

(1995) 07 PAT CK 0017
In the Patna High Court
Case No : Cr. Misc. No. 2024 of 1995 (R)

Rajendra Prasad Chaurasia and Another APPELLANT
Vs
The State of Bihar and Others RESPONDENT

Date of Decision : 06-07-1995

Acts Referred:

Citation : (1995) 07 PAT CK 0017

Final Decision : Dismissed

Judgement

A.K. Ganguly, J.—This application for anticipatory bail under Sections 438 and 440 of the Code of Criminal Procedure, 1973 was filed before this Court on 27th June, 1995 and a notice was also given of the said application to the learned A.P.P. Thereafter, the matter was listed on 3rd July, 1995 when nobody appeared on behalf of the Petitioner and the matter was ordered to be listed on 4th July, 1995 when the matter was heard and the case diary was called for within a period of two weeks from that date, and the matter was directed to be put up immediately after that on the list.

2. Learned Counsel appearing on behalf of the Petitioner prayed for ad-interim order for anticipatory bail and cited before this Court the reported decision in the case of Durge Prasad Vs. The State of Bihar, in support of his prayer. On 6th July, 1995 this Court rejected the said prayer for grant of ad-interim anticipatory bail and the reasons for rejecting the said prayer are given herein below.

3. Prior to the enactment of the provisions of Sections 438 of the Code of Criminal Procedure, there was no similar provision under the old Code of Criminal Procedure. There was a divergence of judicial opinion amongst various High Courts about the power of High Court to grant anticipatory bail. But the view of the majority of the High Court was that the Court did not have any power to grant the same. The Law Commission of India in its 41st report dated-4th September, 1969 felt the requirement of introducing such a provision and pursuant thereto the provisions of Section 438 of the Code of Criminal Procedure was introduced for the first time in the present Code of 1973.

4. The legislative history behind the enactment of the said provision is far too well known to be repeated here. The effect of grant of anticipatory bail is that it fetters the right of the police to arrest a person about whom there is a reasonable accusation of having committed a non-bailable offence whereas, prayer for regular bail can only be made after such person is arrested, and such order of bail, if granted, can take effect only after arrest. Therefore, the essential differences between the two kinds of bail, i.e. anticipatory bail and the regular bail is that the first one will take effect prior to the arrest of a person, whereas, the second one will take effect only when the person concerned is arrested.

5. Now the question is whether the power to grant anticipatory and pre-arrest bail can be exercised at an ad-interim stage and before finally deciding the application praying for anticipatory bail. It is well known that the power to arrest and other consequential powers are included within the sweep of statutory powers of the police to investigate. Such authority of the police is a statutory one and is in public interest, but having regard to the paramount importance of personal liberty of a citizen the device of anticipatory bail under the Code of 1973 was brought about. The provisions of Section 438 therefore, are likely to impose some kind of a restraint on the statutory right of the police to investigate.

6. From the above discussion one thing is clear that the provisions of Section 438 in the 1973 Code are in the nature of an exception and while construing such a provision the Court ought not to stretch it beyond the plain meaning of the words employed in the said section. Section 438 of the 1973 Code does not in its terms provide for grant of ad-interim order of anticipatory bail nor does it provide for grant of ex parte anticipatory bail as has been provided in case of bail under the provisions of Section 439(1)(b) of the said Code.

7. In the judgment cited before this Court in the case of Durga Prasad (supra) the learned Judges of the Division Bench in various pages in the said judgment have come to the conclusion that the power to grant ad-interim anticipatory bail, pending consideration of such an application, cannot be read in Section 438 of the Code. The following observations from the said judgment in the case of Durga Prasad (supra) are set out below:

In my view in Section 438 of the Code, a power to stay arrest of the accused pending consideration of an application for anticipatory bail cannot be read. That section only vests power in the High Court and the Court of Session to direct release of the accused person on bail in the event of his arrest. Sub-section (2) of that section requires that while directing such release on bail the conditions mentioned therein should be imposed on the accused so that the investigation is not hampered in any manner.

8. I am in respectful agreement with those observations. Even then after making those observations the learned Judges of the Division Bench in the said case of Durga Prasad (supra) have also stated at Page-603 of the said report that "of course in appropriate cases interim anticipatory bail for a limited period can be

granted with the conditions mentioned in Sub-section (2) of Section 438 of the Code so that the investigation is not affected in any manner. Such interim order should not be passed in a routine manner."

9. Such observations in the case of Durga Prasad (supra) were made by the learned Judges of the Division Bench obviously after taking into consideration, amongst other, two decisions of the Supreme Court, namely, (i) in the case of Balchand v. The State of Madhya Pradesh reported in AIR 1977 SC 366 and (ii) the case of Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab,

10. On a careful reading of the aforesaid two judgments it appears that in the case of Balchand (supra) a three Judges Bench judgment of the Hon'ble Supreme Court, the interpretation of Section 438 Code of Criminal Procedure was not the central question which came up for consideration. The said decision in the case of Balchand (supra) was taken note of and explained in the subsequent Constitution Bench of the Supreme Court in the case of Gurubax Singh v. The State of Punjab (supra) in para-25 at page-1645-46 of the report where the Chief Justice Chandra Chud (as his lordship then was) made the following observations, relevant excerpts whereof are set out below:

We hold the decision in Balchand Jain (A.I.R. 1977 SC 366) in great respect but it is necessary to remember that the question as regards the interpretation of Section 438 did not at all arise in that case...

The observations made in Balchand Jain regarding the nature of the power conferred by Section 438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot therefore be treated as concluding the points which arise directly for our consideration. We agree, with respect, that the power conferred by Section 438 is of an extraordinary character in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Sections 437 and 439. We also agree that the power to grant anticipatory bail should be exercised with due care and circumspection but beyond that, it is not possible to agree with the observations made in Balchand Jain in an altogether different context on an altogether different point.

11. Therefore, the Constitution Bench of the Supreme Court in the case of Gurubax Singh has not considered the judgment of Balchand (supra) as making any authoritative pronouncement on the question with which this Court is concerned, namely the power of the Court to grant ad-interim order of anticipatory bail. On the said question the authoritative pronouncement has been made in para-38 and at page-1649 of the judgment of Gurubax Singh (supra). The relevant portion of the said paragraph is set out below-

There was some discussion before us on certain minor modalities regarding the passing of bail orders u/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 of 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.

12. From the aforesaid finding of the Supreme Court it is clear that the grant of ad-interim anticipatory bail will arise only when such application is moved without notice to the Public Prosecutor. Thereafter, on notice the said question will be re-examined upon consideration of the rival contentions of the parties. The Apex Court has also cautioned by saying that ad-interim order will have to conform to the requirement of Section 438 of the Code. In para-37 of the said judgment the Apex Court has further stated that a blanket order of anticipatory bail is bound to cause serious interruption with the right of investigation of police and such order may become a charter of lawlessness and may stifle prompt investigation.

13. Therefore, having regard to the aforesaid pronouncement of the Supreme Court and on a reasonable interpretation of the provisions of Section 438 of the Code, this Court is of the view that ad-interim anticipatory bail can be, in a given case and on very rare occasions, granted at an ex parte stage and in an emergent situation where the consideration of the case does not brook any delay. But the question of continuation of such ad-interim anticipatory bail is to come up for hearing before the Court again, within the shortest possible time, after notice, and then on a re-examination of the entire case and by considering the rival contentions of the parties, the question of grant of bail should be decided afresh. Therefore, unless ad-interim bail is granted at an ex parte stage, it ought not to be granted when the matter is contested upon notice. At that stage the Court while considering the application for anticipatory bail upon notice should make all efforts to dispose of it as early as possible without adjourning it to a future date. In my view, deferring the disposal of an application for anticipatory bail will not be in the interest of either the individual or of the police. No hard and fast time limit for disposal of such application can be made, but in all probabilities such application should be disposed of within a period of fortnight from the date when notice is given and the matter is taken up for hearing.

14. In view of the above discussion this Court holds that since the instant application is not an ex parte one nor is it of an emergent nature, the prayer for ad-interim anticipatory bail in this case cannot be entertained and is therefore, rejected.