

(2011) 1 JCR 491

Patna High Court

Case No: Criminal Miscellaneous No. 2875 of 2010

Bishnudeo Sahu

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision: May 12, 2010**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 437, 438, 438(1), 439
- Penal Code, 1860 (IPC) - Section 120B, 323, 34, 341, 379

Citation: (2011) 1 JCR 491**Hon'ble Judges:** Birendra Prasad Verma, J**Bench:** Single Bench

Judgement

@JUDGMENTTAG-ORDER

Birendra Prasad Verma, J.

The primal issue involved in these two cases filed u/s 438. Code of Criminal Procedure is as to whether once an accused surrenders to the jurisdiction of the Court after grant of anticipatory" bail for a limited period, or has been taken into police custody, can invoke the jurisdiction of the Court of Session or the High Court for grant of anticipatory bail for the second time?

2. For the purpose of consideration of the main issue involved in these two cases brief facts are required to be noticed. The Petitioner in Cr. Misc. No. 1257 of 2010 is an accused in connection with Khagaria Rail P.S. Case No. 5 of 2008 dated 21.1.2008 registered under Sections 382, 120-B, 379 and 411 of the Indian Penal Code. Though the Petitioner is not named in the FIR as an accused, but during course of investigation, it transpired that he is involved in sale of stolen railway property. The allegation was denied by the Petitioner and it was claimed that he deals in kabari (scraps). Taking into consideration the aforesaid facts, the learned Sessions Judge, Kahgaria, by his order dated 16.2.2008 passed in A.B. No. 36 of 2008 vide Annexure 2 to the petition, was

pleased to grant him anticipatory bail till conclusion of the investigation of the case. However, on close of investigation police submitted charge-sheet against the Petitioner and accordingly cognizance has been taken in the case. When the Petitioner moved again for grant of anticipatory bail, then by the impugned order dated 14.10.2009 passed in A.B.P. No. 228 of 2009 learned Sessions Judge, Khagaria by placing reliance on the judgment of the Apex Court reported in [Salauddin Abdulsamad Shaikh Vs. State of Maharashtra](#), , [Nirmal Jeet Kaur Vs. The State of Madhya Pradesh and Another](#), , Nirmaljeet Kaur v. State of M.P. and Anr., has rejected the same as not maintainable. Being aggrieved by the aforesaid order the Petitioner has moved before this Court for grant of anticipatory bail.

3. The Petitioners in Cr. Misc. No. 2875 of 2010 are accused in connection with Dumraon (Naya Bhojpur) P.S. Case No. 66/2009 dated 21.4.2009 registered under Sections 323, 341, 504, 468/34 of the Indian Penal Code. All the Petitioners in the aforesaid case are named in the FIR as accused vide Annexure-1. However, by an order dated 10.6.2009 passed in A.B.P. No. 213 of 2009/30/2009 learned Additional Sessions Judge, 1st Buxar, was pleased to grant them anticipatory bail till submission of charge-sheet only on the ground that the entire occurrence was result of family feud between both sides. On close of investigation charge-sheet vide Annexure-4 was submitted on 13.7.2009 against all the Petitioners. In view of submission of charge-sheet and in view of the fact that earlier order dated 10.6.2009 granting anticipatory bail to the Petitioners was for a limited period till submission of charge- sheet in the case, the Petitioners again moved before the learned Sessions Judge, Buxar for grant of anticipatory bail, which has been rejected by the impugned order dated 10.11.2009 passed in A.B.P. No. 540 of 2009 on the ground that Petitioners are not entitled to move for anticipatory bail second time and in terms of previous order they are required to appear in the Court below for seeking regular bail.

4. Learned Counsel appearing for the Petitioners submitted that learned Sessions Judge has erred in law by holding that petition filed by the Petitioners for grant of anticipatory bail for the second time was not maintainable, as the previous orders granting them anticipatory bail were for a limited period till submission of the charge-sheet. Strong reliance was placed on paragraph-10 of a judgment of learned single Judge of this Court in the case of [Anirudh Prasad @ Sadhu Yadav Vs. The State of Bihar](#) , and it was submitted that even if previous anticipatory bail order was for a limited period till submission of the charge-sheet, then after submission of charge-sheet, the Petitioners are entitled to invoke the jurisdiction u/s 438, Code of Criminal Procedure for second time and, therefore, it was submitted that petition filed on their behalf was maintainable. In support of their contention reliance was also placed on a judgment of the Apex Court in the case of [Bharat Chaudhary and Another Vs. State of Bihar and Another](#) , .

5. Learned Counsel appearing on behalf of the State submitted that petition filed on behalf of the Petitioners was not maintainable in view of the ratio laid down by the Hon"ble Apex Court in the case of Salauddin Abdul Samad Shaikh (supra), and Nirmaljeet Kaur (supra), as also in view of the judgment of our own High Court in the case

of [Mahendra Prasad Singh Vs. The State of Bihar](#), and in the case of Sheochandra Singh v. State of Bihar, reported in 2007 (4) BBCJ V 66, as also in the case of Jagnarayan Yadav @ Babajee and Ors. v. State of Bihar, reported in 2010 (2) PLJR 684.

6. I have carefully examined the judgment in the case of Bharat Choudhary (supra), which was altogether on different issue. Issue involved in the present case was not under consideration before the Hon"ble Apex Court in that case. In paragraph-7 of the judgment it has been held as follows:

7. From the perusal of this part of Section 438 of Code of Criminal Procedure, we find no restriction in regard to exercise of this power in a suitable case either by, the Court of Session. High Court or this Court even when cognizance is taken or a charge-sheet is filed. The object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a Court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself, in our opinion, prevent the Courts concerned from granting anticipatory bail in appropriate cases....

7. There is absolutely no dispute that an anticipatory bail application is maintainable even after submission of charge-sheet and after taking cognizance in the case provided the accused has neither been taken into police custody nor he has surrendered to the jurisdiction of the Court. Therefore, the ratio in the case of Bharat Choudhary does not support the case of the Petitioners.

8. Similarly, in the case of Salauddin Abdul Samad Shaikh v. State of Maharashtra (supra), a three Judges Bench of the Apex Court was pleased to hold as follows:

... 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. It should be realized that an order of anticipatory bail could even be obtained in cases of serious nature as for example murder and, therefore, it is essential that the duration of that order should be limited and ordinarily the Court granting anticipatory bail should not substitute itself for the original Court which is expected to deal with the offence. It is that Court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail....

9. The aforesaid case of Apex Court in the case of Salauddin Abdul Samad Shaikh (supra), also does not answer the issue involved in the present case. It has been merely observed in that case that normally anticipatory bail should be granted for a limited period and thereafter the matter should be left open for decision by a regular Court.

10. In order to appreciate the issue involved, it is necessary to quote Section 438 as originally incorporated in the Code of Criminal Procedure, 1973. Relevant portion is

quoted herein below:

438. Direction for grant of bail to person apprehending arrest.--(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit direct that in the event of such arrest, he shall be released on bail.

11. Section 438, Code of Criminal Procedure has undergone a major change by the Code of Criminal Procedure (Amendment) Act, 2005 (25 of 2005) coming into force with effect from 23.6.2006. By the aforesaid amending Act Section 438(1), Code of Criminal Procedure has been substituted by the following provisions which are quoted hereinbelow:

(1) Where any person had reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested.

Either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this Sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer-in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the Court grants as interim order under Sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order, to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the " Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

12. On close examination of Section 438 as stood in the principal Act and Section 438(1) as stood after amending Act, 2005, it is apparent that once the petition filed by an accused is allowed in terms of Section 438(1), then he/she is required to be released on bail. Thus it is apparent that accused person after grant of anticipatory bail is required to furnish the bail bond and; therefore, he or she surrenders to the jurisdiction of the Court. Admittedly in the present case also the Petitioners were granted anticipatory bail for a limited period till submission of charge-sheet. Accordingly, the Petitioners furnished the bail bonds and were enlarged on bail in terms of order passed by the learned Sessions Court and thereby they surrendered to the jurisdiction of the learned Magistrate. A Constitution Bench of the Apex Court in the case of [Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab](#), while considering the scheme, scope and mandate of Section 438, Code of Criminal Procedure has clearly held in paragraph-39 of the judgment that provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of anticipatory bail to an accused, who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy u/s 437 or Section 439 of the Code.

13. The aforesaid Constitution Bench in paragraph 42 has further held as follows:

The ad interim order too much conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that /Stage. Should the operation of an order passed u/s 438(1) be limited in point of time? Not necessarily. The Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Sections 437 or 439 of the Code within reasonably short period after filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

14. Our own High Court in the case of Mahendra Pd. Singh (supra), and Sheochandra Singh (supra), as also in the case of Jagnarayan Yadav @ Babajee Yadav (supra), has clearly held that once the accused is taken into custody or surrenders to the jurisdiction of the Court, then in that case the petition filed on his behalf u/s 438, Code of Criminal Procedure is not maintainable.

15. In view of the fact that the Petitioners were granted anticipatory bail previously for a limit period only till submission of charge-sheet, and they accordingly furnished their bail bonds, and thereby they surrendered to the jurisdiction of the Court, therefore, in view of

ratio laid down by the Apex Court in the case of Gurbaksh Singh Sibbia (supra), and in view of ratio laid down by our own High Court in the case of Mahendra Pd. Singh (supra), and other connected cases referred to above the present applications filed afresh on behalf of the Petitioners for grant of anticipatory bail could have been held to be not maintainable and they could have been directed to surrender in the Court below for seeking regular bail, but a contrary view has been taken by a learned single Judge of our own High Court in the case of Anirudh Pd. @ Sadhu Yadav (supra).

16. In view of the divergence of opinion amongst Judges of our own High Court about the maintainability of second anticipatory bail application, if the previous anticipatory bail order was for a limited period, the issue is required to be decided authoritatively by a Division Bench or a Larger Bench. In fact the issue has not been conclusively decided even by the Hon"ble Apex Court.

17. In view of importance of issue involved in these cases, matter requires early hearing, but that would certainly take some time, it was earnestly prayed by learned Counsel appearing on behalf of the Petitioners that some interim protection may be granted to the Petitioners till matter is conclusively decided either by the Division Bench or a Larger Bench. In view of the fact that Petitioners were granted anticipatory bail for a limited period and Petitioners are not alleged to have misused the privilege of same and authoritative decision by a Division Bench or a Larger Bench may take some time therefore, it is ordered that for a period of three months or till final disposal of the case, whichever is earlier, no coercive steps shall be taken against the Petitioners in the cases which have been referred to above.

18. For the reasons recorded above, I direct that the record of these two cases be placed before Hon"ble the Chief Justice for referring the matter either to a Division Bench or to a Larger Bench for an authoritative decision on the issue formulated at the very outset in paragraph-1 of this order.