

(2008) 04 MAD CK 0006

In the Madras High Court

Case No : Criminal O.P. (MD) No's. 4093, 4094 and 4379 of 2008

Venkatesh Babu

APPELLANT

Vs

The State
A. Jeyaraj and Mohan Vs R. Rajkumar and
The State

RESPONDENT

Date of Decision : 24-04-2008

Acts Referred:

Citation : (2008) 04 MAD CK 0006

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : J. John, in Criminal O.P. MD Nos. 4093 and 4094 of 2008 and K. Jeganathan, in Criminal O.P. MD No. 4379 of 2008, for the Appellant; Siva. Ayyappan, Government Advocate (Crl. Side) in Crl. O.P. (MD) Nos. 4093 and 4094 of 2008 and Siva Ayyappan, Government Advocate (Crl. Side) in Crl. O.P. (MD) No. 4379 of 2008, for the Respondent

Final Decision : Dismissed

Judgement

S. Nagamuthu, J.—The Petitioners in Crl.O.P.(MD) No. 4379 of 2008 are accused Nos. 1 and 5 in C.C. No. 282 of 2005 on the file of the

learned Judicial Magistrate No. II, Madurai, facing prosecution for an offence u/s 500 I.P.C. The Petitioner in Crl.O.P.(MD)Nos.4093 and 4094

of 2008 is the sole accused in S.T.C. Nos. 480 and 481 of 2006 on the file of the learned First Additional District Munsif cum Judicial Magistrate,

Kumbakonam, facing prosecution for an offence u/s 138 of the Negotiable Instruments Act (hereinafter referred to as "the N.I. Act").

2. Admittedly, on taking cognizance and after following the mandatory procedure contained in Section 200 Cr.P.C, the learned Judicial

Magistrates have issued process u/s 204 Cr.P.C by way of Non Bailable Warrant (N.B.W) against the Petitioners for the arrest of the Petitioners

and for their production before the Court. Apprehending arrest at the hands of the Respondent / police, in execution of the said N.B. Ws, the

Petitioners have come forward with these Criminal Original Petitions u/s 438 Cr.P.C, seeking for anticipatory bail.

3. Now, the question which emerges for consideration is as to whether a petition for anticipatory bail u/s 438 Cr.P.C, is maintainable when there is

apprehension of arrest for the accused on the basis of non bailable warrant issued by a Court on taking cognizance of an offence which is bailable.

4. The learned Counsel for the Petitioners Mr. K. Jegannathan, would submit that since N.B. Ws have been issued against the Petitioners in gross

violation of the mandatory provision contained in Section 204 Cr.P.C, the apprehension of the Petitioners become reasonable and therefore the

petitions for anticipatory bail u/s 438 Cr.P.C are maintainable though the offences are bailable. He would rely on a judgment of a learned Single

Judge of this Court in Regupathi v. Govindan and Anr. reported in 2006 (2) M.L.J 336 , wherein the learned Judge has followed an earlier

judgment of another learned Single Judge of this Court in Sarath Kumar v. Inspector Of Police, Chennai reported in 2004 M.L.J 421 and has held

that though the offences are bailable, in view of the fact that Non Bailable Warrants have been issued against the accused, petition for anticipatory

bail is maintainable.

5. Per contra, the learned Government Advocate (Criminal Side) Mr. Siva. Ayyappan would submit since the offences are only bailable,

irrespective of the fact that there is apprehension of arrest in execution of the N.B. Ws, still the petitions for anticipatory bail are not maintainable

since such a petition could be maintained only in respect of non bailable offences.

6. I have considered the rival submissions made by either counsel. A perusal of the judgments relied on by the learned Counsel would show that

the learned Judges have, of course, taken the view that despite the fact that the offences are bailable, petition for anticipatory bail is still

maintainable in a case where N.B. Ws have been issued in violation of Section 204 of the Code of Criminal Procedure. The learned Judges have

taken the view that though u/s 438 of the Code of Criminal Procedure, such petition for anticipatory bail could be maintained only with reference to

non-bailable offences, by invoking the inherent power of the High Court u/s 482

of the Code of Criminal Procedure, even in cases relating to bailable offence, where there is Non-bailable warrant pending, the Court has got power to grant anticipatory bail. But, with due respect, I am not in a position to persuade myself to agree with the said view expressed by the Honourable Judges in view of the judgment of the Honourable Supreme Court in R.P. Kapur Vs. The State of Punjab, . In the said judgment, the Honourable Supreme Court while dealing with Section 561(A) of the Code of Criminal Procedure 1898 (Section 482 of the present Code) has held as follows:

6. Before dealing with the merits of the appeal it is necessary to consider the nature and scope of the inherent power of the High Court u/s 561-A of the Code. The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. There is no doubt that this inherent power cannot be exercised in regard to matters specifically covered by the other provisions of the Code.

(Emphasis supplied)

Similarly, in State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and Others, the Hon''ble Supreme Court has held as follows:

16. The High Court has also invoked powers u/s 482 Cr.P.C while granting bail to the Respondents. Section 482 Cr.P.C saves the inherent power of the High Court. The High Court possesses the inherent powers to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. The power has to be exercised to prevent abuse of the process of the Court or to otherwise secure the ends of justice. But, this power cannot be resorted to if there is a specific provision in the Code for the redressal of the grievance of the aggrieved party. (See Madhu Limaye Vs. The State of Maharashtra,). There being a specific provision for grant of bail, the High Court clearly erred in taking recourse to Section 482 Cr.P.C while enlarging the Respondents on bail.

(Emphasis supplied)

7. In view of the above law laid down by the Hon''ble Supreme Court in the judgments cited supra, the inherent power of the High Court u/s 482 of the Code of Criminal Procedure cannot be invoked at all to issue any direction

which could be otherwise issued u/s 438 of the Code of Criminal Procedure. Since the said law laid down by the Honourable Supreme Court is binding on all Courts, the view expressed by the learned Judges of this Court in the judgments cited supra that u/s 482 Cr.P.C, such a direction could be given cannot be held to be binding precedents.

8. When confronted with the above law laid down by the Hon''ble Supreme Court with regard to the inherent power of the High Court u/s 482

Cr.P.C, to issue directions as stated above, the learned Counsel for the Petitioners would submit that Section 438 Cr.P.C, should be understood

in such a way to cover the cases where non bailable warrants have been issued in gross violation of Section 204, by treating the said offences as

non bailable. He would further submit that in cases where non bailable warrants have been issued without following the mandatory provisions

contained in Section 204 Cr.P.C, since there is apprehension of arrest on the basis of such warrants, the Court of Sessions as well as this Court

u/s 438 Cr.P.C should be liberal in issuing appropriate directions for the release of the accused in the event of their arrest in execution of the non

bailable warrants. But, I am not in a position to countenance the said argument. Classifying the offences into bailable offences and non bailable

offences is within the competence of the Legislature. The Legislature in its wisdom in the First Schedule of the Code of Criminal Procedure has

made such a classification of offences into two categories viz., bailable and non-bailable. For any reason, if the argument of the learned Counsel for

the Petitioners is accepted that though the offences involved in a particular case are bailable and still the said offences are to be treated as non-

bailable offences for the purpose of entertaining an application u/s 438 Cr.P.C it would undoubtedly amount to creating one more classification

categorizing a new set of offences. Such further classification is not within the competence or purview of this Court. Therefore, though non bailable

warrants have been issued in cases involving bailable offences, may be in gross violation of Section 204 Cr.P.C, still no direction could be issued

u/s 438 Cr.P.C since the offences cannot be treated at all as non bailable offences.

9. The view taken by me herein above was exactly the same taken by a learned Single Judge of this Court in J.K.S. Manickam v. The Inspector of

Police, Kumar a Palayam, Salem District reported in 1994 (2) L.W.(CrI) 764 ,

wherein the Hon"ble Judge has held as follows:

4. I am at a loss to understand how the present action is maintainable, on the facts and in the circumstances of the case. Admittedly, from a copy of

warrant produced before Court, it is rather crystal clear that the Petitioner had been facing trial for alleged offence u/s 138 of the Negotiable

Instruments Act, 1881 (Act 26 of 1981) (for short ""NI Act"") before the IX Metropolitan Magistrate, Kanpur. The offence u/s 138 thereof must

have to be construed as an offence falling under Classification II of the Schedule attached to Code of Criminal Procedure An offence u/s 138 of

N.I. Act is punishable with imprisonment, which may extend to one year or with fine, which may extend to twice the amount of the cheque or with

both. Since the punishment prescribed therefor is less than three years, it is a bail able offence, as shown in Classification II of the Schedule

attached to Code of Criminal Procedure Once it is aailable offence, it goes without saying that the present action, which is one for grant of

anticipatory bail, is not maintainable.

10. The next grievance expressed by the learned Counsel for the Petitioners is that it is the common practice of many trial Courts and learned

Magistrates to remand the accused as and when they are produced in execution of such nonailable warrants in cases involvingailable offences

thereby forcing the accused to apply for bail. He would further submit that it is also not uncommon that some of the trial courts issue notice to the

Respondent police or the complainant and then grant him bail or refuse bail. Because of the said practice, according to the learned Counsel, the

accused are made to languish in jails for few days though they are entitled to be released on bail forthwith as the offences areailable.

11. At this juncture, it is appropriate to deal with the power of remand in detail. u/s 167 (2) Cr.P.C, the power of remand has been given to the

Magistrates to remand the accused during the course of investigation. But, after cognizance has been taken either on a private complaint or on the

Police Report, the power to be exercised to remand an accused to judicial custody is provided only in Section 309(2) Cr.P.C. A comparison of

these two provisions would make it manifestly clear that insofar as the power of remand u/s 167 Cr.P.C is concerned, the Magistrate has no

discretion since there is a compulsion on him to pass an order of remand to

appropriate custody, if he is satisfied with the materials available on record that such detention is required for completion of the investigation.

12. This Court, in *Elumalai v. State of Tamil Nadu* reported in 1983 L.W.(CrI) 121 has elaborately dealt with the power of the Magistrates to

remand an accused to custody u/s 167 Cr.P.C wherein this Court has clearly held that such power should not be exercised in a mechanical fashion

and the Courts should afford an opportunity to the accused before passing any such order of remand. But, such power to remand an accused to

custody ceases the moment the Magistrate or the Court takes cognizance of the offences. After taking cognizance, the Court may either issue

summons or issue warrants in lieu of summons to secure the presence of the accused in the Court as the case may be. The said warrant may be

either with endorsement as provided u/s 71 Cr.P.C, or without such endorsement. Either on receiving the summons or in execution of the warrant

or on his volition if the accused is present in Court, then the Court has got two options before it. u/s 309 (2) Cr.P.C, the Court for reasons to be

recorded may either postpone the commencement of enquiry or hearing or adjourn the same and then the Court may remand the accused to

custody. It is needless to say that such custody should be only judicial custody. Here a close analysis of this provision would go to show that there

is no compulsion for the Court to pass an order of remand invariably in all cases. Instead, the Court can resort to Section 88 Cr.P.C, which reads

as follows:

88. Power to take bond for appearance: When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue

a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his

appearance in such Court, or any other Court to which the case may be transferred for trial.

13. On receiving summons or in execution of the non-bailable warrant or on his volition, if the accused is present in the Court and if the Court is of

the opinion that there is no need to remand the accused u/s 309(2) Cr.P.C, the Court may direct the accused either to execute a personal bond

with or without sureties as provided in Section 88 Cr.P.C If the accused either refuses to execute the bond or fails to produce the surety as

directed, then the Court shall remand the accused to judicial custody. Similarly, in appropriate cases, if the Court is of the opinion that the detention

of the accused in custody is absolutely necessary for the smooth conduct of the enquiry or trial, the Court may u/s 309(2) Cr.P.C, remand the

accused to judicial custody without resorting to Section 88 Code of Criminal Procedure To put it otherwise, it is absolutely the discretion of the

Court either to remand him to custody u/s 309 Cr.P.C, or to direct him to execute bond with or without sureties u/s 88 Code of Criminal

Procedure At this moment, it should be remembered that such discretion is not available to a Magistrate u/s 167 Cr.P.C, since it is a statutory

compulsion that the Magistrate has to necessarily remand the accused to custody if the investigation is not completed within the statutory period

and if the other requirements are satisfied. If once the Court or the Magistrate remands an accused u/s 309 Cr.P.C in the circumstances

enumerated above, then the remedy for the accused is to apply for bail. After such an order of remand is passed by the Court, Section 88 Cr.P.C,

becomes inapplicable to such a situation.

14. After an accused is remanded to custody u/s 309 Cr.P.C, if he applies for bail, then the Court is not concerned about the process by which the

accused was brought before the Court. It is totally irrelevant that the accused was brought before the Court in execution of non bailable warrant as

stated herein above. While considering the question of bail, the Court has to see whether the offences are bailable or non bailable and if the

offences are bailable, the Court or the Magistrate shall release him on bail forthwith u/s 436 Cr.P.C.

15. The next question as to what the position is, if the accused commits breach of bond executed u/s 88 Code of Criminal Procedure It is needless

to say that whenever any such breach of bond is committed, u/s 446-A Cr.P.C, the bond stands automatically cancelled. Thereafter, if the accused

either appears or produced before the Court, the Court has got power either to direct him to execute a fresh bond with or without sureties or to

remand him to custody.

16. Yet another clarification required is in respect of the cases where the accused, who was released on bail commits breach of such bond. If any

such breach of bail bond is made, as enunciated in Section 446-A Cr.P.C, the

bond automatically stands cancelled. But, the order of bail granted earlier does not either automatically expire or gets cancelled. At that juncture, for breach of the bond, if non bailable warrant is issued at that stage also Section 438 Cr.P.C cannot be invoked. In execution of the said warrant, if the accused is brought before the Court, the Court has to necessarily direct the accused to execute a fresh bond unless and until the order of bail granted earlier is cancelled. It does not mean that in all cases where there is breach of bail bond committed by the accused, the Court has no option but to direct him to execute fresh bond with or without sureties. Where such breach is committed, the Court may cancel the order of bail after issuing notice to the accused and after affording an opportunity to him. If once the bail is so cancelled, then, there is no question of the accused claiming his right to execute a fresh bond with or without sureties or to seek anticipatory bail. After the bail is cancelled if the accused is produced either in execution of the warrant or on his own, necessarily the accused has to be remanded to custody leaving the option to the accused to apply for fresh bail.

17. In the result, the following conclusions emerge:

(1) On taking cognizance either on a Police Report or on a private complaint, the Magistrate or Court should strictly follow Section 204 Cr.P.C,

to issue summons to the accused and if necessary, to issue a warrant in lieu of summons after recording reasons as provided u/s 87 Code of

Criminal Procedure At that stage, if the offence is non bailable, petition u/s 438 Cr.P.C is maintainable and if the offence is bailable, Section 438

Cr.P.C, cannot be involved.

(2) On appearance of the accused on his own or on receipt of summons or the accused being produced in Court in execution of the non bailable

warrant issued u/s 204 Cr.P.C, the Court, if deems fit, may direct him to execute a bond with or without sureties as provided in Section 88

Cr.P.C, and to release him without remanding him to judicial custody.

(3) If the accused either refuses to execute a personal bond or fails to produce sureties as directed by the Court, then, the Court shall remand him

to judicial custody.

(4) In appropriate cases, without resorting to Section 88 Cr.P.C, after recording reasons as enshrined in Section 309 Cr.P.C, the Magistrate or

the Court may remand the accused to judicial custody.

(5) If once the accused is so remanded to judicial custody by the Magistrate or the Court, then the remedy for the accused is to apply for bail and

thereafter he cannot offer to execute a bond with or without sureties u/s 88 Cr.P.C.

(6) When the accused so applies for bail, it is totally irrelevant as to whether the accused was brought before the Court in execution of non bailable

warrant or by some other process. The Magistrate or Court should see whether the offences are bailable or non bailable and shall release the

accused forthwith on bail if the offence / offences are bailable.

(7) If the accused commits breach of bond executed u/s 88 Cr.P.C, or the bail bond executed u/s 441 Cr.P.C, then the bond stands automatically

cancelled as provided u/s 446-A Cr.P.C If the bail bond stands so cancelled, it will not automatically cancel the bail. It is for the Court to pass

necessary order cancelling the bail, if the Court so deserves fit after affording an opportunity to the accused. Unless such an order cancelling the

bail is made either u/s 437 or 439 Cr.P.C, the bail order granted earlier shall hold good. When the accused has committed such breach of bond or

bail bond, he is not entitled to apply for anticipatory bail u/s 438 Cr.P.C, even if the offence is non bailable.

(8) Subsequent to the cancellation of the bail order, if the accused is produced either in execution of the warrant or if he appears on his own, the

Court has no discretion, but to remand him to custody leaving the option for the accused to apply for fresh bail. If the accused appears or brought

before the Court in execution of the non bailable warrant before cancellation of the bail, then the Court has to direct him to execute fresh bond with

or without sureties.

(9) The provision for anticipatory bail contained in Section 438 Cr.P.C, is not applicable in respect of a case involving bailable offences though

there is apprehension of arrest in execution of non-bailable warrant.

18. In the result, all these Criminal Original Petitions are dismissed as not maintainable and the Petitioners are at liberty to approach the lower

Courts for appropriate relief as indicated above.