

(2008) 12 KL CK 0022
In the High Court Of Kerala
Case No : Bail Appt. No. 6273 of 2008

Puthiyapurayil Moideenkutty and Others	APPELLANT
Vs	
The State of Kerala	RESPONDENT

Date of Decision : 05-12-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 437, 438, 439, 483
Penal Code, 1860 (IPC) — Section 353

Citation : (2009) 1 KLJ 120

Hon'ble Judges : K. Hema, J

Bench : Single Bench

Advocate : O.V. Maniprasad, for the Appellant; K.S. Sivakumar, PP, for the Respondent

Final Decision : Allowed

Judgement

K. Hema, J.—Petition for anticipatory bail.

2. According to prosecution, petitioners (accused Nos. 6,7, 8,15,16,19 and 20), along with other persons (bout 50 persons in total), who are Muslim League workers formed into an unlawful assembly, armed with delay weapons, under the leadership of first accused, assaulted worker of CPI (M) (defacto complaint and others), using iron rod, reapers, stone etc. Dfacto complainant sustained a fracture to the leg, thereby.

3. Learned Counsel for petitioners argued that petitioners are innocent of the allegation made and they are deliberately dragged into this case and falsely implicated under strong political influence. As per the allegations in the First Information Statement, mp overt act is attributed to petitioners and, they have not inflicted any injury on the defacto complainant is a fracture to his leg, and it was allegedly caused by pelting to stones by fifth accused, it is pointed out.

4. Learned Counsel for petitioners also submitted that accused nons. 1 to 5 who are the prime offenders in the case were granted anticipatory bail by learned

Sessions Judge, as per Annexure 3 - order. If petitioners are refused anticipatory bail and in case they surrender before the Magistrate's court, it is likely that they will be remanded to custody and, they will suffer irreparable injury and loss, it is likely that they will be remanded to custody and, they will suffer irreparable injury and loss, it is submitted. It will also result in great injustice, if petitioners who have a lesser role in the incident are remanded especially since prime offenders are granted anticipatory bail, as per Annexure 3 order, it is submitted.

5. This petition is opposed. Learned Public Prosecutor submitted that two other crimes are also registered against petitioners on the same day, as crime nos 202/08 and 203/08., one u/s 353 IPC etc. and another under the provisions of the PDPP Act etc. Almost at the same time and same venue, petitioners caused injuries to police constables also and they were prevented from discharging their duty. Stones were pelted by accused at the Grama Panchayath Office and damage was also caused to the Panchayath Office, and three crimes were registered in respect of three incidents which took place within span of one hour.

6. It is also pointed by learned Public Prosecutor that as per Annexure 3 - order, anticipatory bail was not granted to co-accused. Learned Sessions Judge entered a clear finding in Annexure 3 that this is not a fit case to grant anticipatory bail and it was also observed that learned Sessions judge was not inclined to invoke Section 438 of the code. In such circumstances, Annexure 3 cannot be deemed to be an anticipatory bail order and petitioners cannot claim any benefit under the said order, it is submitted.

7. Annexure 3 - order passed by learned Sessions judge is extracted below.

The learned public prosecutor produced a report from Sreekandapuram Police Station. In the report it is stated that these petitioners and others formed themselves in to unlawful assembly under the leadership of A1 who is a practicing lawyer. He had given leadership to all the activities of the unruly mob. Considering the fact that these petitioners are accused in other crimes of similar nature and as the petitioners failed to make out any special circumstance for invoking the provisions of Section 438 CrI.P.C. I am not inclined to invoke the provisions of Section 438 CrI.P.C. At the same time, I am satisfied that following directions can be given while disposing of this CrI. M.C.

(1) Petitioners shall surrender before the Court of JFMC, Taliparamba on a day prior to 22.9.2008. In case bail application is moved, they shall be released on bail on executing a bond for Rs. 20,000/- each with two solvent sureties each in the like sum to his satisfaction.

2. In case petitioners are arrested by the I.O. in connection with crime No. 206/08, they shall be released on bail on executing a bond for Rs. 20,000/- each without sureties on conditions that they shall surrender before the concerned court before 22.9.2008.

3. In case petitioners fail to surrender before the concerned court on or before 22.9.2008, this order shall lapse.

4. They shall appeal before the I.O. on 23.9.2008 and 24.9.2008 for interrogation.

A reading of Annexure - 3 order shows that learned Sessions Judge was not inclined to invoke the provision contained in Section 438 of the code, since there are no special circumstances to do so.; A specific finding was entered that applicants failed to make out any special circumstances for invoking provisions of Section 438 of the code. After having found that it is not a fit case to grant anticipatory bail, lower court issued certain directions that the accused be released on bail, in the event of arrest and also on appearance before Magistrate court.

8. A reading of Sections 437, 483 and 439 of the code would reveal that when an accused appears before Magistrate Court, such person can be released on bail u/s 437 of the code by the court, before which, such person appears, but such court will not include a court of Session. An order u/s 437 of the code can be passed only by a court other than a High Court or Court of Session. So, it follows that bail can be granted u/s 437 only by the court before which the accused appears and a Court of Session will not have jurisdiction to issue any direction u/s 437 of the code to Magistrate Court to release a person who appears before such court. If it does so, the Sessions court will be usurping jurisdiction of the magistrate Court and interfering with the independent exercise of the jurisdiction of the latter.

9. u/s 439 of the code, a Court of Session may issue an order that an accused who is in custody be released on bail. But, such an order is issued not in anticipation of such custody. It is passed only in respect of a person who is already in custody and not in relation to any person who is not in custody. So it is clear that Court of Session cannot issue any direction to a magistrate Court either u/s 437 or 439 of the code to release a person in anticipation of the appearance or custody of a person by the Magistrate Court or any other court.

10. However, u/s 438 of the code, a Court of session has the power to issue direction that a person be released on bail, in the event of his arrest. Such an order is issued in anticipation of the arrest. So, in cases in which an accused is not so far arrested the sessions Court can direct that he be released on bail in case he be arrested. In cases in which an accused appears before the magistrate Court, in obedience of the direction issued by a Court of session also, the Sessions court can issue a direction u/s 438, to release him on bail since, in such event, there will be a deemed arrest of the accused by the court, on his appearance before court. Therefore, the direction issued in this case as per Annexure 3 order to release the accused can only be treated as one falling u/s 438 of the Code, since it was issued in anticipation of a deemed arrest, on appearance of the accused in the Magistrate court.

11. Therefore, it follows that learned sessions Judge went wrong fundamentally in issuing a direction for release of accused on bail on his appearance, after entering a find that there are no special circumstances to pass an order u/s 438 of the code and that the court was not inclined to invoke provision contained in Section 438 of the code etc., If the Sessions court finds that it is not a fit case to invoke Section 438 of the code, it shall not issue any direction to release the accused on his appearance/surrender before the Magistrate Court because, it has no powers under any of the provisions contained in the code relating to bail, to issue such directions. So any such order issued by a Court of session directing the Magistrate court to release an accused on bail on his surrender will be illegal and without any jurisdiction, unless it is an order passed u/s 438 of the Code.

12. Now coming to the facts persons who are specifically names in the First Information Statement and against whom specific over acts are attributed, enjoyed, the benefit of pre-arrest bail as per Annexure 3 - order. Though the co - accused obtained the benefit under an illegal order, it will be unfair if the petitioners, who have lesser role in the incident are denied such benefit. No specific allegations are made against petitioners in the First Information Statement and no over act is alleged. Even at present, it is not clear from the case diary as to what are the specific overt acts committed by each of the accused.

13. In such circumstances, on the peculiar facts and circumstances, I am forced to invoke Section 438 of the code to grant anticipatory bail to petitioners, since refusal of such order to them any result in great injustice. Hence, the following order is passed.

(1) petitioners shall surrender before the Magistrate court concerned and they shall be released on bail, on their executing bond for Rs. 25,000/- with two solvent sureties each for like sum to the satisfaction of the learned Magistrate on the following conditions:

(i) Petitioners shall report before the Investigating Officer within three days of release on bail and co-operate with the investigation and make themselves available for interrogation.

(ii) Petitioners shall not influence or intimidate any witness or commit any offence while on bail.

With these directions, petition is allowed.