

(2015) 06 KL CK 0057
In the High Court Of Kerala
Case No : Bail Appl. No. 3021 of 2015

Varghese M.U.

APPELLANT

Vs

Central Bureau of Investigation, (CBI), ACB

RESPONDENT

Date of Decision : 12-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 164(1), 167(1), 173(2)
Emigration Act, 1983 — Section 24, 25, 3, 4
Evidence Act, 1872 — Section 74, 76
Penal Code, 1860 (IPC) — Section 307, 420

Citation : (2015) 3 ILR Ker 398 : (2015) 3 KHC 417 : (2015) 3 KLJ 4 : (2015) 3 KLT 54 : (2015) 4 RCR(Criminal) 32

Hon'ble Judges : K. Abraham Mathew, J

Bench : Single Bench

Advocate : Meenakshi Arora, T.K. Sandeep, Arjun Sreedhar, Arun Krishna Dhan and Joseph George (Mullakkariyil), for the Appellant; P. Chandrasekhara Pillai, Advocates for the Respondent

Final Decision : Dismissed

Judgement

K. Abraham Mathew, J.—Petitioner is the 3rd accused. He is the managing director of the 2nd accused company, which is a registered agent to recruit employees for overseas jobs under the Emigration Act 1983. At the interview conducted by the company in December 2014 about 1200 nurses were selected for appointment to Kuwait government service. They were entitled to free air ticket. Under Rule 25 of the Emigration Rules for the services rendered by it the company was entitled to collect Rs. 20,000/- or an amount equivalent to wages for 45 days, whichever was higher from each selected candidate. But it made a false representation to the selected candidates that they were bound to pay the company Rs. 19,50,000/- each, and Rs. 50,000/- to Rs. 80,000/- each towards miscellaneous charges such as visa stamping fee and attestation of documents. Some paid the full amount and others only a part. No receipt was given for the payment. But everyone of the selected candidates was made to sign an affidavit

on a 10 rupee stamp paper stating that she paid only Rs. 19,500/-, and in its records the company made a false entry that the amount collected from each selected candidate was only Rs. 19,500/-. So far as the candidates who were not able to pay the full amount, no entry was made in the company's official registers; whatever amount they paid was entered in unofficial electronic records kept in the custody one of its officers; the balance amount was shown as a loan taken from the company by the said candidates; each of them was made to issue a signed blank cheque, and an affidavit stating that the said amount was paid to them by the company as loan. This illegality was committed by the company and the petitioner pursuant to the conspiracy entered into by them and the 1st accused Protector of Emigrants. The offences committed by them fall under Sections 420 of IPC and Sections 24 and 25 of the Emigration Act. This, in brief, is the prosecution case.

2. Protector of Emigrants is appointed under Section 3 of the Emigration Act. Their general duties are enumerated in Section 4 of the Act. He is bound to protect and aid with his advice all intending emigrants and emigrants and cause, so far as he can, all the provisions of the Act and of the rules made thereunder to be complied with.

3. In this case the prosecution alleges that pursuant to the conspiracy entered into between him and the co-accused-including the petitioner-about 1,200 candidates selected for appointment as nurses to Kuwait government service were cheated.

4. In the raid conducted by the Income Tax authorities and by the CBI several incriminating documents were seized from the company.

5. As petitioner is the managing director of the 2nd accused company there cannot be any doubt that he is in charge of and is responsible to the company for the conduct of the business of the company. Being an artificial person a company can act only through human beings. At present the petitioner is abroad. Learned counsel submits that he is eager to come back to India and help the investigating officer to complete the investigation; but he has been prevented from doing so by the CBI which has issued a look out notice for him, the result of which is that he will be arrested the moment he lands in India. The prayer is to grant him anticipatory bail.

6. Learned counsel Smt. Meenakshi Arora has placed reliance on the decisions of the Apex Court in Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, AIR 1980 SC 1632 : (1980) CriLJ 1125 : (1980) 2 SCC 565 : (1980) SCC(Cri) 465 : (1980) 3 SCR 383 and Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others, AIR 2011 SC 312 : (2011) 1 Crimes 109 : (2011) 1 RCR(Criminal) 126 : (2010) 12 SCALE 691 : (2011) 1 SCC 694 : (2011) 1 SCC(Cri) 514 : (2011) AIRSCW 3813 : (2010) AIRSCW 7007 : (2010) 7 Supreme 194 : (2010) 8 Supreme 353 in support of her argument that the petitioner is entitled to anticipatory bail. In Gurubaksh Singh Sibbia's case the Supreme

Court has observed:

"..... 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".

She has drawn my attention particularly to the following observations of the Supreme Court in Sidharam Sat Lingappa Mhetre's case:

"A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage".

No doubt, if the intention of the investigating officer in arresting the petitioner is primarily to humiliate or ridicule the accused, the court will grant his prayer for anticipatory bail.

7. The investigating officer has filed an affidavit, to which the petitioner has filed a reply statement. The petitioner would say that this case was registered at the instance of his business rivals; he belongs to a reputed family; the CBI has described him as a hard core criminal and given it wide publicity in the media; the investigating officer has refused to arrest the 1st accused; witnesses were compelled to give statements against the petitioner.

8. In the reply statement filed by the petitioner there is no denial of any of the facts alleged by the investigating officer; there is only general statement that he is "innocent of the allegation" levelled against him, the charges made against him "are not maintainable" and he has "duly complied with all the legal stipulations of the government of Kuwait". It stands out that his bail application and reply statement keep a total silence about the seizure of the incriminating materials, the allegation of his making false representation, collection of huge amount from the selected candidates and falsification of accounts.

9. Learned counsel for the CBI Sri. Chandrasekhara Pillai would submit that the petitioner is an absconding accused and he is not entitled to maintain an application under Section 438 Cr.P.C. In Lavesch Vs. State (NCT of Delhi), (2013) 115 CLT 354 : (2012) 4 JCC 2330 : (2012) 8 JT 336 : (2012) 8 SCALE 303 : (2012) 8 SCC 730 and State of Madhya Pradesh Vs. Pradeep Sharma, (2014) 1 AD 382 : AIR 2014 SC 626 : (2014) 1 CCR 13 : (2014) 1 Crimes 70 : (2013) 15 JT 366 : (2014) 1 RCR(Criminal) 269 : (2013) 14 SCALE 626 : (2014) 2 SCC 171 : (2014) 3 SCJ 260 the Supreme Court has held that when the accused is absconding and declared a proclaimed offender there is no question of the court

granting him anticipatory bail. According to learned counsel Smt. Meenakshi Arora the petitioner had left the country even before the registration of the case and he cannot be called an absconding accused.

10. Admittedly, he is now staying abroad. He has not given his foreign address in the bail application; it has been filed as if he is residing at Ernakulam in Kerala. (After this matter was heard he has furnished his foreign address). This case was registered by the CBI on 30.3.2015, which conducted a search on the premises of the company on 31.3.2015. The CBI, as well as the income tax officials who also conducted a raid, seized more than a thousand documents. Still the petitioner did not come back to India. If he had nothing to hide, conceal and suppress, he would have rushed to his company. He was made an accused only on 24.4.2015. His statement that he is ready to cooperate with the investigation but as the investigating officer wants to humiliate him by effecting his arrest the moment he reaches Kerala he cannot come back is false. He is really absconding.

11. In response to the statement of the petitioner that he comes from a reputed family, the investigating officer would say that he is involved in another criminal case which has been registered for the offences under Section 307 IPC and some provisions of the Arms Act, the number of the case being Crime No. 665 of 2009 of Kottayam Police Station, in which final report has already been filed.

12. One of the persons whose statements were recorded by the investigating officer under Section 161 Cr.P.C has given a statement before a magistrate. A certified copy of this document has been produced by the petitioner as Annexure-5. The learned magistrate is seen to have recorded the statement in open court. The maker of the statement told him that the CBI officers threatened him that if he did not state as dictated to him, he would be made an accused in the case.

13. During investigation of a case an accused is not entitled to get a copy of the statements recorded by the investigating officer under Section 161 of the Code or other documents which as of right he will get under Section 207 or 208 of the Code on his appearance after he is issued process under Section 204 of the Code. Even when he is arrested during investigation and produced before magistrate under Section 167(1) of the Code, the law does not permit him to ask for them. The Code only directs the investigating officer to transmit to the magistrate a copy of the entries in the case diary. But the accused will get a copy of the remand report as it is on its basis his custody is sought for and without which he cannot effectively contend that he is not liable to be detained in custody, judicial or police. Moreover, the report becomes accessible to public when it is made part of the records of the court without any reservation.

14. Section 164(1) Cr.P.C under which the statement was recorded is a provision empowering a judicial magistrate to take part in the investigation of a criminal case. Statement not only of persons other than accused but also of accused is covered by this sub section if it does not amount to confession, in which case the

magistrate need not comply with sub sections 2 to 4 of Section 164; the provision applicable to statements of accused and others is sub section 5.

15. The Code does not prescribe that confession or statements should or should not be recorded in open court. Obviously section 327 of the Code which says that the enquiry or trial shall be in open court is not applicable as under section 164(1) statements are recorded in the course of investigation and before commencement of enquiry.

16. In *Ranadhir Basu Vs. State of West Bengal*, AIR 2000 SC 908 : (2000) CriLJ 1417 : (2000) 1 JT 618 : (2000) 1 SCALE 483 : (2000) 3 SCC 161 : (2000) 1 SCR 646 : (2000) 1 UJ 446 : (2000) AIRSCW 4080 : (2000) AIRSCW 499 : (2000) 7 Supreme 701 : (2000) 2 Supreme 534 the Supreme Court has held that examination of an approver need not be conducted in open court since the proceedings is neither enquiry nor trial.

17. Often police produce persons, especially women, who have been abducted, kidnapped or wrongfully confined, or suspected to have been abducted, kidnapped or wrongfully confined at the residence of magistrates after they are taken into protective custody. The Magistrate immediately records the victim's statement at his residence as it is made not in the course of an enquiry or trial.

18. The right of an accused to get copy of the statements recorded under Section 164(1) of the Code was considered by the Madras High Court in *Emperor v. Muthia Swamiyar* (33 Mad. 466). In that case an argument was advanced that since it is a public document, the accused is entitled to a copy in view of the provision in Section 76 of the Evidence Act. The court observed:

"It cannot, we think, be determined merely with reference to the question whether these statements are public documents within the definition in section 74 of the Evidence Act, because section 76 only provides the means of proof of public documents which any person has the right to inspect, and whether any person has a right to inspect any particular public document is, in our opinion, a question not dealt with by the Evidence Act and altogether outside its scope. The Code of Criminal Procedure does not give an accused person a right to inspect and have copies of statements..... "

19. In *State of Madras Vs. G. Krishnan*, AIR 1961 Mad 92 : (1961) CriLJ 382 : (1961) ILR (Mad) 1 : (1960) 73 LW 713 a Full Bench of the Madras High Court had the occasion to consider the question whether copies of the statements under Section 164(1) Cr.P.C may be given before final report is filed. The full bench held:

"Therefore, S.173(4), Cr.P.C., should be construed as impliedly prohibiting the grant of copies earlier than the time prescribed by it. That prohibition will become ineffective if an unlimited right under S.76 of the Indian Evidence Act is recognised. Therefore, the implied prohibition enacted by S.173(4) would itself imply a repeal or an abrogation in part of the right under the former section. This

is no new principle. When two statutes though expressed in affirmative language are contrary in matter, the latter or special would abrogate the earlier or general.....

The introduction of the amendment specifically providing for the grant of copies, should, on the principle of the cases cited above, be held as impliedly taking away the right of the person under S.76 of the Evidence Act. This would be in accord with the general scheme of Ch.XIV, Cr.P.C. It would therefore, follow that the accused would have no right to obtain copies of the statement under S. 164, Cr.P.C, before a charge-sheet is filed, notwithstanding S.76 of the Indian Evidence Act".

20. A division bench of the High Court of Bombay in *Maria Monica Susairaj Vs. The State of Maharashtra*, (2009) CriLJ 2075 agreed with the view taken by the High Court of Madras in *G. Krishnan's case* (supra). It held that an accused is not entitled to get a copy of even his own confession statement recorded under Section 164 Cr.P.C before final report is filed.

21. In *Sunita Devi Vs. State of Bihar and Another*, AIR 2005 SC 498 : (2004) 10 JT 491 : (2004) 10 SCALE 227 : (2005) 1 SCC 608 : (2004) AIRSCW 7116 the apex court directed chief secretary of every state to ensure that supervision notes of investigating officers are not made available to any person and the confidentiality of the notes is protected.

22. Disclosing the evidence collected by the investigating officer before the report under Section 173(2) Cr.P.C is filed will be detrimental to the investigation and is against public interest. It is necessary to ensure confidentiality of the statement, failing which it may hamper the investigation and may afford opportunity to those who are involved in the commission of the offences to abscond, or to destroy or tamper with the evidence, or to influence or to threaten the witnesses. The conclusion, I can reach, is that the proceedings in which statement under section 164(1) Cr.P.C of an accused which does not amount to confession, or of a person other than the accused is recorded shall be conducted in camera and a copy of it shall not be given to anyone other than the investigating officer, who may require it for his investigation - until and unless it is made public by him by making it part of the records of the case without any reservation. The investigating officer shall not directly or indirectly disclose its contents or issue its copy if it is against public interest. Indiscriminate disclosure of its contents by the investigating officer should be avoided.

23. The submission of the learned counsel for the petitioner that the CBI has refused to arrest the first accused, *Protection of Emigrants*, also requires notice. What she wanted to impress upon this court is that the CBI has purposefully targeted the petitioner allowing the prime accused to be at large. The rank of a person in the array of the accused is not an indication as to the significance of the role played by him in the commission of the offence. When the CBI registered the case, the only accused was the *Protection of Emigrants*, which is

why he happened to be the first accused. The non-arrest of a co-accused cannot be a ground to grant anticipatory bail to a petitioner.

24. The number of the victims in this case is about 1200. The amount the petitioner is said to have cheated them is Rs. 100 crores or so. On the strength of the registration granted to him the petitioner exploited the jobless nurses living on their breadline, who wanted to go abroad to make a living. Their parents must have sold their properties or borrowed money at exorbitant rate of interest to pay the amount. As held by the Supreme Court in *Lavesh Vs. State* (NCT of Delhi), (2013) 115 CLT 354 : (2012) 4 JCC 2330 : (2012) 8 JT 336 : (2012) 8 SCALE 303 : (2012) 8 SCC 730 the court, while considering an application under Section 438 Cr.P.C, cannot disregard the magnitude and seriousness of the matter and the gravity of the accusation. Arrest and custodial interrogation of the petitioner is necessary to unearth the evidence presumed to have been concealed by him.

25. All or many of the selected candidates have already joined duty in Kuwait. Some of them have not yet paid the amount demanded by the petitioner in full. Learned counsel for the CBI submitted that staying in a gulf country the petitioner threatens them demanding the balance amount. He also reportedly attempts to intimidate and influence the selected candidates now working abroad. As mentioned earlier, he has nothing to say about the facts alleged against him and the incriminating documents seized from his company. There is every reason to reject his request for anticipatory bail.

26. In *M.C. Rajesh v. State of Kerala* (2011 SCC Online Ker. 2595) a learned single judge of this court passed an interim order as follows in Bail Application No. 5698 of 2011:

"Taking into account the facts and circumstances of the case and the nature of the offence, I am of the view that before considering the question of granting anticipatory bail, the petitioner should be directed to appear before the investigating officer. Accordingly, there will be a direction to the petitioner to appear before the investigating officer on 2nd and 3rd August, 2011".

Learned counsel Smt. Meenakshy Arora submits that a similar order may be given to the applicant in this case also. The direction given in *M.C. Rajesh's* case (supra) was in effect a direction to the accused to surrender before the investigating officer on two consecutive dates. Submission to the custody of a police officer by word or action is as good as arrest (vide section 46 Cr.P.C). Surrender of an accused before the investigating officer amounts to arrest as held by this court in *C. Bhaskaran Nair Vs. State of Kerala and Others*, (1987) CriLJ 170 . Under Section 59 of the Criminal Procedure Code no person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a magistrate.

27. Assuming the appearance of the accused before the investigating officer did not amount to arrest, the order relied on by the learned counsel actually took

away the power of the investigating officer to arrest the accused. In *Adri Dharan Das Vs. State of West Bengal*, (2005) CriLJ 1706 : (2005) 1 CTC 710 : (2005) 2 JT 548 : (2005) 4 SCC 303 : (2005) 2 SCR 188 , *Parvinderjit Singh and Another Vs. State (U.T. Chandigarh) and Another*, (2008) 11 JT 560 : (2008) 13 SCALE 711 : (2008) 13 SCC 431 and *Rashmi Rekha Thatoi and Another Vs. State of Orissa and Others*, (2012) 2 RCR(Criminal) 870 : (2012) 5 SCALE 123 : (2012) 5 SCC 690 the Supreme Court held that in an application under Section 438 Cr.P.C no order shall be passed restraining arrest of the accused. The direction of the apex court in *Siddharam Sat Lingappa Mhetre's* case (supra) is very relevant in this context. " The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the bail application or confirm the initial order of granting bail". In view of the above decisions of the Supreme Court an order similar to the one in *M.C. Rajesh v. State of Kerala* cannot be granted even if it is assumed that there are no grounds to believe that petitioner's custodial interrogation is necessary at this stage. In an appropriate case the court can grant interim anticipatory bail, but it cannot direct the investigating officer not to arrest the petitioner. The request of the learned counsel cannot be granted.

In the result, this bail application is dismissed.