

(1995) 09 OHC CK 0028

In the Orissa High Court

Case No : Criminal Miscellaneous No. 2145 of 1994

Madan Mohan Sahoo and Another

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 27-09-1995

Acts Referred:

Constitution of India, 1950 — Article 214, 225, 226
Criminal Procedure Code, 1973 (CrPC) — Section 167(2), 177, 2, 436, 436(1)
Essential Commodities Act, 1955 — Section 7(1)
General Clauses Act, 1897 — Section 3(25)
Penal Code, 1860 (IPC) — Section 426

Citation : (1996) CriLJ 1169

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : Deepak Misra, R.K. Pattnaik, S.C. Puspalak, B.K. Nayak and P. Panda, for the Appellant; Addl. Standing Counsel, for the Respondent

Judgement

A. Pasayat, J.—Two points which have arisen in this case for consideration are of seminal importance. First is whether the High Court can act in terms of Section 438 of the Code of Criminal Procedure, 1973 (in short, "the Code") in respect of an offence alleged to have been committed outside the State to which it relates. In other words, can such power be exercised by any High Court or any Court of Session within the country irrespective of the locale of the commission of offence. There is divergence of opinion on this aspect by several High Courts. Calcutta High Court, Delhi High Court, Karnataka High Court and Bombay High Court have taken the view in the affirmative [See B.R. Sinha and Others Vs. The State, ; Pritam Singh Vs. State of Punjab, ,Dr. L.R. Naidu v. State of Karnataka 1984 Cri LJ 757 and N. K. Nayar v. State of Maharashtra 1983 Cri LJ 1887 , respectively). The contrary view has been expressed by Patna High Court, Kerala High Court, Punjab and Haryana High Court, Madhya Pradesh High Court and Jammu and Kashmir High Court. (See Syed Zafrul Hassan and Another Vs. State, ; C.T. Mathew and Another Vs. Govt. of India, Home Dept. (C.I.B.) and Others, , Ravinder Mohan Bakhshi and Another Vs. State of Puniab and Others, ,

Dr. Pradeep Kumar Soni Vs. State of Madhya Pradesh, and Mohan Singh Parihar Vs. Commissioner of Police and Others, . Second question is whether an interim order restraining arrest can be passed.

2. Petitioner's case, so far as factual aspects are concerned, runs as follows. On the basis of first information report lodged by Shri Suman Rao, Inspector of Police, D.E.B. Midnapore, P.S. Case No. 103 of 1994 was registered. Petitioners along with five others have been arraigned as accused for offences punishable u/s 7(1)(a)(ii) of the Essential Commodities Act, 1955 (in short, "the Act"), Section 426 of the Indian Penal Code, 1860 (in short, "the IPC) for violation of para 3 of West Bengal Pulses, Edible Oil Seeds and Edible Oil (Dealers Licence) Order, 1978. Petitioners claim that they were transporting ground-nuts legally from Orissa to West Bengal and under erroneous premises the case has been instituted. Since attempt is being made to arrest them, they seek protection u/s 438 of the Code.

3. It is necessary to set out the scope and ambit of Section 438 of the Code before I grapple with the problem at hand. The facility which Section 438 of the Code gives is generally referred to as "anticipatory bail". This expression which was used by the Law Commission in its 41st Report is neither used in the section nor its marginal note. But the expression "anticipatory bail" is a convenient mode of indication that it is possible to apply for bail in anticipation of arrest. Any order of bail can be effective only from the time of arrest of the accused. Wharton's Law Lexicon explains "bail" as "to set at liberty a person arrested or imprisoned, on security being taken for his appearance". Thus, bail is basically release from restraint, more particularly the custody of Police. The distinction between an ordinary order of bail and an order u/s 439 of the Code is that whereas the former is granted after arrest, and therefore means release from custody of the Police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Section 46(1) of the Code, which deals with how arrests are to be made, provides that in making an arrest the Police Officer or other person making the same "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". The order u/s 438 of the Code is intended to confer conditional immunity from the touch as envisaged by Section 46(1) of the Code or any confinement. The apex Court in *Balachand Jain v. State of Madhya Pradesh* AIR 1977 SC 366 : 1977 Cri LJ 225 has described the expression "anticipatory bail" as misnomer. It is well-known that bail is ordinary manifestation of arrest, that the Court thinks first to make an order is that in the event of arrest a person shall be released on bail. Manifestly there is no question of release on bail unless the accused is arrested, and therefore, it is only on an arrest being effected the order becomes operative. The power exercisable u/s 438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty then power is to be exercised u/s 438. The power

being of important nature it is entrusted only to the higher echelons of judicial forums, i.e. the Court of Session or the High Court. It is the power exercisable in case of an anticipated accusation of non-bailable offence. The object which is sought to be achieved by Section 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Court of Session or High Court, he shall be released immediately on bail without being sent to jail.

4. Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead, innocence, since he is not on the date of application for exercise of power u/s 438 of the Code convicted for the offence in respect of which he seeks bail. Any other interpretation of Section 438 would make the provision constitutionally vulnerable. It has to be borne in mind that an over-generous infusion of constraints and conditions which are not to be found in Section 438 can make it so vulnerable. (See *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab*, . Sub-section (1) of Section 438 lays down a condition which has to be satisfied before power can be exercised. The applicant must show that he has "reason to believe" that he may be arrested in a non-bailable offence. Use of the expression "reason to believe" shows that the applicant may be arrested must be founded on reasonable grounds. Mere "fear" is not "belief for which reason it is not enough for the applicant to show that he has some sort of vague apprehension that some one is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief of the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the Court concerned to decide whether a case has been made out of for granting the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. A belief cannot be vague, indefinite. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such "blanket order" should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order u/s 438 is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely.

5. Whenever in statute a reference is made to the High Court, the Court of Session or that of the Magistrate, it is inherent in such language that it is a Court having territorial jurisdiction over the offence. In that context, reference to the "Court" is in terms to the Court having territorial jurisdiction. Section 438 refers to "the High Court" or "the Court of Session". "High Court" is defined in Section 2 of the Code. It means (i) in relation to any State, the High Court for that State;

(ii) in relation to a Union territory to which the jurisdiction of the High Court for a State has been extended by law, that High Court; (iii) in relation to any other Union territory, the highest Court of criminal appeal for that territory other than the Supreme Court of India. Art. 214 of the Constitution of India throws sufficient light on the concept of territoriality in the justice system and more so in the realm of criminal jurisprudence. Article 225 states that subject to the provisions of the Constitution and to the provisions of any law of the appropriate legislature made by virtue of powers conferred on that legislature by the Constitution, the jurisdiction of and the law administered in, any existing High Court shall be the same as immediately before the commencement of the Constitution. Jurisdiction of the High Courts was clearly rooted to the Provinces prior to it. In the General Clauses Act, 1897. Section 3(25) provides that the "High Court" used with reference to civil proceedings, shall mean the highest Civil Court of Appeal (not including the Supreme Court) in the part of India in which the Act or Regulation containing the expression operates. In the Orissa General Clauses Act, 1937. "High Court" has been defined as follows:

"2. Definitions In this Act and in all Orissa Acts unless there is anything repugnant in the subject or context--

xxx xxx xxx (19) "High Court" "High Court" used with reference to civil proceedings shall mean the highest Civil Court of Appeal in the part of Orissa in which the Act containing the expression operates."

In view of the aforesaid provisions, the jurisdiction of Orissa High Court will extend to the State of Orissa and not beyond it. What would be true for civil proceedings would be indeed more true in the context of criminal jurisprudence. It is manifest from the aforesaid provisions that territoriality of the Courts is the basic rule and extra-territoriality is an exception which is not to be easily assumed.

6. Chapter XXXIII deals with provisions as to bail and bonds. Sections 436 and 437 provide for the granting of bail to accused persons before trial and conviction. In the case of a person accused of a bailable offence, where bail has been granted to him u/s 436. it can be cancelled in a proper case by the High Court in exercise of its inherent power u/s 482. Section 439(1) confers on the High Court or the Court of Session power to direct admission to bail or reduction of bail in all cases where bail is admissible u/s 436 and 437. Sub-section (2) of Section 439 empowers the High Court or the Court of Session to cause any person who has been admitted to bail under this Chapter to be arrested and committed to custody. Section 438 empowers the High Court or the Court of Session to direct release on bail on the event of arrest. The remaining sections to the Chapter deal with matters ancillary or subsidiary to the granting of bail.

Section 437 provides as to when a bail can be granted in case of a non-bailable offence by Courts other than High Court or the Court of Session. It is, therefore, manifest that the said provision pertains to and provides for the grant of bail by

Magistrate having territorial jurisdiction in non-bailable offences.. Section 439 deals with the special power of the High Court or the Court of Session regarding bail in non-bailable offences. It is undeniable that this section refers to the High Court or the Court of Session having jurisdiction over the area of the commission of the crime, and not any High Court or any Court of Session. It is to be noticed that identical expression "the High Court" or "the Court of Session" appears both in Sections 438 and 439. It would be apparently resulting in absurd results if the same expression appearing in both Sees. 438 and 439 is interpreted differently for the purpose of exercising power under Sections 438 and 439. Chapter XIII deals with jurisdiction of Criminal Courts in inquiries and trials. Ordinary place of inquiry and trial is dealt with in Section 177. Reference can also be made to Sees. 76 and 167(2). Former refers to production of person arrested before the Court before which he is required in law to be produced. Section 167(2) *inter alia* deals with cases when an accused person is forwarded to a Magistrate who finds that he has no jurisdiction to try the case, or commit it for trial and is of the view that further detention is unnecessary. In such an event, he may order that the accused be forwarded to a Magistrate having such jurisdiction.

7. Great emphasis has been laid by the learned counsel for petitioner and learned counsel appearing *amieus euria* on certain observations made by the Calcutta High Court, the Delhi High Court, the Karnataka High Court and the Bombay High Court referred to above. In all those cases, the Hon^{ble} Judges were of the view that it is place of residence of the applicant which is relevant and not the alleged place of commission of offence. Acceptance of the view is bound to present innumerable practical applications. In a given case there may be large number of accused persons belonging to different locales or States. It would be an absurd situation that there would be different High Courts or Sessions Judges exercising power and possibility of conflicting and contradictory orders being passed cannot be ruled out. For the purpose of Section 438 an applicant is not required to meet prerequisite of surrender to custody. Therefore, an unscrupulous person may embark upon a merry "Court hunting" *ad infinitum*.

In Pritam Singh's case 198 Cri LJ 1174 (*supra*). the Delhi High Court referred to Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, . In my view no part of the judgment throws any light on the controversy at hand. In Dr. L.R. Naidu's case 1983 Cri LJ 757 (*supra*) the Karnataka High Court made reference to Pritam Singh Vs. State of Punjab, and B.R. Sinha and Others Vs. The State, . In the said cases there is no deep-seated consideration of the issues involved. In the killer case the learned Judges have referred to some of the earlier unreported single Judge and Division Bench judgments of that Court, and also relied on Gurbaksh Singh Sibbia's case (*supra*). Though reference was made by that Court to the argument of the Public Prosecutor, particularly with reference to Articles 214 and 225 of the Constitution, same was brushed aside without much discussion. It was held that an order u/s 438 can be granted without notice to the Public Prosecutor or affording any opportunity to him to get necessary information from the investigating agency. Such view was taken even though substance was found in

the plea that it would cause inconvenience, and no serious note was taken thereof. In Dr. L.R. Naiclu's case (*supra*) also this aspect was noticed, but without specifically dealing with this objection it was held that an order of limited duration can be passed. The venue of jurisdiction to try an accused for an offence alleged derives from the statute, either from the statutes which creates the Court or from the statute which defines the offence, and where the Court is specified in particular enactment by which venue is created having jurisdiction to try the offence, it is only such Court that can try the offence and a trial by any other Court becomes *coram non-judice*.

8. It is submitted that there can be no difficulty ;as power can be exercised for an interim period, and after notice to the Public Prosecutor or the investigating agency of the concerned State, the matter can be taken up for final disposal. That is not certainly a workable arrangement, and would defeat the very purpose for seeking prayer u/s 438 of the Code. At this juncture it is to be noticed that the proviso to Sub-section (I) of Section 439 dealing with serious crimes expressly provides for giving notice to the Public Prosecutor before dealing with the prayer for bail, unless for reasons to be recorded in writing, it is found that it is not possible to give such notice. The Public Prosecutor as referred to obviously has to be with regard to the jurisdiction within which the offence has been committed. It is necessary to notice the castigation of the apex Court to Courts attempting to assume jurisdiction extra territorially over areas beyond the geographical limits of the State for which the High Court is constituted. (See *Samarias Trading Co. Pvt. Ltd. Vs. S. Samuel and Others*,).

9. I am therefore, in agreement with the view expressed by the Full Bench of Patna High Court in *Syed Zafrul Hassan's* case (1986 Cri LJ 605) (*supra*). But with deepest respect I record my inability to (subscribe to the contrary view expressed by the Calcutta High Court in *B.R. Sinha and Others Vs. The State*, .

10. The next question is whether a Court can pass an interim order not to arrest the applicant till the disposal of the application u/s 439. The. direction which a Court can issue u/s 438 of the Code is that in the event of arrest of an accused on an accusation of committing an non-bailable offence, he shall be released on bail subject to such conditions as the Court may deem fit to impose. An application u/s 438 of the Code can be moved only by a person who has not already been arrested. Once he is arrested, his remedy is to move the Court either u/s 437 or Section 438 of the Code. In the very nature of the direction which the Court can issue u/s 438 of the Code, it is clear that the direction is to be issued only at the pre-arrest stage. The direction becomes operative only after arrest. The Court in issuing the direction exercises its jurisdiction protect him from the consequence of arrest leading to custody. The condition precedent for the operation of the direction issue is arrest of the accused. This being so, the irresistible inference is that in an application u/s 438 of the Code the Court cannot restrain arrest.

11. Ordinarily, arrest is a part of the process of investigation intended to secure

several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath ,of the crime and the connection of other persons, if any. in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application u/s 438 of the Code. The roll! of the investigator is well-defined and the jurisdictional scope of interference by the Court in the process of investigation is limited. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of accused in a cognizable offence. This is not because of lack of power in the Court since such a power exists under Article 226 of the Constitution of India; but because of the reluctance of the Court to interfere at that stage. (See *State of Haryana and others Vs. Ch. Bhajan Lal and others*, . and *Governing Council of Kidwai Memorial Institute of Oncology, Bangalore Vs. Dr. Pandurang Godwalkar and another*,). An interim order restraining arrest, which cannot be passed u/s 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done u/ s 438 of the Code. The Supreme Court also opined that a blanket order of anticipatory bail should not be passed as it would be a serious encroachment into the power of investigation and against public interest. The position cannot be different in a case of an order restraining arrest.

12, Similar view has been taken by the Patna High Court, Guwahati High Court and Madhya Pradesh High Court. (See *Durga Prasad v. State of Bihar* 1987 Cri LJ 1200; *Mrs. Neeli Mazumdar v. State of Assam* (1991) 3 Crimes 797; and *Surendra Kumar v. State of Madhya Pradesh* 1995 Cri LJ 1517).

The application is disposed of accordingly rejecting the petitioners' prayer.