has jurisdiction to entertain the Bail Application and grant

appropriate relief.

23. The next question to be considered is whether the petitioners are entitled to the reliefs prayed for. The petitioners are doctors. They are working at Ernakulam. They have permanent abode. It cannot be believed that they would make themselves scarce, if bail is granted. The petitioners have expressed their readiness to cooperate with the investigation. They even expressed their willingness for a search of their residence and office premises pending consideration of the Bail Application. There was an attempt to arrest the first petitioner. It is stated that he was dragged out from the hospital where he was working. The interim order passed by this Court was in force at that time. The warrant for arrest specifically states that the accused shall not be arrested if an order of the nature mentioned therein is produced by the accused. The first petitioner states that though he produced the interim order passed by this Court, the police officer from Punjab tried to arrest him and humiliate him.

24. In the facts and circumstances mentioned above, I am of the view that the petitioners are entitled to relief in this Bail Application. The Bail Application is disposed of as follows:

The petitioners, if arrested within a period of two months from today, within the State of Kerala, on the basis of the warrants of arrest issued by the Sub Divisional Judicial Magistrate, Rajpura, Punjab in Crime No. 30 of 2010 of Rajpura City Police Station, or if arrested within a period of two months, within the State of Kerala, by the investigating officer or any other police officer in connection with Crime No. 30 of 2010 of Rajpura City Police Station, they shall be released on bail on their furnishing bond for Rs. 25,000/- each with two solvent sureties for the like amount to the satisfaction of the Chief Judicial Magistrate, Ernakulam. In the event of their arrest, the petitioners shall also surrender their passports before the Chief Judicial Magistrate, Ernakulam. If any of the petitioners does not hold an Indian Passport, he/she shall file an affidavit to that effect before the Chief Judicial Magistrate, Ernakulam. The petitioners shall make themselves available for interrogation by the investigating officer, in the office of the City Police Commissioner, Ernakulam, on such date or dates as intimated by the City Police Commissioner, Ernakulam. The petitioners shall appear before the Sub Divisional Judicial Magistrate, Rajpura, within two months, unless otherwise it becomes unnecessary in view of an order passed by any Court having jurisdiction.

The Registry will communicate a copy of this Order to the Chief Judicial Magistrate, Ernakulam. Hand over copy to all the counsel appearing in the case.