
(1985) 03 BOM CK 0010

In the Bombay High Court

Case No : Criminal Applns. No's. 334 and 338 of 1985

N. K. Nayar and others, etc.

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 12-03-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438

Citation : (1985) 1 BomCR 754 : (1985) 87 BOMLR 141 : (1985) MhLj 450

Hon'ble Judges : H.H. Kantharia, J;B.C. Gadgil, J

Bench : Division Bench

Judgement

Gadgil, J.—The applicants in both these applications are praying for an anticipatory bail. These applications were initially placed before a learned single Judge. However, they have now come up before us as the question arose before the learned single Judge as to whether the provisions of S. 438 of the Cri.P.C. can be utilised by this Court when the case or the contemplated criminal proceedings would be in some other State.

2. Though only this aspect in both these applications has been placed before us for our decision we have heard the learned Advocates on behalf of both the sides on the merits of the applications and we feel that it would be in the interest of the parties if the applications are decided on merits as well if we come to the conclusion that this Court has jurisdiction to entertain the applications.

3. Before going to the rival contentions of the parties it would be necessary to state few facts which have given rise to these applications. Criminal Application No. 334 of 1985 is in connection with a criminal prosecution for the theft of electric energy. Hastinapur Metals Ltd. is carrying on its business in Sonapat District of Haryana State. Its Head Office is at New Delhi. For their business the Company has consuming electric energy that is supplied by the Electricity Board. The allegation is that the Company has committed theft of the electric energy. The three applicants are the Directors of the said Company. They contend that they are the permanent residents of Bombay and that they apprehend that on

the basis of the first information report that has been filed at Rai Police Station (in Sonapat District) they would be arrested. Hence their applications for anticipatory bail.

4. Criminal Application No. 338 of 1985 is in connection with the affairs of Daylight Ceramics (Gujarat) Private Limited having its office at Rajkot. The applicant is said to be the Director of the said Company and a notice has been issued by the Regional Provident Fund Commissioner of Gujarat State calling upon the applicant and other Directors to show cause as to why appropriate action for non-payment of the Company's contributions of the Provident Fund should not be taken against them. The applicant apprehends that a prosecution for having committed offences under the Provident Funds Act would be filed in Gujarat State and that the applicant would be arrested in such a case. According to him, he is a permanent resident of Bombay. With this apprehension he has prayed for an anticipatory bail.

5. We have already observed that when these applications were before the learned single Judge there was a question about the maintainability of the applications in this Court as the offences have been committed outside the State of Maharashtra. We have heard the learned Advocates for the applicants in both these applications as also the learned Public Prosecutors appearing in both these applications. The learned Public Prosecutors have frankly stated before us that such applications for anticipatory bail would be tenable in this Court even if the offences are said to have been committed outside the jurisdiction of this Court. Of course, we do not propose to decide this question on the basis of the concession made by the Public Prosecutors. The provisions for the grant of anticipatory bail are contained in S. 438 of the Cr.P.C. An application for such type of bail can be made to the High Court or to the Court of Session whenever a person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. Thus, the real cause for making an application under S. 438 is the contemplated arrest of a person. If this arrest is likely to be effected within the jurisdiction of this Court, we think that the concerned person should have the remedy of applying to this Court for anticipatory bail. This is more so when the Supreme Court in the case of *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab*, , has observed in para 6 as follows :-

"The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest."

Thus an order of anticipatory bail would have a relevancy to the moment of arrest of the concerned person. Consequently this Court would have jurisdiction if a person is likely to be arrested at a place within the jurisdiction of this Court. We may with advantage refer to a few decisions of the other High Courts which have taken a similar view. For example, Karnataka High Court in the case of *Dr. L. R. Naidu v. State of Karnataka* reported in 1984 Cri LJ 757 , and the Calcutta

High Court in the case of B.R. Sinha and Others Vs. The State, have taken a view similar to the one which we have taken. There is also a decision of the Delhi High Court on the same lines. It would thus be clear that this Court would have jurisdiction to entertain both the applications even if the offences are said to have been committed outside the State of Maharashtra.

6. It is now necessary to consider as to whether anticipatory bail should be granted to the applicants in both the applications and, if so, whether such bail should be conditional one. Mrs. Desai and Mr. Chopda, the learned Public Prosecutors, stated before us that it would not be possible for them to make submissions on the merits of the applications particularly because the contemplated criminal proceedings would be initiated by agencies not subordinate to the State of Maharashtra. However, that does not mean that we should refuse to exercise our powers under S. 438 of the Cri.P.C. We have already indicated the nature of the offences alleged against the respective applicants. We think that it should be necessary to make provision for safeguard against the arrest of the applicants and at the same time it would be just and convenient to put certain conditions while granting interim bail. We have already observed that many a time it will be very difficult to look into the detailed merits of the prosecution allegations particularly when the impending prosecutions are to be lodged in States outside Maharashtra. After taking into account this factor we feel that the interests of the parties will be met if interim bail for a minimum period is granted to the applicants with a condition that the bail should stand vacated and cancelled if the conditions are not fulfilled.

7. Our attention has been drawn to some part of the judgment of the Supreme Court in the abovementioned decision. We would like to reproduce paras 13 and 38. They read as follows :-

"13. This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of S. 438. Though sub-section (1) of that section says that the Court "may, if it thinks fit" issue the necessary direction for bail, sub-section (2) confers on the Court the power to include such conditions in the direction as it may think fit in the light of the facts of the particular case including the conditions mentioned in Cls. (i) to (iv) of that sub-section. The controversy therefore is not whether the Court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to

do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in S. 437 or which are generally considered to be relevant under S. 439 of the Code.

38. There was some discussion before us on certain minor modalities regarding the passing of bail orders under S. 438(1). Can an order of bail be passed under that section without notice to the public prosecutor ? It can be. But notice should issue to the public prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed under S. 438(1) be limited in point of time ? Not necessarily. The Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an F.I.R. in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under S. 437 or 439 of the Code within a reasonably short period after the filing of the F.I.R. as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time."

Thus, it would be clear that there are no inbuilt restrictions in S. 438 itself when the Court has to consider an application for anticipatory bail. At the same time this discretionary power can be exercised and whenever necessary restrictions and conditions can be imposed. It is true that it would not be necessary that the anticipatory bail should be limited in point of time. Everything will depend upon the facts of each case. As we have observed above, the impending prosecutions are likely to be launched in Courts outside the State of Maharashtra. The learned Public Prosecutors who appeared in these applications have not been able to place before us various factors which may come in the way of the applicants to grant anticipatory bail of a limited time. In view of this position, we intend to exercise our powers under S. 438 of the Code of Criminal Procedure by granting anticipatory bail for a period of one month i.e. till the end of 12th April 1985 so as to enable the applicants in both the applications to move appropriate Courts for seeking appropriate orders. It is made specifically clear that this anticipatory bail shall stand automatically vacated and cancelled on 13th April 1985 if in the intervening period no orders about the grant of bail from the appropriate Courts (i.e. the Courts where cases are likely to be filed) are obtained. In the event of the arrest of the applicants in the territory of this State each of the applicants be released on bail up to 12th April 1985 on each of them executing a personal recognizance bond of Rs. 2,000/- and a surety in the like amount.

Order accordingly.