
(2010) 06 KL CK 0131
In the High Court Of Kerala
Case No : B.A. No. 2003 of 2010

Samdeep Varghese

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 11-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438, 70, 71, 72, 73
Information Technology Act, 2000 — Section 65, 66, 66A, 66C, 66D
Penal Code, 1860 (IPC) — Section 120B, 408, 419, 420, 467

Citation : (2010) 06 KL CK 0131

Hon'ble Judges : K. Hema, J

Bench : Single Bench

Advocate : Geo Paul and P.T. Razeena, for the Appellant; Naresh Kumar Sanghi, Jayant K. Sud, A.A.G.s, Punjab and Hariyana, Tek Chand and M.S. Breez, Public Prosecutors, for the Respondent

Judgement

K. Hema, J.—These petitions are filed u/s 438 of the Code of Criminal Procedure ("the Code", for short), for anticipatory bail.

2. On a complaint filed by the representative of a Company, which is engaged in the business of trading and distribution of petrochemicals in India and overseas, a crime was registered against nine persons, alleging offences under Sections 65, 66, 66A, 66C and 66D of the Information Technology Act and Sections 419 and 420 of the Indian Penal Code ("IPC for short).

3. As per the allegations in the complaint, the company has a website in the name and style "www. jaypolychem. com" but, Anr. website was set up in the internet by first accused (Samdeep Varghese @ Sam), who was dismissed from the company, as under the name and style "www. jayplychem. org", in conspiracy with other accused, including one Preeti and Charanjeet Singh, who are the sister and brother-in-law of "Sam" and defamatory and malicious matters about the company and its directors are made available in that website.

4. It is further alleged in the complaint that first accused"s sister and brother-in-

law are based in Cochin and they have been acting in collusion and conspiracy with known and unknown persons, who have dishonestly and fraudulently cheated the company and committed acts of forgery, impersonation etc. In pursuance of the conspiracy, two of the accused (Amardeep Singh and Rahul) had visited Delhi and Cochin.

5. The complaint also reveals that first accused and Ors. sent e-mails from fake e-mail accounts of many of the customers, suppliers, Bank etc. to malign the name and image of the Company and its Directors. It is further alleged thus: "The defamation campaign run by all the said persons named above has caused immense damage to the name and reputation of the Company. The Company has also suffered losses of several crores of Rupees for producers and suppliers, and customers were unable to do business".

6. It is also alleged in the complaint thus: "Company has also learnt that Mr. Varghese, Mr. Amardeed Singh and other above referred persons in collusion with other known and unknown persons have impersonated different individual s, real or imaginary and have made and used forged electronic records, created false e-mail accounts to send information that they knew was false and grossly offensive to cause annoyance, inconvenience, danger, obstruction, injury etc., to the Company, its Directors, employees and other persons with the further mala fide and deliberate intention of causing annoyance and inconvenience and deceive the addresses and recipients about the origin of such information/messages."

7. There is also an allegation that first accused, in collusion with other accused "have been passing on and exchanging confidential information of the Company to each other and to third parties". The further allegation is that first accused along with his sister and brother-in-law and one Rahul had financed a trip of one of the accused Amardeep and his wife to Cochin and Munnar although the Company was informed that he was going to Kulu-Manali for his honeymoon. Those persons parted with certain confidential information of the Company which resulted in great financial loss to the Company, besides loss of business and reputation.

8. The further allegation against the accused is this:

The said persons are withholding certain other information of confidential nature for which they are blackmailing the Company and its Directors and are seeking extortion money for not returning the confidential documents and material which they have unauthorisedly and illegally taken from the Company records of some of which was handed over to them or they had access to as employees of the Company.

9. On the above allegations made in the First Information Statement, a crime was registered against first accused, his sister and brother-in-law and few Ors. , at Rajpura city police station, in Punjab. According to Respondents, later, it was revealed on investigation that huge amount of money was brought by first accused and other accused and handed over to first accused s mother, who is

now reportedly, arrayed accused No. 6 (Smt. Mariamma-who is not named in the FIR). She also allegedly hatched a criminal conspiracy with all the other accused to commit the various offences.

10. The first accused and his mother (A6) filed separate petitions for anticipatory bail. According to them, they are absolutely innocent of the allegations made. The first accused was working as General Manager in Reliance India Limited for a very long time, and he earned a very good reputation. Later, he joined the company of the complainant and worked as the Vice President for a period of two years. In the mean time, he came to know that the company is indulging in illegal activities and various fraudulent money transactions and committing various offences and hence, he did not intend to continue in the company. He resigned from the job.

11. According to Petitioners, the company was aware that first accused was having confidential information about the shady manner in which the company was run and fearing that he would leak out relevant informations to authorities, a false complaint is filed against him, as a shield. First accused, in fact, made a complaint to the Director of Revenue Intelligence (who is shown as 4th Respondent in these petitions) regarding the various illegalities in which the Company is indulged in, and proceedings are now pending against the company. (Learned Standing Counsel appearing for 4th Respondent submitted that a complaint is received raising serious allegations against the Company and its Directors and enquiry is being conducted).

12. It is also submitted that the only motive of the Company is to wreak vengeance against first accused and to destroy his reputation. His whole family is dragged into criminal proceedings, without any basis. The first accused's sister and brother-in-law were implicated in the complaint, as per the FIR, and much later, first accused's mother who is aged 78 years is also dragged in as an accused, on flimsy grounds and with ulterior motive, as a pressure tactics, it is submitted.

13. The first accused's sister and brother-in-law, who are Doctors, filed application for anticipatory bail and this Court was pleased to allow the application, as per order dated 1-3-2010 in B.A. 1163/2010 reported in Koshy Vs. State of Kerala, , it is submitted. The allegations against first accused in the said bail application are almost similar in nature and, as against first accused's mother, those are still lesser in substance and content. In such circumstances, there is no reason to refuse anticipatory bail to Petitioners, it is submitted.

14. This petition is strongly opposed by the second and third Respondents, who are represented by Sri Naresh Kumar Sanghi, and Sri Jayant K. Sud, learned Additional Advocates Generals for the State of Punjab and also by Sri Vineeth Malhotra, who was also heard on behalf of the de facto complainant. It was strenuously argued by all of them that this Court has no jurisdiction to consider or entertain the anticipatory bail applications. The offences are allegedly committed

within the limits of Rajpura city police station in Patiala District in the State of Punjab. Therefore, the only courts which can grant anticipatory bail are the High Court of Punjab or the Sessions Court concerned in Punjab, within whose jurisdiction the crime is committed, it is strenuously contended.

15. Learned Advocate General cited a decision of the Supreme Court in *State of Assam v. R.K. Krishna Kumar* AIR 1998 S.C. 144, and also pointed out that various High Courts of this country, followed the dictum laid down in the above decision and held in same lines that the court which can grant anticipatory bail is the court within whose jurisdiction, the offence is committed. The following decisions were cited: *Capt. Satish Kumar Sharma v. Delhi Administration and Ors.* ILR 1990 Del 203, *In re: Ram Badan* 1982 Cri.L.J. 1961 Calcutta, *Kailashpati Kedia Vs. State of Maharashtra and Others*, .

16. It was also pointed out by learned Additional Advocate General that a petition was filed before the High Court of Punjab by first accused's sister and brother-in-law, for quashing the proceedings initiated against them and it is still pending. No stay is granted in the case. They also moved the Sessions Court in Punjab for anticipatory bail. The Petitioners herein being their close relatives being brother and mother are aware of the pendency of the said proceedings and nothing prevents them from moving the appropriate forum, it is argued. Petitioners may be directed to approach the courts in Punjab which alone have jurisdiction to entertain the petitions and if these petitions are entertained, it will encourage forum shopping, it is submitted.

17. It is also submitted that though an anticipatory bail order was passed in favour of first accused's sister and brother-in-law, by Anr. learned Judge of this Court, in *Koshy Vs. State of Kerala*, , the said order is challenged by the State of Punjab before the Supreme Court on various grounds, including jurisdiction and notice has been ordered to the accused. It is also pointed out that as per the order passed by this Court in the anticipatory bail application, there is a direction that Petitioners therein shall make themselves available for interrogation by the Investigating Officer in the Office of the City Police Commissioner, Ernakulam, on such date and dates, as intimated by the City Police Commissioner, Ernakulam.

18. The above direction in *Koshy's* case is illegal, in the light of the dictum laid down by the Supreme Court in *Dukhishyam Benupani, Asstt. Director, Enforcement Directorate (FERA) Vs. Arun Kumar Bajoria*, , wherein it is clearly laid down that such directions cannot be granted by the court while granting anticipatory bail, it is strenuously argued. The fixing of place for interrogation is within the realm of investigation and the court cannot intrude into it, it is strongly argued. In such circumstances, the mere fact that an order of anticipatory bail is granted in favour of two of the co-accused may not be made a ground to grant anticipatory bail to the Petitioners, it is argued.

19. It is also pointed out that from the arguments advanced on behalf of Petitioners it is clear that first accused is not residing at present within Kerala

and that he is still in Singapore. But, his address shown in the cause title is that of Cochin. He has not subjected himself to the jurisdiction of this Court; he has not filed even a vakalath, but only a memo is filed by learned Counsel for first accused, on behalf of him though he is residing abroad, it is pointed out. (Learned Counsel for Petitioners clarified that as per the relevant Rules in Kerala, a memo filed by counsel is sufficient and vakalath is not insisted upon in criminal matters. That is why the Registry has not noted any defect and the petition was admitted by this Court).

20. Learned Counsel for Petitioners refuted the above arguments and contended that an anticipatory bail application can be entertained by any High Court within whose jurisdiction a person apprehends arrest. He placed reliance upon the decisions reported in *C.I. Mathew v. Govt. of India* 1984 KLT 942 and *Madhusoodan v. Supdt. of Police* 1992 (2) KLT 83. It is further submitted that first accused is a permanent resident of Kerala and the address shown in the cause title is his permanent address. He may come to Kerala at any time and he is apprehending arrest within Kerala, since a crime was registered and a non-bailable warrant was issued against him, it is submitted.

21. In this context, Anr. argument is raised by learned Counsel for Petitioners that the arrest warrant issued in this case is not legal or proper. According to him, it is illegal for the Magistrate Court to issue a warrant for securing the presence of an accused, for the purpose of investigation in the light of the decision in *State through C.B.I. Vs. Dawood Ibrahim Kaskar and others*, . It is based on an illegal warrant that Petitioners are now being sought to be arrested, it is pointed out. Further, there was no necessity at all to obtain a warrant from the court, since police can arrest the accused even without warrant, as cognizable offences are involved in this case. The over-enthusiasm of the police in procuring warrant raises an apprehension that Petitioners may be harassed in case they are arrested under an illegal warrant, it is argued.

22. It is also submitted that two Additional Advocate Generals and Anr. counsel from the State of Punjab have come all the way from Punjab to Kerala, to argue a case which does not even involve any public interest, but it is between two private individuals only. In the above circumstances, Petitioners reasonably apprehend that if they are arrested, they will be subjected to torture and harassment by police. They will also suffer irreparable injury and loss, if anticipatory bail is not granted, it submitted.

23. Learned Advocate Generals maintained the strong stand that there is no bar in issuing a non-bailable warrant for the purpose of investigation. According to him, other High Courts in *Neela J. Shah Vs. State of Gujarat*, and *State of Manipur Vs. Vikas Yadav*, considered the very same question and following the dictum laid down in *Dawood Ibrahim's* case, it was held that there is no bar for issuance of warrant by the Magistrate, for the purpose of investigation.

24. Learned Additional Advocate General also clarified that it is only because

accused's presence could not be procured by the Investigating Officers that they were forced to get an order of non-bailable warrant from the Magistrate Court concerned. It is only legal and no malice can be attributed to the investigating agency on this count. Further, merely because the Additional Advocate Generals have appeared in this case for the State concerned and argued the case, it cannot be contended that there is malice. It is only to assist this Court that they are here, it is submitted.

25. Learned Additional Advocate General also argued that many important facts can be brought to light only if Petitioners are subjected to custodial interrogation. Though a direction was issued by this Court in Koshy's case while granting anticipatory bail to the co-accused, who are none other than first accused's sister (she is also daughter of sixth accused) and her husband to appear before the Sub Divisional Judicial Magistrate, Rajpura within two months, they have not complied with the said direction. The Respondents reasonably believe that Petitioners may also follow the same path, in which event, investigation will be at peril. The urgency in the case of application for anticipatory bail has been emphasised by the Supreme Court in *M.R. Vijayakumar v. State of A.P.* 1988 Cri.L.J. 14. Taking into account all these facts and circumstances, it is submitted that both the petitions deserve to be dismissed.

26. I also heard Sri M.S. Breez and Sri Tek Chand, learned Public Prosecutors on behalf of the State of Kerala. They limited their arguments to jurisdiction of this Court. According to them, whatever is stated by the Supreme Court in *Krishnakumar's* case confines to the facts of said case. It is also specifically stated therein that it was unnecessary to consider whether the Bombay High Court has jurisdiction or not. On the facts of that case, the Supreme Court found that the cases should be considered by High Court of Guwahati, it is pointed out.

27. Learned Public Prosecutors for the State of Kerala also supported the arguments advanced that the court within whose jurisdiction the arrest is apprehended also has jurisdiction to entertain the application for anticipatory bail. They also cited a decision of the Sikkim High Court reported in *Rama Shankar Prasad and Others Vs. The State and Others*, which is in tune with the decisions of this Court in *C.I. Mathew v. Govt. of India* 1984 KLT 942 and *Madhusoodan v. Supdt of Police* 1992 (2) KLT 83 on the question of jurisdiction. It is held therein as follows:

We are of the view that the place where the arrest is threatened should also confer jurisdiction for entertainment of a matter u/s 438, Code of Criminal Procedure. Hence, the application is quite in order so far as the jurisdiction is concerned.

28. On hearing both sides, I find that I must first decide whether this Court has jurisdiction to entertain these anticipatory bail applications or not. The Supreme Court in *State of Assam v. R.K. Krishna Kumar* AIR 1998 S.C. 144 held as follows:

We do not think it necessary to decide whether Bombay High Court has

jurisdiction to entertain the applications filed by the Respondents. All the same, the question of granting anticipatory bail to any person who is allegedly connected with the offences in question must for all practical purposes be considered by the High Court of Guwahati within whose territorial jurisdiction such activities should have been perpetrated. In view of the conceded position that Appellants were not heard by the High Court, we set aside the impugned orders on that ground alone. The applications are to be disposed of after hearing the Appellants also. For that purpose we order that the applications for anticipatory bail filed by the Respondents would stand transferred to the High Court of Guwahati where those applications would be heard by a Division Bench of that High Court and appropriate orders be passed thereon.

(Emphasis supplied)

29. In Krishnakumar's case cited above the offences were committed within the territorial jurisdiction of the State of Assam but, anticipatory bail applications were moved before the Bombay High Court. The Bombay High Court allowed the applications, without hearing the Respondents and hence, the Director General of Police filed appeals against the said orders before the Supreme Court. The Supreme Court, while considering the said appeals held thus: "in view of the conceded position that Appellants were not heard by the High Court, we set aside the impugned orders on that ground alone".

30. So, it is clear that the bail orders were set aside only on the ground that the Appellants were not heard and it was not on the ground that the Bombay High Court has no jurisdiction. It is also relevant to note that the Supreme Court held that it was not "necessary to decide whether Bombay High Court has jurisdiction to entertain the applications filed by the Respondents" though an argument was raised that the Bombay High Court had no jurisdiction to entertain the bail applications, since the offences were committed within State of Assam.

31. It is true that the Supreme Court also held in the above decision that the question of granting anticipatory bail to any person, who is allegedly connected with the offences in question "must for all practical purposes be considered by the High Court of Guwahati within whose territorial jurisdiction such activities should have been perpetrated". It is pertinent to note that what is referred to by the Supreme Court is, "the High Court of Guwahati" and not "any High Court". In such circumstances, it appears to me that the Supreme Court was not laying down a general proposition but, the appeals were disposed of on facts holding that the anticipatory bail applications in that case are to be considered by the High Court of Guwahati within the jurisdiction of which the activities were perpetrated. Of course, there can be no doubt that anticipatory bail can be granted by the courts, within whose jurisdiction the offence is committed.

32. It is also relevant to note that the Supreme Court did not consider in Krishnakumar's case whether the High Court within whose jurisdiction arrest is apprehended has jurisdiction to entertain the application or not. A Division Bench

of this Court held in *Madhusoodan v. Supdt. of Police* 1992 (2) KLT 83 that the court within whose jurisdiction the arrest is apprehended can grant anticipatory bail. The relevant portion from the above decision is extracted as hereunder:

If release from arrest is necessary, the place where arrest is made has some significance for such release. In our view the place where a person apprehends arrest is a sure test for determining jurisdiction of "the" High Court or "the" Court of Session as the case may be. If the applicant can satisfy the court that his apprehension that he would be arrested at a place within the territorial limits of a particular court is based on reasonable grounds, we would say that the High Court or the Sessions Court having jurisdiction over that place has authority to exercise powers u/s 438 of the Code.

33. I may mention here that the judgments of the Supreme Court in *Krishnakumar's* case and that of the Division Bench decision are authored by the same learned judge. I also find that there is nothing in *Krishnakumar's* case which runs contrary to what is laid down on jurisdiction in the decision of the Division Bench of this Court. No other decision of the Supreme Court was cited by the Respondents which would over rule the two decisions of this Court in *C.I. Mathew v. Govt. of India* 1984 KLT 942 and *Madhusoodan v. Supdt. of Police* 1992 (2) KLT 83 or render them, not good law. In the above circumstances, I am bound to follow the decisions of this Court and I hold that the High Court within whose territorial jurisdiction a person apprehends arrest also can grant anticipatory bail. There is no bar for a High Court in entertaining an application for anticipatory bail, if a person apprehends arrest within its jurisdiction.

34. Therefore, the next question to be decided is, whether the Petitioners apprehend arrest within the State of Kerala. It has come out from the arguments advanced by learned Counsel for Petitioners that first accused is working abroad in Singapore and he is also residing there. He is not, at present, residing in Kerala. In such circumstances, I find that there can be no reasonable apprehension of arrest of Petitioner within the State of Kerala.

35. A reading of Section 438 of the code shows that a person who seeks anticipatory bail shall satisfy the court that "he has a reason to believe that he may be arrested". It is not enough if he merely states that he has an apprehension of arrest. The court must be satisfied that the apprehension of arrest expressed by him is reasonable and not merely fanciful. In a case in which non-bailable offence is allegedly committed outside the jurisdiction of the High Court, before which a person has moved for anticipatory bail he must also satisfy the court that he may be arrested within its territorial jurisdiction.

36. According to me, it is also necessary that Petitioner satisfies the court that there is an imminent likelihood of arrest within its territorial jurisdiction. A remote possibility of an arrest, on an indefinite future date, is not what is contemplated by the provision contained in Section 438 of the code. It is relevant to mention here that as per the dictum laid down by the Supreme Court, in *Shri*

Gurbaksh Singh Sibbia and Others Vs. State of Punjab, , it is the "imminence of a likely arrest founded on a reasonable belief which is relevant while considering an anticipatory bail.

37. The applicant in an anticipatory bail application has therefore, to satisfy the High Court that there is likelihood of his imminent arrest within its territorial jurisdiction. The apprehended arrest shall not be too remote, in respect of time factor. Depending on the facts and circumstances of each case, delay in arrest of an accused may turn out to be detrimental to the investigation, and the court must bear in mind this fact, while considering an anticipatory bail application.

38. While considering the case of first accused, I am not satisfied that there is any imminence of likelihood of his arrest within State of Kerala, since he is still in Singapore. He has no case that he is coming to Kerala in the near future. He has also not stated when he is coming down to Kerala. The apprehension expressed by first accused who is in Singapore that he would be arrested in Kerala is a fanciful apprehension and not a reasonable one. In such circumstances, in the absence of any reasonable apprehension of arrest of first accused within Kerala, his application for anticipatory bail cannot be entertained by this Court.

39. However, the case of the 6th accused (Smt. Mariamma) stands on a totally different footing. She is a permanent resident of Kerala and, she is residing at Cochin. There is no dispute on this fact. Admittedly, she is under threat of arrest and Respondents also seek her arrest and custodial interrogation. But, on the sole ground that 6th accused apprehends arrest within the State of Kerala, this Court cannot pass an order of anticipatory bail, even for a restricted period. The court must "think it fit" to grant the relief, taking into consideration all the relevant aspects.

40. According to prosecution, 6th accused "conspired" to commit the various offences and she also received huge amounts of money and other items from first accused and thereby, committed the various offences alleged. Learned Counsel for other 6th accused strenuously argued that 6th accused is not an accused as per the First Information Report. FI Statement is totally silent about her role in the offences in any manner. The complainant had no case that she had any thing to do with the case. But, much later, she was implicated in this case. The present case is that she, in conspiracy with other accused, committed the offences under Sections 120B, 408, 467, 468, 471, 419, 420 of IPC.

41. Learned Counsel for Petitioners argued that 6th accused was implicated only as a pressure tactics, as she happened to be first accused's mother. She is aged 78 years. She is a retired professor in a college. She has absolutely no role in any of the transactions with the company. There is absolutely no materials or evidence on record to connect her with the crime, in the light of the above submissions by Petitioners' counsel and in the light of the strong objection raised by the opposite side, I am forced to go into the merits of the case, since it is absolutely essential to take decision whether I can grant an order in favour of

6th accused u/s 438 of the Code. The mere apprehension of arrest in a non-bailable offence is not sufficient for invoking Section 438.

42. Hence, I directed the Respondents to furnish the details of evidence and materials, if any, which they have collected during investigation against 6th accused. The copy of the statements of certain witnesses, who were questioned by the police, on different dates, in February and March, 2010, were produced before me. Learned Additional Advocate General cautioned this Court that the investigation is at the initial stage and the materials so far collected have to be kept confidential, failing which, it is likely to affect the investigation adversely. I do agree with him and I have to direct the Registry to keep all the materials which are handed over to this Court during hearing in a sealed cover and I do so.

43. On a reading of the First Information Statement (the relevant portions from the FIS are quoted in this order while narrating the facts), I am satisfied that there are only general and vague allegations that certain acts are committed by certain accused. On a reading of the F.I. Statement, I cannot brush aside the arguments advanced by Petitioners' counsel that none of the ingredients of the alleged offences under IPC are made out from the allegations made in the FI Statement.

44. The materials placed before me consist of Statements of five witnesses which are translated in English. It is very vaguely stated in those statements of the witnesses that certain named persons (I would avoid mentioning their names, taking into consideration the stage of investigation), "put necessary documents and valuable items and gave them to the mother of " first accused. In Anr. statement, it is recorded, "I sent about Rs. 5/6 crores through Mr. X (I am avoiding the name of the said person) to his mother", referring to the 6th accused. It is on the basis of such statements that the 6th accused is now sought to be arrested.

45. The Supreme Court, in *Joginder Kumar v. State of U.P. and Ors.* 1994 S.C.C. 1172 cautioned that "no arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest".

46. The Supreme Court also held in *Joginder Kumar's* case that denying a person of his liberty is a serious matter. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do.

47. I would also take note of the fact that 6th accused is willing to be interrogated at any time during pendency of these cases and that she also submitted through her counsel that her whole house can be searched. She also volunteered to furnish all the details of her Bank accounts etc. to the Respondents. She has also expressed her willingness to co-operate with the investigation. In the above circumstances, keeping in mind, what the Supreme Court stated in Joginder Kumar's case I have no doubt that if 6th accused is arrested on the vague allegations revealed from the materials furnished, she will suffer great hardship and irreparable injuries. I am also satisfied that she apprehends arrest within the State of Kerala. It is true that 6th accused can seek remedy before the Punjab High Court also, but the mere fact that she has remedy elsewhere does not dissuade me from exercising my powers u/s 438 of the code in this case, especially after going through the materials made available to this Court.

48. In this context, learned Counsel for Petitioners put forward Anr. contention, placing reliance upon a decision reported in State through C.B.I. Vs. Dawood Ibrahim Kaskar and others, that non-bailable warrant cannot be issued by the court u/s 73 of the Code for the purpose of aiding investigation. It will be clear from the dictum laid down in the said decision that the order passed by learned Magistrate is illegal and contrary to the dictum laid down by the Supreme Court in the above decision, it is strenuously argued.

49. I find some force in the submissions made. It cannot be disputed that even without a warrant from a court, police can arrest the accused, if he has committed cognizable offence. So, a question will arise why the warrant is obtained. Since malicious intention is attributed to the Respondents and such motive is a relevant factor to decide whether this is a fit case to grant anticipatory bail or not, I shall proceed to consider whether the warrant procured in this case is legal or not. If the arrest is effected with malicious intention, it is likely that the accused will be tortured on arrest.

50. Both sides would submit that the warrant issued in this case is u/s 73 of the Code. It is pointed out by learned Additional Advocate General that there is nothing in Section 73 to indicate that a warrant cannot be issued during the course of investigation or that it can be issued only in a proceedings pending before the court. Section 73 reads as follows:

73. Warrant may be directed to any person.--(1) The Chief Judicial Magistrate or a Magistrate of the First Class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or of any person who is accused of a non-bailable offence and is evading arrest.

(2) Such person shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, any land or other property under this charge.

(3) When the person against whom such warrant is issued is arrested, he shall

be made over with the warrant to the nearest police officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken u/s 71.

51. A reading of Section 73 shows as per Sub-section (1) of Section 73, the Chief Judicial Magistrate or a Magistrate of the First Class may direct a warrant "to any person" within his local jurisdiction for the arrest of that of any person who is accused of a non-bailable offence and is evading arrest. As per Section 70 of the Code, every warrant of arrest issued by a Court under the Code shall be in writing, signed by the Presiding Officer of such Court and shall bear the seal of the Court. The form of the warrant is available in Form 2 of Schedule 11 of the Code. It is clear from the language used in the Form that when a person is arrested under a warrant, he shall be produced before the court. The warrant in Form 2 does not direct production of the arrested person before the investigating officer or police for investigation.

52. Further, Sub-section (3) of Section 73 of the Code lays down that once a person is arrested on a warrant issued u/s 73(1) of the Code, he shall be taken before the Magistrate having jurisdiction in the case, through the nearest police officer. Therefore, it is evident that if a person is arrested on the strength of an arrest warrant issued u/s 73(1) of the Code, he shall be produced before the Magistrate having jurisdiction of the case, as stated in Section 73(3). That means, the purpose of issuing warrant u/s 73 of the Code is, production of accused before the Magistrate having jurisdiction and not before police, to aid investigation.

53. Thus, it is clear that any person who is sought to be arrested in execution of a warrant issued u/s 73 shall be produced ultimately, before the Magistrate and not before the investigating officer. If a warrant u/s 73 is issued for arrest of any person who evades arrest, such person shall, on his arrest, be produced before the Magistrate and not before the investigating officer for the purpose of investigation. It follows therefore, that a warrant cannot be issued by the Magistrate u/s 73, for production before investigating officer, to aid investigation. There is nothing in Sections 70 - 73 and the Form of warrant to indicate that the person who is arrested under a warrant under the Code can be produced before the police for the purpose of investigation.

54. That is what the Supreme Court has held in the decision reported in State through C.B.I. Vs. Dawood Ibrahim Kaskar and others, . The relevant portion can be extracted as follows:

Since warrant is, and can be issued for appearance before the court only and not before the police and since authorisation for detention in police custody is neither to be given as a matter of course nor on the mere asking of the police, but only after exercise of judicial discretion based on materials placed before him, it cannot be said that warrant of arrest u/s 73 of the Code could be issued by the Courts solely for the production of accused before the police in aid of

investigation.

55. Learned Additional Advocate General strenuously argued that the Supreme Court has held that Section 73 can be invoked for issuance of warrant in the course of investigation also. He has also referred to the decision of the Delhi High Court in *Mrigendra Jalan v. State and Anr.* 2008 (4) S.C.C. 2925, wherein it was held that it is only legal to issue warrant u/s 73 of the Code for the purpose of investigation, following *Dawood Ibrahim's* case.

56. On going through the decision of the Supreme Court, I find that the Supreme Court has considered the various steps to be taken during investigation like test identification parade, taking of specimen handwriting etc. and held that warrant is, and can be issued "for appearance before the court only and not before the police". It was also noted therein that authorisation for detention in police custody is neither to be given as a matter of course nor on the mere asking of the police, but only after exercise of judicial discretion based on materials placed before him. Hence, "it cannot be said that warrant of arrest u/s 73 of the Code could be issued by the Courts solely for the production of accused before the police in aid of investigation".

57. Thus, a reading of the relevant provisions of the Code and the decision of the Supreme Court in *Dawood Ibrahim's* case would support the contention raised by Petitioners. I have no doubt to hold that even though the court is empowered to issue warrant u/s 73, during the course of investigation also, a warrant shall be issued only for procuring presence of a person before the court and not before the Investigating Officer or police, for aiding investigation. In the light of the relevant provisions contained in Sections 70 - 73 and Form No. 2 of Schedule II of the Code and pronouncement of law by the Supreme Court in *Dawood Ibrahim's* case, with due respect, I would say, I am not persuaded by the dictum laid down in the decisions of the other High Courts, referred to by the learned Additional Advocate Generals.

58. The Respondent has no case that warrant is procured from the court for the arrest of 6th accused for the purpose of test identification parade or for getting specimen handwriting or to get police custody through court. A warrant is obtained solely for the purpose of investigation. A copy of the warrant issued in this crime was made available to me by learned Counsel for Petitioners for perusal. On going through the warrant produced, I find that it can hardly be called a warrant issued u/s 73.

59. The warrant is not in Form No. 2. None of the provisions relating to issuance of warrant under Chapter VI are followed in issuing the said warrant. No Police Officer or any other person is authorised to arrest and I am sure that based on the warrant of this nature produced before me, no Police Officer can arrest any accused. On the strength of a mere paper, which is signed by a judicial Magistrate containing the seal which is not in accordance with Form No. 2 of Schedule II of the Code, no Police Officer shall arrest a person, purporting such

paper to be a warrant issued u/s 73.

60. In the above circumstances, I am satisfied that if the 6th accused is arrested on the basis of the vague allegations made against her, and on the strength of a warrant issued u/s 73 of the Code to aid investigation, it is likely that she may suffer irreparable injury. Her apprehension appears to be reasonable. Taking all the above aspects into consideration, I think it only fit to grant anticipatory bail to 6th accused. However, the request of first accused cannot be entertained, since I am not satisfied that he is likely to be arrested in Kerala in near future.

61. Learned Counsel for Petitioners submitted that the accused seeks to move the courts in Punjab for appropriate reliefs, but the courts are closed for vacation and hence, it will be difficult to get orders immediately. Learned Additional Advocate General submitted that the High Court of Punjab will be reopening on 28th of June and that the Sessions Courts and Magistrate Courts are functioning, even during vacation. Taking all the facts into consideration, the following order is passed:

(1) The petition for anticipatory bail by first accused is dismissed, as not maintainable.

(2) The 6th accused shall, in the event of her arrest, be released on bail, on her executing a bond for Rs. 25,000 with two solvent sureties each for the like sum, to the satisfaction of the arresting Officer, on the following conditions:

(i) She shall report before the Investigating Officer, as and when directed, and co-operate with the investigation.

(ii) She shall not influence or intimidate any witness or tamper with evidence.

(3) The above order of anticipatory bail will be in force only for a period of 30 days or till 6th accused is arrested, whichever is earlier.

(4) I also make it clear that this order of anticipatory bail will take effect only if, the arrest is made within the State of Kerala.

In the result, B.A. 2003/10 is dismissed and B.A. 2638/10 is allowed.