
(2003) 07 KAR CK 0081

In the Karnataka High Court

Case No : Cr.P No. 938 of 2003 C/w Cr.P No's. 648, 878, 1106, 1137, 1209 and 1338/ 2003

Venkatachalaiah and Others

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 22-07-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 438, 438 (2), 439

Citation : (2003) ILR (Kar) 3985 : (2003) 6 KarLJ 261 : (2004) 2 RCR(Criminal) 917

Hon'ble Judges : S.R. Bannurmath, J;A.M. Farooq, J

Bench : Division Bench

Advocate : M.T. Nanaiah, Shankarappa, Ashok B. Hinchigeri, S.S. Koti, S.B. Chanal, K.L. Sreenivas, O.K. Harish, D.P. Prasanna, Hashmath Pasha and Mahantesh S. Hosmath, for the Appellant; Bhavani Singh, Addl. S.P.P., for the Respondent

Judgement

Bannurmath, J.—These criminal petitions have been referred to this Bench to decide -

"whether filing of the charge sheet or insurance of warrant by a Magistrate would put an end to the power u/s 438 Cr.P.C. to grant anticipatory bail?"

2. In the case of Dr. A. Ebenezer Vs. State, . Hon''ble Mr. Justice Sreedhar Rao held that after filing of a charge sheet, the right of accused to seek anticipatory bail gets extinguished.

3. In the said case of Dr. Ebenezer, the petitioner had approached this Court invoking jurisdiction u/s 438 Cr.P.C. challenging the order of the Trial Court rejecting the application of the petitioner u/s 317 Cr.P.C. and issuing NBW against him. In this regard, the learned Judge after interpreting the judgment of the Apex Court in the case of Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, .disagreed with the view expressed by Full Bench of Andhra Pradesh High Court in the case of SHEIKH KASHIM BI vs THE STATE OF ANDHRA PRADESH

1986 Cri.L.J. 1303. The learned Judge on consideration of the rival contentions held that " In the back drop of the object and purpose of the provisions of anticipatory bail, it does not really warrant to make the provision of Section 438 Cr.P.C. applicable after filing of a final report and grant of anticipatory bail in such a situation is only a redundant effort." As this view has been doubted by Hon"ble Mrs. Justice Manjula Chellur, she referred these petitions for consideration of the aforesaid question.

4. To understand the law regarding anticipatory bail we have to look into the recommendations of the Law Commission of India in its 41st Report introducing the provision of Section 438 Cr.P.C. as well as various pronouncements of the Hon"ble Supreme Court in this regard.

5. In the 41st Report of the Law Commission, it is pointed out thus:

"The necessity for grant of the anticipatory bail arises mainly because sometimes influential persons try to implicate the rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In the recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases where there is reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."

and thus the Law Commission recommended acceptance of the provision for grant of `anticipatory bail".

This recommendation of the Law Commission was accepted by the Central Government and Clause 447 was introduced in the Draft Bill of the new code of Criminal Procedure conferring an express power on a Court of Sessions or a High Court to grant `anticipatory bail".

6. Commenting on this provision in the Draft Bill, the law Commission observed in Paragraph 31 of its 48th Report thus:

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendations made by the previous Commission (41st Report). We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the public prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the Court is satisfied that such a direction is necessary in the interests of justice".

7. In the case of BALCHAND JAIN vs THE STATE OF MADHYA PRADESH AIR 1977 SC 366 the Hon"ble Supreme Court for the first time had occasion to examine and propound the scope and ambit of Section 438 Cr.P.C. In that case the Hon"ble Supreme Court observed thus"

"We do not find in this section the words `anticipatory bail", but that is clearly the subject with which the Section deals. In fact, `anticipatory bail" is a misnomer. It is not as if bail is presently granted by the Court in anticipation of arrest. When the Court grants `anticipatory bail", what it does is to make an order that in the event of arrest, a person shall be released on bail. Manifestly there is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting "anticipatory bail" becomes operative. Now, this power of granting `anticipatory bail" is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or `there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail" that such power is to be exercised. And this power being rather of an unusual nature, it is entrusted only to the higher echelons of judicial service, namely, a Court of Sessions and the High Court. It is a power exercisable in case of an anticipated accusation of non-bailable offence and there is no limitation as to the category of non-bailable offence in respect of which the power can be exercised by the appropriate court.

Now Section 438 contemplates an application to be made by a person who apprehends that he may be arrested on an accusation of having committed a non-bailable offence. It is an application on an apprehension of arrest that invites the exercise of the power u/s 438. And on such an application, the direction that may be given u/s 438 is that in the event of his arrest, the applicant shall be released on bail.

(emphasis is supplied)

8. A Constitution Bench of the Apex Court in the GurbakshSingh's case (cited supra) again considered the scope of Section 438 Cr.P.C. The Supreme Court observed thus:

"Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in paragraph 29.9. that it had `considered carefully the question of laying down the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left `to the discretion of the Court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Session to grant

anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a some what free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the term of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Sessions 'may, if it thinks fit' direct that the applicant be released on bail... It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail is generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the Court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437."

(emphasis supplied)

9. In a recent decision of the Apex Court in the case SALAUDDINABDULSAMAD SHAIKA vs STATE OF MAHARASHTRA 1996 SCC (Cri) 198 it is laid down thus:

" It is necessary that such anticipatory bail orders should be of a limited duration only and ordinarily after the expiry of that duration or extended duration, the Court granting anticipatory bail should leave it to the regular Court, to deal with the matter on appreciation of evidence placed before it after the investigation has made progress, or the charge-sheet is submitted. The order of anticipatory bail does not ensure till the end of trial but it must be limited duration as the regular Court cannot be by-passed."

10. Applying and practically interpreting these principles various High Courts have either held that anticipatory bail can be granted at any time irrespective of filing of charge-sheet or not and in many cases it is laid down that after filing of the charge-sheet or issuance of warrants by the Court, the extraordinary jurisdiction u/s 438 cannot be invoked.

11. A few of these decisions which restrict the invoking of Section 438 jurisdiction prior to filing of the charged-sheet are as follows:

In Re: Purna Chandra Chatterjee,

2. A. KAMALAKAR RAO vs STATE OF ANDHRA PRADESH 1983 Cri.L.J. 872

3. Ambalal Punamchand Rashamwala Vs. State of Maharashtra and another,

4. Bimaladak and Others Vs. State,

5. Hemanta Kumar Nayak and Others Vs. State of Orissa, and

6. Dr. Sidhartha Patra Vs. Republic of India,

12. However, in the following decisions it is held that u/s 438 Cr.P.C. There is no restriction as to the stage at which the prayer for anticipatory bail is made, i.e., whether prior to or after filing of charge-sheet.

1. Puran Singh Vs. Ajit Singh and Another,

2. Sheik Khasim Bi Vs. The State,

3. Nirbhay Singh and Another Vs. The State of Madhya Pradesh,

4. P.V. Narasimha Rao Vs. State (Central Bureau of Investigation),

5. Natturasu and Others Vs. The State,

6. Akhalaq Ahmed F. Patel Vs. State of Maharashtra,

We have perused these decisions in detail.

13. In our considered view in most of the first set of cases mentioned above the High Courts have mainly relied upon the wordings "reason to believe" and interpreting the same it is held that the expression "reasonable belief" fosters a belief of genuine apprehension of arrest on an allegation which prima facie is unsubstantiated and made with sinister motive, the object being to malign a person where his arrest by prosecuting agency is immediate than remote. According to these decisions, when a non-bailable offence has been committed by an accused, such "reason to believe" or apprehension of arrest can never be used by any individual to cultivate his right when he is prima facie liable for accusation and does not commensurate with his innocence and as such as the reasonable belief cannot be a colourable belief, the right to be enlarged on anticipatory bail if allowed to remain alive even after the submission of the charge sheet, Section 437 would be the vanishing point of existing Code of Criminal Procedure.

14. These very decisions indicate that in most of the cases the Courts have relied upon Clause (3) of Section 438 Cr.P.C. To hold that the power u/s 438 does not survive the limitation after filing charge-sheet and issue of arrest warrant.

15. A close scrutiny of the relevant provisions of law regarding bail and especially anticipatory bail, it would reveal that an applicant who prays for release on bail in an anticipation of his arrest must show the following:

- a) He must be having a reasonable apprehension that in case he is not granted an order of anticipatory bail, he is going to be arrested;
- b) There must have been levelled against him an accusation of commission of a non-bailable offence;
- c) He must not have been arrested before his moving an application for grant of anticipatory bail.

16. It is crystal clear that the power u/s 438 Cr.P.C. To grant anticipatory bail is of an extraordinary character in as such as the bail (under Section 439 Cr.P.C.) can be granted only after the arrest, whereas an order of anticipatory bail is to be granted before a person is arrested. It is of a wider amplitude. It is without any strings or fetters attached to it except those referred to above. The legislature in its wisdom has chosen not to impose any sort of checks, restrictions and impediments in the way of the Courts to grant the relief of anticipatory bail in the case where the Courts come to the conclusion that it is a fit case for them to do so. They will be free to do so without any hindrance. It must be remembered that this extraordinary power has been granted only to Superior Courts like the Sessions Court or the High Court, which is presided over by much experienced judges. This aspect is clear from the proposal of the Law Commission while recommending introduction of provisions of anticipatory bail. In fact as noted earlier in para 39.9 of the 41st Report of the Law Commission it is opined thus:

"We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion of the Court and prefer not to fetter such discretion in the statutory provision itself. Superior Courts will, undoubtedly, exercise their discretion properly, and not make any observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused."

17. Thus it is clear from the proposal of the Law Commission that though initially it thought of imposing certain checks and restrictions on the power of the Court to grant anticipatory bail, however, subsequently on giving a careful consideration to the facts and circumstances dropped the said idea and left it completely to the discretion and wisdom of the Courts. The Law Commission did not do so because it reposed confidence on the Courts, as the power is well being given only to Superior Courts like the Court of Sessions or the High Court. Further more, according to the Law Commission, in case certain fetters, restraints and checks were put, in that eventually the very purpose of the granting of the powers was likely to be defeated. Admittedly, the intention of the legislature was to make it possible to the Courts to grant bail in anticipation of the arrest in those case where a citizen approaches the Court with an apprehension of being arrested.

18. Thus, it is amply clear that the legislature in its wisdom thought it fit that it is not proper to impose any condition on the power of the Courts to grant anticipatory bail. As such in our view would it be improper to read into the Section something which is not proper? It is well settled principle of law that while interpreting a provision, the Court has to interpret it as it is and not as it ought to be or as the Court thinks it should be. The Courts are not there to

legislate and to tread into the legislature's territory. The Courts are not permitted to weave a new texture replacing the original one.

19. In this regard the argument of the State is that once charge-sheet is filed and warrant is issued, that means, the matter has reached a stage where the arrest is certainty and as such there is no question of the person having still only "reason to believe". In our view, the words "reason to believe" are to be read in a wider sense.

20. As noted earlier, in Gurbaksh Singh's case (cited supra) it is observed thus:

"The applicant must show that he has 'reason to believe' that he may be arrested for a non-bailable offence. The use of the expression 'reason to believe' shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'believe', for which reason it is not enough for the applicant to show that he has some sort of a vague expression that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the Court objectively, because it is then alone that the Court can determine whether the applicant has reason to believe that he may be so arrested."

21. As such in our view the apprehension of the applicant becomes certain that he would be arrested once a charge-sheet is filed or warrant is issued by the Magistrate. Hence filing of a charge-sheet and the issuance of warrant are certainly the grounds which make the person not only to believe that he would be arrested, but also he can move the Courts u/s 438(1) Cr.P.C.

22. Considering the several rulings cited before us, it is so clear that the issue of bail is one of the personal liberties of an accused or convict and it is a fundamental right of every citizen to be free unless he is detained under any law enacted by Parliament. The question as to whether bail to be granted or not depends upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict and any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail. In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some other ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made and on the other hand, if it appears on considering the antecedents of the applicant that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made.

23. In this regard, the Hon'ble Supreme Court has further held in Gurbaksh Singh's case (cited supra) thus:

"..... it cannot be laid down as an inexorable rule that anticipatory bail cannot be

granted unless the proposed accusation appears to be actuated by mala fides, and equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations too numerous to enumerate, the combined effect of which must weigh with the Court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and 'the larger interest of the public or the State' are some of the considerations which the Court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in *The State Vs. Captain Jagjit Singh*, which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the Court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail."

24. The Hon'ble Supreme Court further held in the same case:

"We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction u/s 438 by a wise and careful use of their discretion which, in their long training and experience, they are ideally suited to do. The end of justice will be better served by trusting these Courts to act objectively and in consonance with principles governing the grant of bail which are recognized over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the grounds that, after all 'the legislature in its wisdom' has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected."

Again it is held in the above case:

"During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, as granted anticipatory bail to many a person by imposing conditions set out in Section 438(2)(i), (ii) and (iii). The Court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made u/s 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the Court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after

the filing of the F.I.R. in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The Court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various Courts have long since been released by this Court u/s 438(1) of the Code."

25. In so far as the relevancy of Section 438(3) Cr.P.C. is concerned, in our view, the same is not connected with the powers under Sub-Section (1) of Section 438 and it makes only a provision for a situation only after anticipatory bail is granted u/s 438(1). As such it is to be held that Sub-Section (3) of Section 438 Cr.P.C. does not in any manner restrict the power of the Court to grant anticipatory bail, but on the other hand it only contains the procedural aspect that is necessary to give effect to the order of an anticipatory bail passed under Sub-Section (1) of Section 438 and the manner in which it would be given effect to. In a given case, may be the High Court or the Court of Session would not be inclined to grant bail keeping in view of the fact that Magistrate has taken cognizance and issued process, but the mere non-exercise of such power does not mean lack of jurisdiction.

26. For all the aforesaid reasons we hold that filing of chargesheet by the police does not put an end to the power of the Court to grant anticipatory bail u/s 438(1) Cr.P.C. Therefore, the view taken by the learned Single Judge in Dr. Ebenezer's case (cited supra) is not a good law.

27. This takes us to the next question as to whether on an issuance of warrant by the Magistrate, can a person approach the Court u/s 438(1) Cr.P.C. We would like to state that in the normal course where warrant is issued in pursuance of filing charge-sheet or issuance of summons and non-appearance of the party, the remedy u/s 438(1) Cr.P.C. is available. However, we would like to emphasis that where in a criminal proceeding a party has already appeared once or more than one date and thereafter does not appear in the Court, the Court in such circumstances issues non-bailable warrant and the said warrant issued is in view of the defaulting conduct on the part of the accused and we are of the view that in such cases a petitioner cannot invoke the jurisdiction of the Court u/s 438(1) Cr.P.C. and he is bound to obey the Court order or warrant by first appearing before the Court and than by satisfying the Court as to the sufficient cause for his absence, pray for bail u/s 439 Cr.P.C.

28. For the reasons stated above, we answer the reference as follows:

The filing of the charge sheet or the issuance of warrant by Magistrate cannot put an end to the power of the Court to grant anticipatory bail u/s 438 Cr.P.C.

In so far as the case where the accused appears once before the Court and thereafter on account of his absence on any later date warrant is issued by the Court for the deliberate absence is concerned, the remedy of anticipatory bail u/s

438 Cr.P.C. is not available to such person.

29. In consequence, we hold that the law laid down in the case Dr. A. Ebenezer Vs. State, is no more a good law.