

(1998) 03 OHC CK 0010

In the Orissa High Court

Case No : Criminal Miscellaneous Case No. 738 of 1997

Mirza Yakub Beig and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 10-03-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438

Citation : (1999) CriLJ 1502 : (1999) 1 OLR 369

Hon'ble Judges : S.C. Datta, J;A. Pasayat, J

Bench : Division Bench

Advocate : D. Panda, J. Rath, M.K. Chand, D.P. Dhal and G.R. Mohanty, for the Appellant; A.G.A., Sk. Aziz, S.K. Jena, A.K. Bhuyan, S. Acharya and Sk. Najimulla (for Informant), for the Respondent

Judgement

A. Pasayat, J.—While hearing an application u/s 438 of the Code of Criminal Procedure, 1973 (in short, the "Code") a learned Judge of this Court felt that there was divergence of view in orders passed by learned Single Judges, on the question whether the Court can pass an interim order not to arrest the accused till disposal of the application u/s 438 of the Code. Reference was made to one view expressed in *Madan Mohan Sahoo and Anr. v. State of Orissa* : (1995) XI OCR 553, where it was observed inter alia as follows after referring to cases of *State of Haryana and others Vs. Ch. Bhajan Lal and others*, , and *Janata Dal Vs. H.S. Chowdhary and Others*, , held as follows :

".....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 facts 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

1999(1) M Y S 371 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 role 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 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 Art. 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 *Janata Dal Vs. H.S. Chowdhary and Others*,). An interim order restraining arrest, which cannot be passed u/s 438 of the Code, will amount to interfere 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.L.J. 1200, *Mrs. Desai Mazumdar v. State of Assam* : (1991) 3 Crimes 797; and *Surendra Kumar Vs. State of Madhya Pradesh*,).

Other learned Judges without any detailed discussion or indication of reason had directed accused not to be arrested.

2. Reliance was placed by the learned counsel for petitioners and decision of the Apex Court in *Salauddin Abdulsamed Shaikh v. State of Maharashtra* : AIR 1996 SC 1042 to submit that such orders can be passed. The learned referring Judge observed that there was nothing in the said decision from which it can be inferred that such interim orders can be passed. Therefore, the matter was referred to a Division Bench and that is how the matter has been placed before us.

3. It was submitted by the learned counsel for petitioners that there is nothing in Section 438 of the Code which prohibits passing of such interim order. Learned counsel for the State and the informant submitted that the correct position has been indicated in *Madan Mohan Sahoo's* case (supra).

4. The scope and ambit of Section 438 of the Code has been examined by the Apex Court in several cases and four cases which have dealt with the matter in detail are *K.L.Verma v. State and Anr.* : 7996 (7) SCALE 20; *Director of Enforcement and Anr. v. P.V.Prabhakar Rao* : 7997 Cri.L.J. 4634; *State Rep. by the C.B.I, v. Anil Sharma* : 7997 (7) Supreme 670; and *Dukhishyam Benupani, Asst. Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria* : 7997 (10) Supreme 62. In *Director of Enforcement's* case (supra), it was observed as

follows :

"Legal position concerning the grant of anticipatory bail requires no repetition particularly in view of the decision of the Constitution Bench of this Court in *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab*, which has settled the position wellnigh. Nonetheless, we remind ourselves that the order contemplated u/s 438 of the Code is to be granted or refused by the High Court or a Court of Session, after exercising its judicial discretion wisely. The Constitution Bench in *Gurbaksh Singh's case* (supra) said thus :

" A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail".

After hearing both sides and after perusing the case records (which was submitted to us in a sealed cover by the Enforcement Director, on our request) we have no doubt that the learned single Judge of the High Court went wrong in exercising his discretion by granting anticipatory bail to the respondent in this case. Learned Single Judge has observed :

"I have examined the material in order to satisfy myself whether the apprehension of the petitioner is well founded or not. Suffice it (to) say that the files which are made available by the Enforcement Directorate would disclose an accusing finger against the petitioner. Be it noted that this is not the stage when this Court can apply any test for its acceptability and hence a superficial examination 1999 (I) MIRZA YAKUB V. STATE 373 is done. It is also not necessary to see whether this material is sufficient to file a complaint against the petitioner or not."

When we perused the records we felt that learned single Judge has euphemistically stated that the file disclosed "an accusing finger" against the respondent. We, however, refrain from saying anything more at this stage.

Learned single Judge has taken into account the fact that all other accused arrested in connection with this case have been released on bail. But they were released on bail only on the failure of the investigating agency to complete the investigation within the time prescribed in the proviso to Sec. 167(2) of the Code. How could this respondent take advantage of that fact ? We cannot overlook that the respondent too has contributed to the non-completion of the investigation. Completion of investigation could be achieved only by interrogating all the persons involved as well as acquainted with the matter and after collecting all material evidence procurable. So learned single Judge should never have counted this point in favour of granting anticipatory bail to the respondent.

The most glaring feature which even the respondent did not repudiate is the magnitude of the criminal conspiracy hatched, the ingenuity with which the cabal was orchestrated and the meticulousness with which it was implemented and the colossal amount of foreign exchange siphoned off from the country. It is not disputed that whomsoever perpetrated this grave economic offence deserves to be dealt with sternly under law.

When the learned single Judge himself felt, after going through the records in this case, that the materials already collected were capable of stretching accusing finger towards the respondent, it was not at all a proper exercise of the discretion by favouring him with an order of anticipatory bail u/s 438 of the Code."

5. In K.L.Verma's case (supra), it was observed as follows :

"We have carefully examined both the orders of 9th and 11 th October, 1996, and have also heard counsel for the accused as well as counsel for the C.B.I, and we are of the opinion that the proper course for the High Court was to decide on the question of the requirement of sanction and if the High Court could not do so, to have stayed further proceedings till that vital question was answered. On the other question emanating from the order dated 9th October, 1996, we find that the High Court placed reliance on this Court's decision in Salauddin Abdulsamad Shaikh v. State of Maharashtra : (7996 1 SCC 667, which was a case in which the High Court, while granting interim anticipatory bail, imposed certain conditions, one of which was that the accused should move for regular bail before the Court which was in seisin of the case pending against him. The High Court also observed that the application should be disposed of uninfluenced by the observations made in the earlier order. The SLP was directed against that order of the High Court. While dealing with that order, this Court observed that u/s 438 of the Code, when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High Court or the Court of Session may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions as it may deem appropriate. This Court further observed that anticipatory bail is granted in anticipation of arrest in non- bailable cases, but that does not mean that the regular Court, which is to try the offender, is sought to be by-passed. It was, therefore, pointed out that it was necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the basis of that duration or extended duration the Court granting anticipatory bail should leave it to the regular Court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted. By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular Court cannot be by-passed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular Court for bail and to give the regular

Court sufficient time to determine the bail application. In other words till the bail application is disposed of one way or the other the Court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher Court, if they desire. This decision was not intended to convey that as the accused persons are produced before the regular Court the anticipatory bail ends even if the Court is yet to decide the question of bail on merits. The decision in Salauddin's case, has to be so understood."

6. In Dukhishyam's case {supra} it was observed as follows :

"It seems rather unusual that when the aggrieved party approached the High Court challenging the order passed by a subordinate Court the High Court made the position worse for the aggrieved party. The officials of the Directorate are now enjoined by the Division Bench from arresting the respondent and the time and places for carrying out the interrogations were also fixed by the Division Bench. Such kind of supervision on the enquiry or investigation under a statute is uncalled for. We have no doubt that such type of interference would impede the even course of enquiry or investigation into the serious allegations now pending. For what purpose the Division Bench made such interference with the functions of the statutory authorities, which they are bound to exercise under law, is not discernible from the order under challenge. It is not the function of the Court to monitor investigation processes so long as such investigation does not transgress any provision of law. It must be left to the investigating agency to decide the venue, the timings and the questions and the manner of putting such questions to persons involved in such offences. A blanket order fully insulating a person from arrest would make his interrogation a mere ritual, (vide State rep. by the CBI v. Anil Sharma) 7997 (7) Supreme 670)."

7. In State rep. by the CBI's case (supra), it was observed as follows :

"We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation orientated than questioning a suspect who is well ensconced with a favourable order u/s 438 of the Code. In a case like this effective interrogation of suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible Police Officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

8. In both Salauddin's case (supra) and K.L.Verma's case (supra), the point for determination was the duration of order passed u/s 438 of the Code, while Director of Enforcement's case (supra) dealt with parameter thereof. Dukhishyam's case (supra) and State rep. by the C.B.I's case (supra) throw considerable light on the controversy at hand. Direction not to arrest would amount to interference with investigation. In this context view expressed by the Apex Court in Director of Enforcement's case (supra) is to be referred to. Exercising power u/s 438 of the Code, liberty which is commonly described as anticipatory bail can be granted on conditions as may be imposed for a limited period. A condition that petitioner shall not be arrested for some period cannot be passed. Imposition of condition for the anticipatory bail is conceptually different from a direction not to arrest. The latter is impermissible while dealing with an application u/s 438 of the Code.

9. In view of the aforesaid position, the view in Madan Mohan Sahoo's case (supra) is correct. Direction not to arrest during pendency of the application u/s 438 of the Code cannot be given. Reference is accordingly answered. The matter may be placed before the appropriate Bench for disposal on merits.

S.C. Datta, J.

I Agree