

(2008) 09 CAL CK 0065
In the Calcutta High Court
Case No : C.R.M. No. 6124 of 2008

Vivek Kathotia

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 15-09-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156, 156(3), 392, 437, 438
Penal Code, 1860 (IPC) — Section 120B, 406, 420, 467, 468

Citation : (2009) 4 CALLT 167 : (2009) 1 CHN 119

Hon'ble Judges : Prabuddha Sankar Banerjee, J; Amit Talukdar, J

Bench : Division Bench

Advocate : Sekhar Basu, Kallol Mondal, Koushik Chatterjee and Moumita Chattarjee, for the Appellant; Kalyan Bandopadhyay and Dipak Dey for Opposite Party No. 2, Y.Z. Dastoor, for Opposite Party No. 3, Sudipta Moitra and Rajdeep Majumdar for Opposite Party No. 4 and Ld. Public Prosecutor and U.A. Dewan, for the Respondent

Judgement

INTRODUCTION

1. What was felt to be just desert by the opposite party Nos. 2, 3 and 4 was not found to be just justice for the petitioner. This antithesis has paved the way for filing of this application at the instance of the petitioner, who feels that he has not received just justice while the opposite party Nos. 2,3 and 4 has sought to sustain their sense of just desert.

BACKGROUND FACTS

2. The petitioner hereinabove had taken out an application under Sub-section (3) of Section 156 before the learned Chief Judicial Magistrate, Alipore on 18.02.2008 praying for necessary direction upon Bhowanipore Police Station for causing an investigation into the allegations contained in the said petition in respect of the offence punishable under Sections 420, 406, 467, 468, 471 of the Indian Penal Code by way of treating the same as a First Information Report.

Acting on the basis of the same, the learned Chief Judicial Magistrate, Alipore directed Bhowanipore Police Station to cause an investigation which resulted in registration of Bhowanipore P.S. Case No. 48 of 2008 dated 20th February, 2008 under Sections 467, 468, 469, 471 and 120B of the Indian Penal Code (C.G.R. Case No. 544 of 2008).

Since the factual matrix have been elaborately set out in the order of the learned Chief Judicial Magistrate as well as the learned Sessions Judge-to avoid prolixity, we refrain from reproducing the same.

FEAR OF INCARCERATION

3. Driven by the apprehension of arrest the opposite party Nos. 2,3 & 4 felt it necessary to prefer an application u/s 438 of the Code of Criminal Procedure. Accordingly, they approached the learned Sessions Judge, Barasat on 12.03.2008. The said application was registered as C.M.C. No. 1006 of 2008. The learned Sessions Judge passed an ex parte order on the selfsame day admitting the opposite party Nos. 1, 2 and 3 with an order u/s 438 Cr. PC. She concluded "...I do not want to go into the merits of the case but it appears that there are two civil suits already pending regarding self-same matter in the Id. Civil Judge (Senior Division) 2nd Court, Barasat and also it appears that a considerable amount has been paid by the accd. petitioners and it is also seen that petitioners are the resident under the Salt Lake jurisdiction. In these circumstances I think the petitioners are entitled to anticipatory bail. Accordingly it is ordered that in the event of arrest of the petitioners in connection with the above noted case they may find bail of Rs. 3,000/- each with one surety of like amount each with a direction to surrender before the Id. Chief Judicial Magistrate, Alipore..."

REGULAR BAIL

4. Armed with such order u/s 438 Cr. PC from the Court of the learned Sessions Judge, Barasat; now, the opposite parties submitted themselves to the jurisdiction of the learned Chief Judicial Magistrate, Alipore on 09.04.2008.

On the basis of a put up petition, all the three opposite party Nos. 2, 3 and 4 surrendered and were enlarged on ad interim bail till 22.04.2008. The interim bail was being extended from time to time and in the interregnum period - on 06.06.2008 there was a prayer made on behalf of the investigating agency for cancellation of the said ad interim bail.

On 11.06.2008 the learned Chief Judicial Magistrate rejected the prayer of the investigating agency for cancellation of the said bail and confirmed the ad interim bail.

BEFORE THIS COURT

5. While the State of West Bengal remained mute, the petitioner (the complainant) felt he has been wronged and has approached this Court with an application u/s 439(2) of the Code of Criminal Procedure.

It is in this trajectory we had issued notice and subsequently, after appearance of the learned Senior Counsel for the opposite parties, we proceeded to hear the matter.

IN THE MEANTIME

6. It would be pertinent to mention that while granting bail the learned Chief Judicial Magistrate had imposed a condition upon the opposite parties not to leave the jurisdiction of Calcutta. For the purpose of admitting his daughter at Ajmer the opposite party No. 2 approached this Court by way of relaxation of the said condition. This Court refused the said prayer. Against the said order, the opposite party No. 2 had approached the Apex Court.

Criminal Appeal No. 1144 of 2008 arising out of SLP (Crl.) No. 4661 of 2008, was finally disposed of by the Supreme Court on 24.07.2008. The order passed by this Court in connection with A.S.T. No. 1108 of 2008 was set aside by the Supreme Court and certain observations made by it were also deleted.

While disposing of the Criminal Appeal No. 1144 of 2008 arising out of SLP (Crl.) No. 4661 of 2008 filed by the opposite party No. 2 Their Lordships of the Supreme Court directed "...The High Court shall now proceed to decide the applications filed by the complainant challenging the orders passed by the CJM, Alipore granting bail to the appellant and CJM, Alipore rejecting the application of the State for cancellation of bail in accordance with law, without being influenced by any of the observations made in the order impugned or in this order...."

AT THE CROSS ROADS,

7. After the disposal of the appeal by the Supreme Court, we have again taken up the hearing and would proceed to appreciate the prayer made in this application in the light of the submissions made at the Bar.

AT THE BAR

8. A. For the petitioner:

Shri Sekhar Basu appearing with Shri Koushik Chatterjee, Shri Kallol Mondal and Ms. Moumita Chatterjee for the petitioner has submitted that first of all, the learned Sessions Judge, Barasat was not competent to hear the application u/s 438 Cr. PC filed by the opposite parties since the case was registered before Bhowanipore Police Station, which was beyond her territorial jurisdiction. As such, on this ground alone, the order passed by her should be set aside necessarily resulting in scuttling the order passed by the learned Chief Judicial Magistrate, Alipore- which is nothing but the fall out of the parent order passed by the learned Sessions Judge.

Shri Basu also submitted that the order was passed ex parte by the learned Sessions Judge. She did not hear the learned Public Prosecutor for the State and

simply, abided by the one sided picture presented on behalf of the opposite parties. Her order was accordingly, a reflection of only one side of the coin.

According to Shri Basu, the learned Sessions Judge did not adhere to the provisions of Sub-section (1A) of Section 438 and passed an ex parte order, which practically attained its finality in view of the nature and character of the same without offering an iota of opportunity to the State to give its view.

Furthermore, Shri Basu, by way of referring to the provisions of Section 81 of the Cr. PC submitted-----even though for the sake of argument say she has granted a transit order u/s 438 Cr. PC; the learned Chief Judicial Magistrate, Alipore was not a Magistrate within the meaning of Section 81 Cr. PC as in view of the second proviso of Section 81 she was not the Sessions Judge of the district where the incident occurred.

Shri Basu also invited our attention to Section 9 Cr. PC. He was of the view that Section 9 Cr. PC clearly demarcates a Sessions Division and in view of the provisions of Section 9 - since a Sessions Judge was to preside over a particular Sessions Division; it was wholly improper on the part of the learned Sessions Judge, Barasat to deal with an application u/s 438 Cr.PC concerning a case registered before Bhowanipore Police Station, which falls within the Sessions Division of the Sessions Judge, Alipore.

Shri Basu further submitted that since the order was vulnerable, the same was liable for cancellation by this Court.

Moving on further, Shri Basu also assailed the order of the learned Chief Judicial Magistrate, Alipore, which according to him was the result of absolute non-application of mind.

Shri Basu submitted that the materials, which were placed before the learned Magistrate by the Investigating Officer was not at all considered and firstly, the ad interim bail was granted in a mechanical process and subsequently, it was confirmed in a very cryptic fashion without keeping in mind the staggering amount involved and the gravity of the offence.

He pointed out that the learned Chief Judicial Magistrate on 11.06.2008 confirmed the bail of the opposite party Nos. 1, 2 and 3 in a very routine manner and in the same breath refused the prayer of the investigating agency for cancellation of bail without adverting to the materials-on-record.

As a part of his submission Shri Basu referred to the decision of Dinesh M.N. v. State of Gujarat reported in 2008(2) SCC 508 and submitted that since the entire order passed by the learned Sessions Judge was vulnerable and irrelevant materials were taken into consideration-the said order passed by the learned Sessions Judge was absolutely bad in law.

According to Shri Basu when the order u/s 438 Cr.PC was untenable; the consequential order passed by the learned Chief Judicial Magistrate is also

necessarily, bad in law. To illustrate his point he referred to two decisions of the Division Bench of this Court in *Damayanti Majhi v. State of West Bengal* 2002 C Cr. LR(Cal) 823 and *In Re: Deepika Samanta*, .

Shri Basu on the basis of the said two Division Bench decisions of this Court submitted that the order passed by the learned Chief Judicial Magistrate releasing the opposite parties on bail was required to be set aside.

Shri Basu also cited the decision of the Supreme Court in *Jarnail Singh v. Pitamber Singh and Ors.* reported in 2001(5) SC 470 on the selfsame proposition.

Shri Basu thereafter cited the decision of the Special Bench of this Court in *Sailesh Jaiswal v. State of West Bengal and Ors.* 1998(2) C.LT 423 and the Full Bench decision of this Court in *Mahesh Kumar Sarda alias Maheswari v. Union of India (UOI)* 2001 (1) ALD (Cri) 127. On the strength of these two decisions Shri Basu argued that under no stretch of imagination the learned Sessions Judge, Barasat could assume jurisdiction in connection with a case registered against the opposite parties before the Bhowanipore Police Station which fell within the territorial jurisdiction of the Alipore Court.

Shri Basu very much laid stress on the factum of geographical jurisdiction. He also invited our attention to the Special Bench decision of the Patna High Court in *Syed Zafrul Hassan and Another Vs. State*, , which has been taken into account by Their Lordships in the Five-Judge Bench decision in *Sailesh Jaiswal* (supra).

Citing the Supreme Court decision of *State of Assam and Another Vs. Dr. Brojen Gogol and Others*, , Shri Basu contended that the order of the learned Sessions Judge, without hearing the State was-----at the first instance bad in law and secondly, on the question of jurisdiction also the same was not sustainable.

Winding up his submission Shri Basu was of the view that the learned Chief Judicial Magistrate also acted improperly on several scores. He lost sight of the fact that the learned Sessions Judge, Barasat was not his Superior Court and after receiving the order passed by her u/s 438 Cr. PC mechanically, even without hearing the State the learned Chief Judicial Magistrate passed an order of ad interim bail which was subsequently, confirmed without taking into account the factual aspect of the case.

To buttress his point that the order passed by the learned Chief Judicial Magistrate did not meet the approval of law he cited the decisions of *Naresh Kumar Yadav Vs. Ravindra Kumar and Others*, and *D.K. Ganesh Babu Vs. P.T. Manokaran and Others*, .

9. B. IN TANDEM:

Learned Public Prosecutor for the State with Ms. Hasi Saha did not support the order passed by the learned Chief Judicial Magistrate in the light of the directions passed by the learned Sessions Judge, Barasat.

According to the learned Public Prosecutor, who has referred to the materials in the case diary; the offence involved was very serious in nature. Huge amount of money was involved and custodial interrogation of the opposite parties was required. He adopted the submissions of Shri Basu and further submitted that it would be proper to cancel the bail of the opposite parties which will enable the investigating agency to take them on police remand for working out vital information.

Learned Public Prosecutor also addressed us with regard to the efficacy of the order dated 11.06.2008 passed by the learned Chief Judicial Magistrate, Alipore whereby the prayer of the Investigating Officer for cancelling the bail was refused.

Learned Public Prosecutor was of the view that the learned Chief Judicial Magistrate did not take into account the materials and the fact situation of the entire case and in a ritualistic manner refused the prayer.

Learned Public Prosecutor felt aggrieved with the same and also agitated before this Court to allow the prayer of the State.

10. PER CONTRA:

Shri Kalyan Bandopadhyay, learned Senior Advocate appearing with Shri Dipak Dey for opposite party No. 2 has used an affidavit denying all the allegations made by Shri Basu.

Shri Bandopadhyay, the learned Senior Counsel has very strongly maintained the position that in this case necessary documents have been seized and the opposite party Nos. 2,3 and 4 have cooperated with the investigating agency. As such, their further incarceration for the purpose of custodial interrogation is unwarranted.

Learned Senior Counsel further submitted that if the entire sequence of events leading from the filing of the petition under Sub-section (3) of Section 156 of the Cr. PC before the learned Chief Judicial Magistrate, Alipore by the present petitioner till the time the order was passed by the learned Sessions Judge and the backdrop of a number of civil suits and the underlying overture of business deal are looked into; it would at once be established that business vendetta is being settled by way of filing the criminal case.

Shri Bandopadhyay has referred to his return and emphasised that the entire dispute arises from a fall out of business transaction and the criminal prosecution has been initiated to settle trade scores and it will not be in the interest of justice to interfere in this application.

Shri Bandopadhyay has relied on a bunch of decisions relating to the scope of passing an order under Sub-section (3) of Section 156 Cr. PC by the learned Magistrate and the impact of an order u/s 438 Cr. PC by the superior Court and

the regular Court. For the reasons to be noted in the later part of order, we would not feel it appropriate to advert to any of the citations.

Shri Dastoor by way of adopting his submission, invited our attention to the entire set of allegations made against the opposite party No. 3.

Shri Dastoor has also used a return.

Shri Dastoor submitted that there is no descriptive role assigned to her. Simply, she being wife of opposite party No. 2, she was implicated. She is a home maker and it would not be in the interest of justice to proceed against her further.

Shri Y. Z. Dastoor for respondent No. 3 has practically, reiterated what has been stated by Shri Bandopadhyay in, his affidavit.

Shri Sudipta Moitra with Shri Rajdeep Majumder appearing on behalf of opposite party No. 4 has also used a separate affidavit almost in the same line of Shri Bandopadhyay and controverted all the allegations made by Shri Basu.

11. IN REPLY:

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Shri Basu took us to the various averments made in the affidavits used by the opposite parties. Shri Basu submitted that the affidavit was concentrated on factual aspects only.

Shri Basu also submitted since on the prayer made by opposite party No. 2 u/s 482 Cr. PC for quashing the proceedings the matter has been kept reserved for judgment before a learned Single Judge of this Court- it would not be open for the opposite parties to contend on the strength of the prosecution case.

Shri Basu very strongly relied on the fact that in none of the affidavits it has been denied that the impugned order passed by the learned Sessions Judge, which has been passed ex parte - has been controverted. As such, Shri Basu submitted it can be taken that they have admitted the said position.

TEMPLATE

Law Governing Cancellation of Bail

12. The power to cancel a bail has given to the High Court or Court of Session under Sub-section (2) of Section 439 of the Code of Criminal Procedure, 1973 which reads as follows:

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

Law governing the field of Sub-section (2) of Section 439 Cr. PC very much crystallised by several decisions of the Supreme Court. It is by now a trite position that an order of bail once granted should not be cancelled in a mechanical fashion without considering as to whether there is any compelling

circumstances which has rendered it no longer expedient to allow the accused persons to retain his freedom by enjoying the bail granted [See: Dolat Ram v. State of Haryana 1995 SCC 237].

Similarly, there has to be certain cogent and overwhelming circumstances so as to enable the Court to cancel an order of bail obtained by the accused persons (See also: Bhagirathsinh Judeja Vs. State of Gujarat,).

In all, it has to be established that the liberty granted by the Court has been misused and it would not be in the interest of justice to allow the accused to retain his freedom and that there is chance of prosecution evidence being tampered and the question of absconsion is also there.

However, when it is found that the order of granting bail to the accused was vulnerable and it is found that irrelevant materials were taken into consideration-certainly, the order granting bail in favour of the accused can be interfered with. In this context I find the decision of Dinesh M.N. v. State of Gujarat (supra) appropriate.

Now, I advert to the decision of Rizwan Akbar Hussain Syed Vs. Mehmood Hussain and Another, . I would like to quote the relevant portion of this decision for a profitable discussion:

Cancellation of bail should not be done in a routine manner. Where it appears to the superior Court that the Court granting bail acted on irrelevant materials or there was non-application of mind or where Court does not taken note of any statutory bar to grant of bail, order for cancellation of bail can be made. These circumstances are illustrative and not exhaustive. The Court considering the application for cancellation of bail has to take note of all relevant aspects.

The Supreme Court in Mehboob Dawood Shaikh v. State of Maharashtra 2004 SCC (Cri) 551, held:: "Rejection of bail stands on one footing, but cancellation of bail is a harsh order because it takes away the liberty of an individual granted and is not to be lightly resorted to...."

SPECTRUM

13. In the light of the submissions made at the Bar and from my appreciation of the materials placed before this Court following salient features crystalises:

A. The petitioner hereinabove, is engaged in the business of promotion and development of real estate operating from 59C, Chowringhee Road and Premises No. 7/1A, Hazra Road both falling within the jurisdiction of Bhowanipore Police Station. He was introduced to the accused on or about the month of June, 2005 by a real estate broker. He was given to understand that they possessed a plot of land at BP-2, Sector-V, Salt Lake City, Calcutta through a company known as Graphitech India Ltd. (GIL) and was in control of 100% equity and was desirous of transfer and/or sale of the said shares in favour of the complainant. It was also made to understand that the opposite party Nos. 2 and 3 were authorised to

represent the other shareholders of GIL. As such, the agreement was entered into for the purpose of purchase of the said shares. A sum of Rs. 5 lacs was paid in favour of the company and thereafter other residuary balance amount was paid totalling about Rs. 7,86,00,000.00/-

Subsequently, it transpired that the share scripts, which was kept with the Solicitor were transferred without the original share certificates on the basis of fake, forged and duplicate certificates. From that it was evident that the accused has a criminal intention to defraud the complainant right from the very beginning.

It also transpired from the letter of the Solicitor that the accused did not deposit any Share Transfer Deed and the share certificates and in the meantime generated fake and forged share scripts with distinctive numbers and traded the same in the market. It became clear from the conduct of the accused that on the basis of false and dishonest representation they have induced the petitioner to part with a sum of Rs. 13,91,90,000/- thereby causing wrongful deprivation with an intention of transferring the said shares.

B. The petitioner thereafter filed an application u/s 156(3) Cr. PC before the learned Chief Judicial Magistrate, Alipore with a prayer for sending the same to the Bhowanipore P.S. by way of treating it as an FIR in terms of Sub-section (3) of Section 156 of the Code of Criminal Procedure.

C. The learned Chief Judicial Magistrate by his order dated 18.02.2007 directed the police to treat the same as an FIR and cause investigation into the allegations made therein.

D. Pursuant thereof Bhowanipore P.S. Case No. 48 dated 20/02/2008 u/s 467/468/469/471/120B of the Indian Penal Code was registered for investigation against the accused persons (CGR No. 544 of 2008).

E. A prayer was made on 12.03.2008 u/s 438 Cr. PC by the opposite party Nos. 2, 3 and 4 before the learned Sessions Judge, Barasat, which was not the jurisdictional Court. And on the same day she passed an order u/s 438 Cr. PC in favour of the opposite party Nos. 2 and 3.

F. It would be pertinent to note that learned Sessions Judge, Barasat passed her order on 12.03.2008 on the very same day when the said application was filed by the opposite party Nos. 2, 3 and 4 without causing any notice to the State and without hearing the learned Public Prosecutor.

G. On 09.04.2008 the opposite party Nos. 2, 3 and 4 submitted themselves before the learned Chief Judicial Magistrate, Alipore by way of a put up petition. They were straight away enlarged on ad interim bail till 22.04.2008.

H. The interim bail went on being extended from time to time.

I. On 06.06.2008 the Investigating Officer prayed for cancellation of the said bail.

J. Finally, on 11.06.2008 the learned Chief Judicial Magistrate, Alipore was

pleased to reject the prayer for cancellation of the bail made by the investigating agency and confirmed the interim bail of the accused persons with a direction that the opposite party Nos. 2, 3 and 4 shall not leave the address without the permission of the Court and with a further direction upon opposite party Nos. 2, 3 and 4 to meet the Investigating Officer every day for one month.

After apprising ourselves with the factual matrix and keeping abreast with the legal position, we will now proceed to see as to whether the order passed by the learned Chief Judicial Magistrate, Alipore confirming the interim bail passed in terms of an order passed by the learned Sessions Judge, Barasat can be sustained.

OF THE BEATEN TRACK

14. Prior to moving ahead it cannot lose sight of the fact that an order of bail ones granted; cannot be interfered with very lightly and has to be considered on the ground of expediency and the balance of convenience and of justice. I would refer to a Division Bench decision of our Court in Superintendent and Remembrances of Legal Affairs v. Amiya Kumar Roy Chowdhury alias Dadaji 78 CWN 320, where the Id. Judge writing the judgment for the Division Bench in paragraph 6 has held "....The law of bails, which constitutes an important branch of the procedural law, is not a static one; and in a welfare State, it cannot indeed be so. It has to dovetail two conflicting demands, namely on one hand, the requirements of the society for being shielded from the hazards of being exposed to the mis-adventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence, viz., the presumption of innocence of an accused till he is found guilty. These are indeed conflicting equities highlighting the law of bails but the shield in no case should be allowed to be the sword. The observations aptly made that in a barbaric society you can hardly ask for bail; in a civilised society you can hardly refuse it are more than an epigram, subject only to the tests of considerations laid down from time to time by the imprimatur of judicial decisions..."

DISCUSSION

15. Shri Basu has dealt at length with regard to the question of jurisdiction and he assailed the order passed by the learned Sessions Judge, Barasat allowing the prayer of the opposite parties made u/s 438 Cr. PC as being illegal since it did not have the jurisdiction to entertain the prayer in connection with an offence which is being investigated by a police station which was beyond her territorial jurisdiction.

Since Shri Basu has addressed us at length on this point, which he took as a preliminary point and in support of his contention has referred to the decision of the Supreme Court in State of Assam and Anr. v. Brojen Gogol (supra), the Full Bench decision of the Patna High Court in Syed Zafrul Hassan and Anr. (supra) and the Full Bench decision of our Court in Sailesh Jaiswal v. State of West Bengal and Ors. (supra) as well as the Special Bench decision of our High Court

in Mahesh Kumar Sarda alias Maheswari (supra) -----I would take up the said question at the outset.

In my view, it will not be proper for me to entertain this question. Earlier, while dealing with the question of relaxation of the condition of bail imposed by the learned Chief Judicial Magistrate, Alipore in connection with a prayer made by the opposite party Nos. 2, 3 & 4 after obtaining an order u/s 438 Cr. PC from the learned Sessions Judge, Barasat in connection with the order impugned in this application-this Court was of the view that she did not have any jurisdiction and the order passed by the learned Chief Judicial Magistrate, was non est.

The opposite party No. 2 went to the Supreme Court and on July 24, 2008 in Criminal Appeal No. 1144 of 2008 [arising out of SLP (CrL) No. 4661 of 2008] (Surya Prakash Bagla v. State of West Bengal and Anr.) Their

Lordships of the Supreme Court held "...we set aside the impugned order passed by the Division Bench and delete the observations made by it, quoted above, being unnecessary...."

By virtue of the order of the Supreme Court; in my humble view, the question of jurisdiction raised by Shri Basu should not be considered as a subject-matter for discussion in this application.

Now, once I have covered a portion of Shri Basu's argument, I would now proceed to the other aspect of the submission made by Shri Basu.

He was of the view since the order passed by the learned Sessions Judge was without jurisdiction-----subsequent order passed by the learned Chief Judicial Magistrate allowing the regular bail of the opposite parties in terms of the order passed u/s 438 Cr. PC was also bad in law. The decision of the Supreme Court cited by Shri Basu in Jarnail Singh v. Pitember Singh and Ors. 2001(5) Supreme 470 and the Division Bench decision of our Court in Deepika Samanta v. Respondent (supra) and Damayanti Majhi v. State of West Bengal (supra) have also been taken into account by me.

But if I again address myself to the decision of the Hon''ble Apex Court in Surya Prakash Bagla v. State of West Bengal and Anr. (supra), I Find that the Division Bench had found the order passed by the learned Chief Judicial Magistrate, Alipore on 11.06.2008 "... was also a non est order in the eye of law."

As I have earlier found that the entire gamut of the finding of the Division Bench has been set aside by the Hon''ble Supreme Court and the observations made by the Division Bench which was deleted in the order of Surya Prakash Bagla v. State of West Bengal and Anr. (supra) by the Supreme Court-----I am extremely sorry, I cannot also abide by this part of the submission of Shri Basu.

Now, what remains before us is to see as to whether on merit the order can be sustained and the prayer of the petitioner for cancelling the bail should be allowed.

In the TEMPLATE I have already apprised myself with regard to the position governing the field relating to application of Sub-section (2) of Section 439 Cr. PC. It is by now a very trite position of law crystalised by a galaxy of decisions of the Hon'ble Apex Court as well as of the various High Courts that the grant of bail is one aspect of the matter, cancellation thereof is a diametrically opposite proposition. From the traditional view with regard to tinkering with the evidence and according threat perception to the witnesses and the misuse of the liberty the concept has now fructified to a broader sphere-----conduct of the accused at the post-stage of grant of bail and also the order being vulnerable and in the event if it was result of non-application of mind based on irrelevant materials.

DECISION

16. Simply, serious nature of the accusations and the deprave nature of the crime may be a paramount consideration for the Court considering the prayer for regular bail. But it cannot be the guiding factor for scuttling the said order, once an accused, is released, in the absence of any supervening circumstance and availability of further incriminating materials before the Court which would not justify the sustenance of the liberty of the accused, then only the order of bail can be interfered with.

In the present case, if we shift our attention to the merit of the case, it would be seen that the entire cause of action sprang off from a dispute, which was inextricably connected with the business deal of the petitioner in one hand and the opposite parties on the other. Civil suits are pending between them. Of course, I do not want to harp on the same in the present application. But I am of the view that the present opposite parties have their permanent place of residence in the address shown in the cause title. They have business commitments in and around the city of Calcutta and it cannot be lightly said they will flee from the process of justice.

I do not share the view of the learned Public Prosecutor that they are required for the purpose of custodial interrogation for the purpose of unearthing the duplication of shares. In ordinary circumstances I could have accepted the submission of the learned Public Prosecutor and felt the necessity of a custodial interrogation. But the fact remains interim bail of the present opposite parties was granted on 11.06.2008 before the learned Chief Judicial Magistrate, Alipore. They have regularly met the Investigating Officer. There is no material worthwhile before me to substantiate that either their conduct at the post-stage of such bail is not conducive in the interest of investigation to allow them to retain their liberty or there is any material suggestive of any threat perception received by the witnesses. Entire bunch of allegations are basically, document oriented, which is nothing else but a fall out of business dislike. It would not be in the proper exercise of my judicial powers to arrive at the conclusion that this would be a case for custodial interrogation.

Furthermore, the opposite parties have been on bail and is continuing to do so

for all these period since 09.04.2008, when at first they were on ad interim bail. I do not find any whisper of allegation that they have misused the liberty or there are any supervening circumstances which do not permit them to retain their liberty.

Accordingly, I would be extremely slow to interfere with the prayer made by the petitioner for scuttling the order of bail obtained by the opposite parties from the Court of the learned Chief Judicial Magistrate, Alipore after they were admitted with an order u/s 438 Cr. PC by the learned Sessions Judge, Barasat.

The decisions of Naresh Kumar Yadav v. Ravindra Kumar and Ors. (supra) and D.K. Ganesh Babu v. P.T. Manokaran and Ors. (supra) have also been carefully perused by me. In my opinion, the learned Chief Judicial Magistrate has, in a copy book fashion allowed the prayer for bail of the present opposite parties and did not live up to its legislative mandate while exercising his powers u/s 437/439 vis-a-vis an order passed by a superior Court u/s 438 Cr. PC and have militated against the ratio of the decision of Naresh Kumar Yadav (supra) and D.K. Ganesh Babu (supra).

But this, by itself, cannot form the ground for setting aside the said order for the reasons discussed earlier.

I have with close scrutiny perused the judgment of the Supreme Court Surya Prakash Bagla v. State of West Bengal and Anr. (supra) relating to the direction "....The High Court shall now proceed to decide the applications filed by the complainant challenging the orders passed by the CJM, Alipore granting bail to the appellant" and "CJM, Alipore rejecting the application of the State for cancellation of bail in accordance with law, without being influenced by any of the observations made in the order impugned or in this order....

FINDING

17. In my objective assessment of the entire situation, as I have found that it would not be prudent to accede to the prayer for cancelling the bail obtained by the opposite parties before the learned Chief Judicial Magistrate, Alipore for the reasons, which I have discussed hereinabove-by the same analogy I am of the considered view that the prayer of the State of West Bengal made before the learned Chief Judicial Magistrate on 06.06.2008, which was summarily rejected, in the event is allowed to be revived would serve no purpose. I have in my own way applied my judicial mind to that aspect of the matter and find at the present juncture the prayer made by the Investigating Officer on 06.06.2008 before the learned Chief Judicial Magistrate, Alipore for cancelling the interim bail, which was later confirmed, if allowed to be revived-would not be in the best interest of justice.

I have found that this is not a case fit for custodial interrogation and as already the investigating agency had the scope to examine the opposite parties; the prayer of the Investigating Officer made on 6.06.2008 has withered away by

virtue of the subsequent stream of events that have been witnessed by me.

ON THE RAMP

18. I have found that the order of bail should not be interfered with and have arrived at my finding on the basis of the legal principles before me. As such, I do not feel it necessary to revert to the citations referred to by Shri Bandopadhyay, learned Senior Counsel for the opposite party No. 2 as it would be of no consequence in my decision.

FOR THE FUTURE

19. It would however, stand qualified, any passing reference on the merit or observation impinged on the factual matrix of the case should be understood to have been passed on the context of the legal issue involved and on the basis of the submissions made at the Bar, which has obligated me to deal with the same. It cannot be understood to either influence the future proceeding or cast any shadow in the decision making process before the Trial Court.

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20. From a broad conspectus of the entire fact scenario and the legal kaleidoscope, I feel that this application can now be disposed of with the following directions:

I) The opposite party Nos. 2, 3 and 4 shall restrict themselves within the jurisdiction of Salt Lake City and the Metropolitan Area of Greater Calcutta;

II) The opposite party Nos. 2 and 4 will meet the Investigating Officer till such time challan is filed-----thrice a week on such time which would be notified by the Investigating Officer at his office;

III) Opposite party Nos. 2,3 and 4 shall deposit their passports with the Investigating Officer;

IV) The opposite party No. 3 would make herself available for interrogation by the investigating agency upon prior notice;

V) In the event it is found that any of the opposite party Nos. 2, 3 and 4 has rendered themselves unsuitable to maintain their freedom and their conduct is not palatable either for the investigating agency or the for the various witnesses, the learned Chief Judicial Magistrate, Alipore would, at once cancel the bail without making any further reference to this Court on the basis of available materials before it.

Application accordingly, stands disposed of.

Amit Talukdar, J.:

21. I have had the advantage of listening to the order passed by my learned Senior Brother. I beg to differ with the same. I am of the view that the order

passed by the learned Sessions Judge, Barasat cannot be maintained for more than one reasons:

- 1) The final order passed was ex parte without considering the case diary.
- 2) That being conscious of the gravity of the offence and the amount involved, the learned Sessions Judge was not correct in passing the order. Such power of anticipatory bail, which was exercised by the learned Sessions Judge, in my view, was a wrong exercise of power and should be interfered with.
- 3) Once I am of the view that the order passed by the learned Sessions Judge cannot be affirmed in this application and the said order is liable to be set aside, the subsequent orders passed thereto by the learned Chief Judicial Magistrate, Alipore is also liable to be set aside.

22. However, as the private opposite parties were enjoying the anticipatory bail for a long period, the liberty should be given to them to approach the proper forum by filing application u/s 438 Cr. PC afresh.

23. Till order to that effect is passed by the learned Sessions Judge, the present private opposite parties should not be arrested by the investigating agency. The application afresh, if any, is to be filed within a period of fortnight from this date.

Prabuddha Sankar Banerjee, J.:

24. Since we have been unable to reach a consensus, it would be appropriate that this application is laid before the Hon"ble the First Bench within the ambit of Section 392 Cr.PC.