

(1982) 11 GAU CK 0003

Gauhati High Court

Case No: None

Kulendra Kumar Dey
and Another

APPELLANT

Vs

Union Territory of
Arunachal Pradesh

RESPONDENT

Date of Decision: Nov. 6, 1982

Acts Referred:

- Constitution of India, 1950 - Article 21
- Criminal Procedure Code, 1973 (CrPC) - Section 438

Citation: (1983) CriLJ 1122

Hon'ble Judges: B.L. Hansaria, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

B.L. Hansaria, J.

Arunachal Pradesh was a part of the "tribal areas" of Assam for whose administration special provisions were made in the Sixth Schedule to the Constitution. The enactment of the Schedule has a history of its own which can be traced to early 19th century. The backwardness of the region was the principal reason for having a special machinery for administering the areas, first known as backward tracts, subsequently designated as excluded and partially excluded areas. We may not traverse the history for the case at hand. Suffice it to say that in so far as administration of justice is concerned, special rules were made keeping in view the peculiar and particular situation of the tracts. The whole idea was to have a simple administration which would be de hors of the technicalities of, say Codes of Criminal and Civil Procedure, Arunachal Pradesh was not the only region to have such a system. Reference to the table to para 20 of the VIth Schedule would show that the tribal areas included various hill districts of the east while State of Assam. It is because of this that even under the new Code of Criminal Procedure the

provisions of this enactment except those relating in Chapters VIII. X and XI were not made applicable to the tribal areas. A power was however conferred to apply any of the provisions of the Code as may be specified in the notification to be issued in this regard.

2. The question with which we are seized is whether Section 438 of the Code containing provision for anticipatory bail, as it is generally called, would apply to the territory of Arunachal Pradesh. It may be stated that by virtue of the provisions in Section 32 of the Assam Frontier (Administration of Justice) Regulation, 1945, for short the Regulation, the Courts are to be guided "in regard to procedure by the principles of the Cri. P.C. It would be apposite to state that in similar rules governing other parts of the tribal area, the phraseology used is that courts would be guided by the spirit of the Criminal P.C. What is meant by spirit came to be considered in [State of Nagaland Vs. Ratan Singh, etc.,](#) It was stated in paragraphs 29 and 30 of this judgment that the desire to make the spirit alone applicable would imply that the technical rules of the Code are not to prevail over the substance of the matter, because removal of the technicalities leads to the advancement of the cause of justice in these areas which are inhabited by simple folks.

3. The submission made on behalf of the Union Territory by its learned Standing Counsel is that what is made applicable by Section 32 of the Regulation is only the procedure of the Code and that too the principles of the same: and so those provisions of the Code will not apply which deal with substantive right, unless a notification has been made as contemplated by the proviso to Section 1 (2) of the Code. My attention is invited to Criminal Revision No. 108 of 1975 wherein it has been observed by Lahiri, J. that there is nothing in the Regulation to show that any right envisaged under the Code was extended in favour of the subject. Learned standing counsel finally urges that the question of obtaining anticipatory bail is a matter relatable to substantive right, and as such the same has no applicability in Arunachal Pradesh for want of a notification extending Section 438 to the Union Territory.

4. Sri Bhattacharjee, the learned Counsel appearing for the petitioner, contends that acceptance of the aforesaid submission would amount to leaving the accused persons arrested or to be arrested at the absolute mercy of the authorities inasmuch as the Regulation does not contemplate of release on bail of an arrested person. Indeed the Regulation has not even conferred power of arrest. Realising this position perhaps the Government of Arunachal Pradesh extended the provisions of Chapters IV, V and XII of the Code by notification dt. 5-1-79. It is apparent that power of arrest would be absolutely arbitrary if no provisions were to be made for release of the person on bail. Article 21 would also be violated because it would be a question of depriving personal liberty without laying down a procedure which would be just, fair and reasonable.

5. Though provisions of Chapter XXXIII of the Code have not been extended to the Union Territory, it cannot be contended that a person would not be entitled to get himself released on bail in the wake of his arrest by the police. The learned standing counsel was fair in realising this position. As grant of anticipatory bail is a part of the provision finding place in Chapter XXXIII dealing with bails and bonds, the applicability of the same cannot be ruled out on the aforesaid ground alone. This apart, as has been pointed out in [Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab](#), Section 438 is "a procedural provision which is concerned with the personal liberty of the individual". It has also been accepted in para 26 that denial of bail amounts to the deprivation of personal liberty. The history behind the incorporation of Section 438 in the new Code clearly brings home this aspect. As sated by the Law Commission of India, relevant portion of whose report has been noted in para 4 of the judgment. the need of pre-arrest bail was felt to take care of those situations in which influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. The procedure in Section 438 has thus a clear nexus with the personal liberty which is protected from unfair, unjust and unreasonable deprivation by Article 21.
6. So, the provision of anticipatory bail in Section 438 of the Code has to be regarded as one of the basic principles of the Code. And further, it is a procedural provision, as pointed out, in Gurbaksh Singh. For these twin reasons, its provisions have to be applied by all the courts mentioned in Section 32 of the Regulation.
7. In view of this, the order passed earlier is made absolute, as on the facts, the order of release has not been contested by the respondent.