

(2015) 02 CAL CK 0013
In the Calcutta High Court
Case No : CRM 5306 of 2014

Madhumita Rahut

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 04-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437, 438, 439, 439(1), 439(2)
Penal Code, 1860 (IPC) — Section 323, 354, 385, 448, 498A

Citation : (2015) 2 CALLT 269

Hon'ble Judges : Subrata Talukdar, J.

Bench : Single Bench

Advocate : Shekhar Basu, Senior Advocate, Siladitya Sanyal and Arindam Jana, for the Appellant; Anand Keshari and Ayan Bhattacharyya, Amicus Curiae, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Subrata Talukdar, J.—By way of this application under Section 439(2) read with Section 482 of the Code of Criminal Procedure, 1973 (for short Cr.P.C.) the petitioner challenges the order dated 4th April, 2014 passed by the Ld. Sessions Judge, Jalpaiguri in Criminal Misc. Case No. 1006 of 2014 corresponding to Kotwali Police Station Case No. 274 of 2014 dated 23rd March, 2014 under Sections 448/323/354/385 of the Indian Penal Code (for short IPC).

2. By the order dated 4th April, 2014 the Ld. Sessions Judge was pleased to, inter alia allow an application for anticipatory bail filed under Section 438 Cr.P.C. by the present OP2-accused in connection with the said case. Noticing the submission of the Ld. Advocate for the OP2-accused and the Ld. Public Prosecutor that the disputes between the present petitioner-complainant and the OP2 is civil in nature in respect of which a civil suit is pending between the parties and the prayer for anticipatory bail was not opposed by the Ld. Public Prosecutor, such prayer stood allowed. The OP2-accused was directed to be released on furnishing a bail board upon compliance with the provisions of

Section 439(1) Cr.P.C. with the further direction that he shall surrender before the Ld. Magistrate within 15 days from the date of the said order.

3. Shri Shekhar Basu, Ld. Senior Counsel appearing for the petitioner-complainant, while praying for cancellation of the order of anticipatory bail granted by the Ld. Sessions Judge raises at the threshold a jurisdictional issue before this Court.

4. Shri Basu points out that the order granting anticipatory bail is the foundational order and the subsequent order of bail granted by the Ld. Magistrate under Section 437 Cr.P.C. pursuant to an order under Section 438 Cr.P.C. is consequential to the foundational order. Taking this Court to the several provisions pertaining to grant of bail under the Cr.P.C. Shri Basu submits that in this petition praying for cancellation of bail challenge has been thrown to the foundational order dated 4th April, 2014 of anticipatory bail and such foundational order can only be assailed before a Division Bench of this Court under Section 439(2) Cr.P.C..

5. In support of his submissions Shri Basu relies upon the following decisions:-

Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab,

Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others,

Damayanti Majhi v. State of West Bengal and Anr. reported in 2002 C Cr LR (Cal) 823

In Re: Deepika Samanta,

6. Drawing the attention of this Court to the decision in Damayanti Majhi (supra) Shri Basu points out to paragraph 13 thereof which reads as follows:-

13. If the order by which anticipatory bail was granted to O.P. No. 2 is found to be bad and illegal for lack of jurisdiction, the consequential relief subsequently granted to the O.P. No. 2b the Sessions Judge in the form of regular bail under subsection (1) of Section 439 of the Code is equally bad and illegal. Furthermore, the O.P. No. 2 was not in custody when such order under Section 439(1) was passed. No application under sub-section (1) of Section 439 of the Code is maintainable unless the applicant is in custody. In R.C. Goel v. State of West Bengal, 2002 C Cr LR (Cal) 83 a Division Bench of this Court has already expressed the same view relying upon certain decisions of the Apex Court apart from the decisions of the Privy Council and other High Courts. Therefore, the learned Sessions Judge ought not to have entertained the application at the instance of the O.P. No. 2 under sub-section (1) of Section 439 for granting him bail as at that point of time O.P. No. 2 was not detained in any custody. Therefore, the order passed by the learned Sessions Judge granting regular bail under sub-section (1) of Section 439 of the Code is equally bad and in excess of jurisdiction. 7. Further drawing the attention of this Court to In Re: Deepika Samanta (supra) Shri Basu points out that the Hon''ble Division Bench was

pleased to approve the law as laid down in Damayanti Majhi (supra) and treat the decision in Quality-Inn-Resort and Travels Pvt. Ltd. Vs. State of West Bengal and Others, as per incuriam. At paragraphs 21 and 22 of In Re: Deepika Samanta the Hon"ble division Bench held as follows:-

21. The decision of Quality-Inn-Resort and Travels Pvt. Ltd. Vs. State of West Bengal and Others, , referred to by Shri Chatterjee to which one of us was a party (Talukdar, J.). True, it has been held so under the fact situation of the said case but we now have a latter Division Bench decision of our Court operating in the field, Damayanti Majhi v. State of West Bengal, 2002 C Cr LR (Cal) 823, in which the Division Bench of Barman Roy (as His Lordship then was) and De, JJ. had held that since the parent order was not liable to be set aside and consequential order passed thereafter on the basis of the said order also has to be set aside as a necessary corollary which point was not taken into account in the decision of Quality-Inn-Resort and Travels Pvt. Ltd. Vs. State of West Bengal and Others, to which one of us was a party (Talukar, J.)

22. In view of the fact that the decision of Damayanti Majhi v. State of West Bengal, 2002 C Cr LR (Cal) 823, is latter in point of time and the point held in the said Division Bench decision was not taken into account by Quality-Inn-Resort and Travels Pvt. Ltd. Vs. State of West Bengal and Others, we feel bound by the later Division Bench decision of Damayanti Majhi v. State of West Bengal, 2002 C Cr LR (Cal) 823, and are of the view that as the parent order No. 2 dated 24.7.03 passed by the learned Sessions Judge was practically a non est order--firstly, it was acted on the concession of the learned Public Prosecutor without the learned Sessions Judge applying his independent judicial mind; secondly, the respondent, even if not a member of the in-laws family of the petitioner can very well be booked under the provisions of Section 498A of the Indian Penal Code and thirdly, there were sufficient materials in the Case Diary which was overlooked by the learned Sessions Judge--the order ipso facto being bad in law, once we have decided to set it aside, it follows as a necessary corollary--that all consequential orders passed thereafter, thereunder and based thereon has to be set aside, Also in this respect as we are duty-bound to follow the latter Division Bench decision of Damayanti Majhi v. State of; West Bengal, 2002 C Cr LR (Cal) 823, we are sorry, that we cannot accept the argument of Shri Chatterjee in this respect.

8. On the strength of the above noted decisions Shri Basu argues that the prayer for cancellation of bail being directed principally against the order granting anticipatory bail by the Ld. Sessions Judge and, not the subsequent order of regular bail granted by the Ld. Magistrate pursuant to the order of anticipatory bail, such relief can only be granted by a Division Bench and not by a Single Bench.

9. Per contra, Shri Navanil De, Ld. Counsel appearing for the OP2 argues that an order of anticipatory bail under Section 438 Cr.P.C. ceases to be operative once an order of bail is granted by the Ld. Magistrate. Shri De further argues that the

petitioner has erroneously challenged the order of anticipatory bail granted by the Ld. Sessions Court.

10. However, according to him, at the present stage when regular bail has been granted by the Ld. Magistrate pursuant to the order of anticipatory bail challenge can only be thrown to the order granting bail. He, therefore, asserts that the prayer for cancellation of bail made in the present CRR can only be heard by a Single Bench and not before a Division Bench.

11. Shri Ayan Bhattacharyya, Ld. Counsel who was appointed as amicus curiae distinguishes the unreported decision in Tanusree Bhattacharjee v. State of West Bengal and Anr. in CRM No. 13444 of 2012.

12. Shri Bhattacharyya argues that the facts in Tanusree Bhattacharjee (supra) are not pari materia to the challenge in the present application. In Tanusree Bhattacharjee (supra) the offences complained of carry a punishment of 10 years and above and therefore the Hon''ble Division Bench was competent to consider the prayer for cancellation of anticipatory bail. According to Shri Bhattacharyya, the point with regard to the jurisdiction of either the Single Bench or the Division Bench to consider an application for cancellation of bail as sought to be canvassed by Shri Basu was not the issue in Tanusree Bhattacharjee (supra).

13. Also distinguishing the judgments in Damayanti Majhi (supra) and Deepika Samanta (supra) Shri Bhattacharyya points out that in both the above noted cases and similar to the facts in Tanusree Bhattacharjee (supra) the offences complained of carried punishments of 10 years and more. Thus a Division Bench became automatically competent to consider a prayer for cancellation of such bail in as much as jurisdiction pertaining to such offences stood bestowed in a Division Bench.

14. In support of his above noted arguments Shri Bhattacharyya draws the attention of this Court to Chapter 2 Rule 9 of the Appellate Side Rules. Chapter 2 Rule 9 Sub-rules (1) and (2), inter alia provide that offences involving a sentence of death or sentence of rigorous imprisonment for a period exceeding 7 years as well as of bail applications exceeding 7 years shall be placed for consideration before a Division Bench. Similarly, all anticipatory bail applications under Section 438 Cr.P.C. shall be heard by a Division Bench.

15. Chapter 2 Rule 9 provides as follows:-

9. (1) A Division Bench for the hearing of cases on Appeal, Reference, or Revision in respect of the Sentence or Order of any Criminal court shall consist of two or more Judges.

(2) All Appeals, Reference or Revision in respect of Sentence or Order of any Criminal court shall be heard by a single Judge:

Provided, however, that the following matters shall be placed before a Division Bench consisting of two or more Judges:

(i) All Appeals or Reference relating to an Order of Sentence of death and Sentence of Rigorous Imprisonment for a period exceeding 7 years and all Appeals from Order of Acquittal from offences where the Sentence may be of death, Imprisonment for life or any term of Imprisonment exceeding 7 years.

(ii) All Bail Applications pertaining to Terrorist and Disruptive Activities Act, Narcotic Drugs and Psychotropic Substances Act, 1986 and Foreign Exchange Regulation Act;

(iii) All Bail Applications at the pre-conviction stage involving offence where sentence may exceed imprisonment for 7 years;

(iv) Bail Applications relating to Appeals involving a Sentence of death or Imprisonment for life or Imprisonment for a period exceeding 7 years;

(v) Anticipatory Bail Applications under Section 438, Cr.P.C.

16. Shri Bhattacharyya therefore submits that irrespective of the foundational nature of granting anticipatory bail the offences involved in the present case carry punishments not exceeding 7 years and are therefore eligible to be heard by a Single Bench. Furthermore, even assuming but not admitting for the sake of argument that the foundational order is one of anticipatory bail, such order has been passed by the Ld. Sessions Judge.

17. Therefore having regard to the allocation of business pertaining to criminal matters the order passed by a Ld. Sessions Judge pertaining to offences carrying punishments not exceeding 7 years are eligible to be heard by a Single Bench. The Single Bench is also empowered to grant bail in connection with such offences not carrying punishments exceeding 7 years. Therefore, ipso facto it also has the power of cancelling such bail.

18. Having heard the parties and considering the materials on record this Court is of the considered view that the clinching issue is not the foundational order of anticipatory bail granted by the Ld. Sessions Judge but the challenge to an order of bail in respect of offences carrying punishments not exceeding 7 years before a competent bench in terms of allocation of criminal business. The demarcation of the jurisdiction of the Division Bench to hear criminal matters is with regard to offences which carry punishments exceeding 7 years and above. In the other categories of offences carrying punishments not exceeding 7 years fall within the domain of the Single Bench.

19. In the usual course of its allocated business, the Single Bench has regularly exercised jurisdiction of hearing applications for grant of bail, modification of bail conditions and bail in connection with appeals as also applications for cancellation of bail in respect of offences carrying punishments not exceeding 7 years and below. Therefore, judicial propriety and hierarchy does not debar the Single Bench from considering the prayer for cancellation of bail made in the present application by way of a challenge to an order of the Ld. Sessions Judge dated 4th April, 2014.

20. As rightly pointed out by the *Ld. Amicus Curiae* the point with regard to exercise of jurisdiction qua a foundational order and a sub-sequential order of bail was not in issue in the cases relied upon by Shri Basu. Undeniably the Division Bench exercised jurisdiction in *Tanusree Bhattacharjee*, *Damayanti Majhi* and the *Deepika Samanta* (*supra*) on the premise that the offences carry punishments exceeding 7 years and above. In such context the Hon''ble Division Bench did not consider the judgment in *Quality-Inn* (*supra*) to be appropriate and, instead relied upon the later decision in *Damayanti Majhi* (*supra*).

21. This Court is further sufficiently persuaded by the fact that irrespective of the nuances argued by Shri Basu on the propriety of challenging a foundational order, the allocation of criminal business does not limit the Single Bench from hearing an application for cancellation of bail in respect of offences carrying punishment of 7 years and below.

22. However, from the pleadings in CRM 5306 of 2014 the solitary challenge is to the grant of pre-arrest bail by the *Ld. Sessions Judge*. The grounds made out by the petitioner for cancellation of the pre-arrest bail granted vide order dated 4th April, 2014 essentially relate to the argument that the *Ld. Sessions Judge* did not apply his judicious mind to the fact that the petitioner was yet to receive any summons with regard to any civil suit pending between the parties, that is the petitioner and the OP2.

23. It has also been pleaded that the impugned order granting pre-arrest bail is devoid of reasons and was not properly opposed by the *Ld. Public Prosecutor*.

24. Therefore, the petitioner is aggrieved by the alleged non-application of mind by the *Ld. Sessions Judge* in granting pre-arrest bail.

25. Although, this Court is not persuaded, for the reasons recorded above in this order, with the argument upheld by an Hon''ble Single Bench In *Re: Sudakshina Chowdhury* (reported in 2013 (3) CLJ (Cal) 478) that in all cases of pre-arrest bail the cancellation of such bail is required to be heard by the Hon''ble Division Bench since the allocation of criminal business read with the Appellate Side Rules of the High Court and the Code of Criminal Procedure enable the Single Bench to hear matters in connection with offences carrying punishment of 7 years and below including cancellation of bail, however, in the particular facts of this case since the challenge thrown by the petitioner pertains to only (emphasis supplied) the illegality alleged in the grant of pre-arrest bail; this Single Bench finds itself unable to hear the application for cancellation of the anticipatory bail.

26. For the reasons above CRM 5306 of 2014 is disposed of with the direction to place the matter before the appropriate Hon''ble Division Bench.

27. There will be, however, no order as to costs.

28. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.