

(1998) 07 OHC CK 0048

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 1620 of 1996

Md. Safik

APPELLANT

Vs

Md. Abdul Gaffar and Others

RESPONDENT

Date of Decision : 01-07-1998

Acts Referred:

Penal Code, 1860 (IPC) — Section 363, 364, 364A, 379, 395
Criminal Procedure Code, 1973 (CrPC) — Section 436, 437, 439(2)

Citation : (1998) 86 CLT 698 : (1999) CriLJ 77

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Judgement

P.K. Tripathy, J.—The case is taken up for further hearing. Heard further argument. Both the parties rely upon the ratio in the case of Upendra Kumar Sahoo v. Giridhari Sahu (1996) 11 OCR 53. Hearing is concluded and the order is as follows:-

2. This application u/s 439(2) of the Code of Criminal Procedure, 1973 (in short, "the Code") has been filed by the informant of G. R. Case No. 948 of 1995 of the Court of S.D.J.M., Jajpur with the prayer for cancellation of the bail granted to opposite parties I to 3 who are the accused persons in that case.

3. The fact alleged in short is that on 10-8-95 petitioner's minor son aged about three years was found missing having been kidnapped by some unknown culprits who demanded a ransom of Rs. 1.5 lakhs. After registration of Badachana Police Station Case No. 175/95 investigation was taken up and during the course of investigation ultimately the child could be recovered from Calcutta. During the course of investigation it was found that opposite parties 1 to 3 were the culprits behind the crime. It also appears from the arrest-cum-surrender memo available in the Case diary that after his arrest opposite party No. I was forwarded to the Court being challenged for the offence u/s 364, I.P.C. However, his application for bail being allowed by learned Addl. Sessions Judge, Jajpur in CrI. Misc. Case No. 432/95 he was released on bail on furnishing bail bond as per the bail order.

Thereafter, on 17-1-96 charge sheet was filed for the offence u/s 363, I.P.C. and as it appears from the order dated 17-1 -96 learned Magistrate mechanically passed an order by taking cognizance of that offence, but issued N.B. W. A. against opposite parties 2 and 3 as they had been shown as absconders. On 8-3-96 opposite parties 2 and 3 voluntarily surrendered in the Court and applied for bail and their prayer was allowed by the S.D.J.M. on the ground that the offence u/s 363, I.P.C. is bailable in nature.

4. Learned counsel for the petitioner argues that facts and evidence available in the F.I.R. and the C. D. prima facie reveal a case u/s 364A, I.P.C. where the punishment prescribed is death or imprisonment for life and the offence is triable by the Court of Session and that the learned Magistrate at the time of considering the bail application should have perused the statements on record to find out what offence is made out against the petitioner and should have considered the bail application looking to the nature and gravity of the offence and the punishment prescribed therefor. He further argues that since the punishment of death or imprisonment for life is provided for the offence u/s 364A, I.P.C., learned S.D.J.M. had no power to release the petitioner on bail, therefore, granting bail in favour of opposite parties 2 and 3 is illegal and without jurisdiction. On that ground he argues that the bail order be cancelled.

5. Learned Addl. Standing Counsel advances a supporting contention and argues that for the reasons best known to the investigating officer he submitted the charge sheet u/s 363, I.P.C. though at the time of forwarding opposite party No. I to the Court he had mentioned about existence of a case u/s 364, I.P.C. He further states that there is no information of any overt act or misuse of liberty by the opposite parties I to 3.

6. Learned counsel appearing for opposite parties, 1 to 3, on the other hand, argues that the case was registered u/s 363, I.P.C., investigation was undertaken and ultimately charge sheet was filed for the said offence and that on 17-1-1996 learned S.D.J.M. took cognizance of the said offence. At that stage or thereafter that order was not challenged in appropriate forum either by the informant or by the prosecuting agency. Thus, keeping in view the provisions in Section 436 of the Code learned S.D.J.M. was justified in allowing them to go on bail. He, however, does not dispute the contentions advanced by the petitioner and the learned Addl. Standing Counsel that a prima facie case u/s 364A, I.P.C. is made out from the materials available in the Case Diary.

7. While dealing with a similar matter this Court in the case of Upendra Kumar Sahoo (1996 (11) OCR 53) (supra) found that the accused persons were allowed to go on bail on the ground of their involvement in an offence u/s 379, I.P.C. though the materials in the Case Diary was disclosing existence of a prima facie case u/s 395, I.P.C. Taking such facts and circumstances into consideration and the principle of law it was held that:-

It is the duty of a Magistrate even at the stage of considering the question of bail

to the apply judicial mind to find out prima facie the nature of offence alleged to have been committed. Mere registration of a case under a particular section does not preclude the Magistrate from delving into the matter to find out about the real offence. Of course, endeavour at that stage is to find out a prima facie case and not to come to any definite conclusion. u/s 437, Cr. P.C., while considering the question of bail the Magistrate is to find out about the offence alleged to have been committed. It is prima facie found that an offence "punishable with death or imprisonment for life has been committed, the Magistrate has no jurisdiction to release the accused on bail. If on the other hand, it is found that though a case has been registered under a section punishable with death or life imprisonment, if there is no material to support of such allegation, the Magistrate has the power to consider the question of bail. The mere registration of a case under a particular section by the Police is not the end of the matter. Sometimes either due to ignorance or for some other reason or even for some ulterior purpose the Police may register case, apparently under some very serious sections or even less serious sections. The opinion of the Police regarding the nature of offence committed is not conclusive even at the stage of consideration of bail and it is the duty of the Magistrate to find out about the real nature of offence.

With respectful agreement with the aforesaid principle and looking to the facts and materials a prima facie view is taken regarding existence of a prima facie case u/s 364A I.P.C. so far against opposite parties 1 to 3. Thus, there is no hesitation to hold that learned S.D.J.M. acted illegal in granting bail to opposite parties 2 and 3 and without considering the nature and granting of the offence.

8. So far as opposite party No. 1 is concerned, as stated earlier bail was granted to him by the Addl. Sessions Judge u/s 439 of the Code. It cannot be regarded as without jurisdiction. Petitioner has not shown or substantiated how the order of bail granted in favour of the opposite party No. 1 is illegal. There is also no specific allegation against him regarding misuse of the liberty granted to him. Hence, under the given circumstances, cancellation of the bail granted to him is not warranted.

9. Illegality of the order of bail in favour of opposite parties 2 and 3 is sufficient to cancel the order of bail granted in their favour. But in this case the existing fact and circumstance should also be taken into consideration while considering such matter. Opposite Party No. 1 who is a co-accused for the same offence has been released on bail. So far accusation is concerned prima facie opposite parties 2 and 3 are similarly situated regarding the criminal liability. There is also no allegation of any overt act or misuse of liberty by the opposite parties 2 and 3 during the period of last above two years. Therefore, if at all the bail order is cancelled at this stage they need not be detained in custody until conclusion of the trial inasmuch as the co-accused (opposite party No. 1) has been allowed to go on bail and therefore opposite parties 2 and 3 should be given similar treatment. In other words, if this bail order is cancelled then opposite parties 2

and 3 may have to renew their prayer u/s 439 of the Code and under the existing circumstances, their prayer for bail may be favourably considered because the co-accused i.e. opposite party No. 1 has been allowed to remain on bail. Following of such a procedure will not serve any purpose of the petitioner though it may cause some harassment to opposite parties 2 and 3. Court proceedings and orders are not mean to harass the litigant, but to pass orders in furtherance of maintenance the criminal justice system. Under such circumstance, this Court feels that the bail order granted in favour of opposite parties 2 and 3 need not be cancelled. Since adequate conditions were not imposed while allowing the opposite parties 2 and 3 to go on bail, now learned S.D.J.M. may impose suitable terms and conditions as will be deemed just and proper and appropriate order in that regard be passed within fifteen days from the date of receipt of a copy of this order directing opposite parties 2 and 3 to comply with the direction within a period of seven days thereafter by way of executing fresh bail bonds and that will serve the purpose. It is, however, made clear that in the event of any overt act it is open to the prosecution/ informant to seek for cancellation of bail if subsequent events will so warrant.

10. The criminal misc. case is accordingly disposed of.