SUPREME COURT OF INDIA

Parvinderjit Singh

Vs.

State (U.T. Chandigarh)

Crl.A.No.1716 of 2008

(Dr. Arijit Pasayat and C.K. Thakker JJ.)

03.11.2008

JUDGMENT

Dr. Arijit Pasayat, J.

1. Leave granted.

2. Challenge in these appeals is to the order of learned Single Judge of the Punjab and Haryana High Court. Though the appellants had filed application under Section 482 of the Code of Criminal Procedure, 1973 (in short the `Code') praying for quashing the proceedings in FIR No.73 dated15.4.2008 registered in espect of offences punishable under Sections 406,420 and 120B of the *Indian Penal Code, 1860* (in short the `IPC') in PoliceStation, Sector 3, Chandigarh, in essence the prayer was for grant ofprotection under Section 438 of the Code.

3. Background facts, highlighted by the appellants, are as follows:

> "Citibank and Citigroup Wealth Advisors (in short `CWA') are two separate legal entities. Citibank carries on banking activities and is incorporated under the Banking Regulations Act, 1956 and is guided by the directions and guidelines of the Reserve Bank of India; whereas CWA is a wealth advisory body incorporated under the Companies Act, 1956 and is regulated by the directions and guidelines as set out by SEBI and the StockExchanges.
>
> Appellants' (who are employees of Citi Bank) prayer for anticipatory bail are based on the premises that the allegations in the complaint are purely of civil nature since arbitration proceedings have been initiated at the behest of both the complainant and CWA much prior to the institution of the criminal case. The prayer was opposed by the State and the complainant. The High Court noted that the allegation in the FIR was to the following effect:

"A perusal of the FIR shows that an amount of Rs.1.10 crores has been fraudulently withdrawn from the saving account of the complainant and shares worth Rs.1.60crores have been fraudulently with drawn/embezzled from his demats account maintained in the City Bank with whom the petitioners were employed at the relevant time. The act of embezzlement is attributed to the petitioners and two other persons, who are employees of City Group Wealth Advisors India Private Limited. On these allegations, a case under sections 406/420 and120B of the Indian Penal Code in Police Station, Sector 3, Chandigarh was registered against the petitioners. "

The High Court noted that this was not a case where any protection in terms of Section 438 of Code was to be extended."

4. In support of the appeals, learned counsel for the appellants submitted that the FIR was nothing but a sheer abuse of the process of the law. The entire case hinges on documentary evidence which cannot be tampered since the records are duly co-related with NSE/BSE and CWA and there cannot be apprehension of either the appellants tampering with the evidence or absconding since they are responsible officers and are willing to assist the investigation. It is further submitted that the complaint made by the complainant is not bona fide and has been filed with ulterior motive.

5. Learned counsel for the State on the other hand submitted that in spite of the directions of this Court the appellants are not cooperating with the investigation. This statement is strongly denied by learned counsel for the appellants. They have submitted that they have on more than twenty occasions appeared before the investigating officer. Strangely, the investigating officer is asking for certain documents which have either no relevance and, therefore, the investigating officer is not acting fairly.

6. The facility which Section 438 of the Code gives is generally referred to as `anticipatory bail'. This expression which was used by the Law Commission in its 41st Report is neither used in the section nor in its marginal note. But the expression `anticipatory bail' is a convenient mode of indication that it is possible to apply for bail in anticipation of arrest. Any order of bail can be effective only from the time of arrest of the accused. Wharton's Law Lexicon explains `bail' as `to set at liberty a person arrested or imprisoned, on security being taken for his appearance.' Thus bail is basically release from restraint, more particularly the custody of Police. The distinction between an ordinary order of bail and an order under Section 438 of the Code is that whereas the former is granted after arrest, and therefore means release from custody of the Police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest.(See: *Gur Baksh Singh v. State of Punjab*[1]). Section 46(1) of the Code, which deals with how arrests are to be made, provides that in making an arrest the Police officer or other person making the same "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". The order under Section 438 of the Code is intended to confer conditional immunity from the touch as envisaged by Section 46(1) of the Code or any confinement. The apex Court in *Balachand Jain v. State of Madhya Pradesh*[2] has described the expression `anticipatory bail' as misnomer. It is well-known that bail is ordinary manifestation of arrest,

that the Court thinks first to make an order is that in the event of arrest a person shall be released on bail. Manifestly there is no question of release on bail unless the accused is arrested, and therefore, it is only on an arrest being effected the order becomes operative. The power exercisable under Section 438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty then power is to be exercised under Section 438. The power being of important nature it is entrusted only to the higher echelons of judicial forums, i.e. the Court of Session or the High Court. It is the power exercisable in case of an anticipated accusation of non-bailable offence. The object which is sought to be achieved by Section 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Court of Session or High Court, he shall be released immediately on bail without being sent to jail.

7. Sections 438 and 439 operate in different fields. Section 439 of the Code reads as follows:

> "439. (1) A High Court or Court of Session may direct - (a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section; (b) that any condition imposed by the Magistrate whenreleasing any person on bail be set aside or modified." (underlined for emphasis)

8. It is clear from a bare reading of the provisions that for making an application in terms of Section 439 of the Code a person has to be in custody. Section 438 of the Code deals with "Direction for grant of bail toperson apprehending arrest"

9. In *Salauddin Abdulsamad Shaikh v. State of Maharashtra*[3] it was observed as follows:

> "Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realized that when the Court of Sessions or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on 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 an appreciation of evidence placed before it after the investigation has made progress or the charge- sheet is submitted". (Emphasis supplied)

10. In *K.L. Verma v. State and Anr.*[4] this Court observed as follows:

"This Court further observed that anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed. It was, therefore, pointed out that it was necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on 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 an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted. By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or evena few days thereafter to enable the accused persons to move the higher court, if they so desire." (Emphasis supplied)

11. In *Nirmal Jeet Kaur v. State of M.P. and Another*[5] and Sunita Devi v. State of Bihar and Anr. Criminal Appeal arising out of SLP (Crl.) No. 4601 of 2003 disposed of on 6.12.2004 certain grey areas in the case of K.L. Verma's case (supra) were noticed. The same related to the observation "or even a few days thereafter to enable the accused persons to move the Higher Court, if they so desire". It was held that the requirement of Section 439 of the Code is not wiped out by the above observations. Section 439 comes into operation only when a person is "in custody". In K.L. Verma's case (supra) reference was made to Salauddin's case (supra). In the said case there was no such indication as given in K.L. Verma's case (supra), that a few days can be granted to the accused to move the higher Court if they so desire. The statutory requirement of Section 439 of the Code cannot be said to have been rendered totally inoperative by the said observation.

12. In view of the clear language of Section 439 and in view of the decision of this Court in *Niranjan Singh and Anr. v. Prabhakar Rajaram Kharote and Ors.*[6] there cannot be any doubt that unless a person is in custody, an application for bail under Section 439 of the Code would not be maintainable. The question when a person can be said to be in custody within the meaning of Section 439 of the Code came up for consideration before this Court in the aforesaid decision.

13. After analyzing the crucial question is when a person is in custody, within the meaning of Section 439 of the Code, it was held in Nirmal Jeet Kaur's case (supra) and Sunita Devi's case (supra) that for making an application under Section 439 the fundamental requirement is that the accused should be in custody. As observed in Salauddin's case (supra) the protection in terms of Section 438 is for a limited duration during which the regular Court has to be moved for bail. Obviously, such bail is bail in terms of Section 439 of the Code, mandating

the applicant to be in custody. Otherwise, the distinction between orders under Sections 438 and 439 shall be rendered meaningless and redundant.

14. If the protective umbrella of Section 438 is extended beyond what was laid down in Salauddin's case (supra) the result would be clear bypassing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies upto higher Courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner.

15. Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead, innocence, since he is not on the date of application for exercise of power under Section 438 of the Code convicted for the offence in respect of which he seeks bail. The applicant must show that he has `reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression `reason to believe' shows that the applicant may be arrested must be founded on reasonable grounds. Mere "fear" is not `belief' for which reason it is not enough for the applicant to show that h has some sort of vague apprehension that some one is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief on the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the Court concerned to decide whether a case has been made out of for granting the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such `blanket order' should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 is a device to secure the individual's liberty' it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely.

16. The next question is whether a Court can pass an interim order not to arrest the applicant, where an application under Section 438 of the Code is pending disposal.

17. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermathof the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide informationleading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his dis-appearance to maintain law and order in the locality. For these or other reasons, arrest may become inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an

application under Section 438 of the Code. The role of the investigator is well-defined and the jurisdictional scope of interference by the Court in the process of investigation is limited. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code. The above position was highlighted in *Adri Dharan Das v. State of West Bengal*[7].

18. We find that in the instant case this Court had in fact by order dated 30.5.2008 directed that the appellants shall not be arrested subject to the condition that they will joint investigation. Strictly speaking the order does not fit in with the parameters indicated in Adri Dharan Das's case (supra). Be that as it may, the order is in operation and we do not think it appropriate in the present case to make any variation.

19. We dispose of the appeals with the following directions:

> "(1) The investigation shall be completed within two months unless there is some practical difficulty in completing the same within that period.
>
> (2) The appellants shall, as and when required by the investigating agency, appear before the investigating officer and shall cooperate in
> the investigation.
> (3) If any document is asked for the same shall be supplied unless the appellants are not in possession of the documents.
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> (4) In case the investigating officer feels that the non-production of documents as called for has any relevance, that can certainly be taken note of while submitting the final form or the charge sheet as the case may be. Needless to say that this order shall be operative till the charge sheet or the final form as the case may be is filed before the concerned court."

20. The appeals are disposed of.

[1]*1980(2) SCC 565*
[2]*AIR 1977 SC 366*
[3]*AIR 1996SC 1042*
[4]*(1996 (7) SCALE 20)*
[5]*(2004 (7) SCC 558)*
[6]*(AIR 1980 SC 785)*
[7]*(2005 (4) SCC 303)*