Shibram Bhowmik and Another Vs State of West Bengal

Court: Calcutta High Court

Date of Decision: May 20, 2011

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 395, 397, 397(1), 397(2), 397(3)
Penal Code, 1860 (IPC) â€" Section 323, 354, 406, 498A
Special Courts Act, 1979 â€" Section 11(1), 19(1), 20(8)

Citation: (2011) 3 CHN 650 : (2011) 3 Crimes 87

Hon'ble Judges: Raghunath Ray, J; Girish Chandra Gupta, J

Bench: Division Bench

Advocate: Bhaskar Sen, Moni Lal Chatterjee and Arijit Chatterjee, for the Appellant;Pronoti Goswami, for State, Himangshu De, Sandip Kundu and A. Bhowmick, for the Respondent

Judgement

Girish Chandra Gupta, J.
The Petitioners approached this Court praying for pre-arrest bail u/s 438 of the Code of Criminal Procedure.

The Petitioner No. 1 is the father and the Petitioner No. 2 is the son. Accusation against them amongst others has been made by the wife of the

Petitioner No. 2 under Sections 498A, 406, 323 and 354 of the Indian Penal Code.

2. Briefly stated the allegations are that the complainant Sangeeta was married to the Petitioner No. 2 on 1st March 2008. The marriage was duly

consummated. After having lived together for some time the husband/Petitioner No. 2 and his parents demanded a sum of Rs. 5 lakh. It is alleged

that in order to ensure the happiness of the complainant her parents had already given a sum of Rs. 2 lakhs together with 10 bharis of gold,

furniture, utensils and household goods but that allegedly did not satisfy the greed of the accused persons. They demanded a further sum of Rs. 5

lakhs. When the demand was not met she was subjected to both physical and mental torture. It is also alleged that the Petitioner No. 1, the father-

in-law of the complainant, used to make indecent advances and as a matter of fact attempted to rape her. The husband of the complainant refused

to believe this when the aforesaid act of his father was brought to his notice. The mother-in-law of the complainant, it is alleged, instigated her son

to physically assault her. It is also alleged that the mother of the complainant was also not spared. The father-in-law of the complainant allegedly

assaulted her.

3. An application seeking pre-arrest bail was presented by the father-in-law on 28th January 2011. The complaint is dated 17th November 2010.

The application made by the father-in-law was dismissed as not pressed by this Bench by an order dated 3rd February 2011 pursuant to the

prayer of the learned Advocate for the Petitioner Shibram Bhowmick. Subsequently on 4th February 2011 another application u/s 438 of the

Code of Criminal Procedure was filed by Mr. Shibram Bhowmick and his son Pinku Bhowmick alleging, inter alia, as follows:

No application for anticipatory bail has been preferred by the Petitioners before this Hon''ble Court in connection with the instance case.

4. It is this application which was taken up for hearing. It was contended that the prayer of the Petitioner No. 1 Shibram Bhowmick cannot be

entertained because he had his application for pre-arrest bail dismissed as not pressed on 3rd February 2011. Mr. Dey, learned Senior Advocate

appearing for the de facto complainant opposed the prayer for any anticipatory bail to any of the Petitioners.

5. Mr. Sen, learned Senior Advocate appearing in support of the petition drew our attention to Black''s Dictionary in order to impress upon us that

withdrawal simply means ""the act of taking back"". He contended that by withdrawing an application the Court was not requested to consider the

matter. Therefore there is no room for the argument that the Court is being asked to decide the matter over again.

6. His second submission was that an application for anticipatory bail is an interlocutory matter for which Court may be approached repeatedly.

He in support of his submission relied on the judgment in the case of Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, . He drew

our attention to paragraph 24 wherein the following views were expressed:

At the conclusion of the hearing on the legal aspect, Shri Poti, learned Counsel appearing for the State Government contended, on instructions, that

an order passed by a Designated Court for grant or refusal of bail is not an ''interlocutory order'' within the meaning of Section 19(1) of the Act

and therefore an appeal lies. We have considerable doubt and difficulty about the correctness of the proposition. The expression ''interlocutory

order'' has been used in Section 19(1) in contradistinction to what is known as final order and denotes an order of purely interim or temporary

nature. The essential test to distinguish one from the other has been discussed and formulated in several decisions of the Judicial Committee of the

Privy Council, Federal Court and this Court. One of the tests generally accepted by the English Courts and the Federal Court is to see if the order

is decided in one way, it may terminate the proceedings but if decided in another way, then the proceedings would continue. In V.C. Shukla v.

State, Fazal Ali J. in delivering the majority judgment reviewed the entire case law on the subject and deduced therefrom the following two

principles, namely, (I) that a final order has to be interpreted in contradistinction to an interlocutory order; and (ii) that the test for determining the

finality of an order is whether the judgment or order finally disposed of the rights of the parties. It was observed that these principles apply to civil

as well as to criminal cases. In criminal proceedings, the word "judgment" is intended to indicate the final order in a trial terminating in the

conviction or acquittal of the accused. Applying these tests, it was held that an order framing a charge against an accused was not a final order but

an interlocutory order within the meaning of Section 11(1) of the Special Courts Act, 1979 and therefore not appealable. It cannot be doubted that

the grant or refusal of a bail application is essentially an interlocutory order. There is no finality to such an order for an application for bail can

always be renewed from time to time. It is however contended that the refusal of bail by a Designated Court due to the non-fulfilment of the

conditions laid down in Section 20(8) cannot be treated to be a final order for it affects the life or liberty of a citizen guaranteed under Article 21.

While it is true that a person arraigned on a charge of having committed an offence punishable under the Act faces a prospect of prolonged

incarceration in view of the provision contained in Section 20(8) which places limitations on the power of a Designated Court to grant bail, but that

by itself is not decisive of the question as to whether an order of this nature is not an interlocutory order. The Court must interpret the words "not

being an interlocutory order" used in Section 19(1) in their natural sense in furtherance of the object and purpose of the Act to exclude any

interference with the proceedings before a Designated Court at an intermediate stage. There is no finality attached to an order of a Designated

Court granting or refusing bail. Such an application for bail can always be renewed from time to time. That being so, the contention advanced on

behalf of the State Government that the impugned orders passed by the Designated Courts refusing to grant bail were not interlocutory orders and

therefore appealable u/s 19(1) of the Act, cannot be accepted.

7. He also drew our attention to the judgment in the case of Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others, , at page 729

(para 89)

It is imperative for the Courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the

basis of the available material and the facts of the particular case. In cases where the Court is of the considered view that the accused has joined

investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be

avoided.

8. He contended that the full Bench judgment of this Court in the case of Sudip Sen reported in 2010 (3) C Cr LR (Cal) 314 did not lay down that

a subsequent application was not maintainable.

9. As regards the assertion that no earlier application was filed, Mr. Sen contended that this was an inadvertent obvious error largely due to ""cut

paste"" device followed in the computer age.

10. Mr. Dey, learned Senior Advocate appearing for the de facto complainant however contended that a subsequent application repeating the

prayer for anticipatory bail in the absence of subsequent events is not maintainable. With respect to an application dismissed as not pressed he

submitted that the position in law is no different. He in support of his submission relied on a judgment in the case of Rajinder Prasad Vs. Bashir and

Others, wherein the Apex Court held as follows:

We are of the opinion that when the earlier revision-petition filed u/s 397 of the Code had been dismissed as not pressed, the accused-

Respondents could not be allowed to invoke the inherent powers of the High Court u/s 482 of the Code for the grant of the same relief. We do not

agree with the arguments of the learned Counsel for the Respondents that as the earlier application had been dismissed as not pressed, the accused

had acquired a right to challenge the order adding the offence u/s 395 of the Code and arraying four persons as accused-persons by way of

subsequent petition u/s 482 of the Code. The object of criminal trial is to render public justice and to assure punishment to the criminals keeping in

view that the trial is concluded expeditiously. Delaying tactics or protracting the commencement or conclusion of the criminal trial are required to

be curbed effectively, lest the interest of public justice may suffer. For exercising power u/s 482 of the Code of the learned Judge of the High

Court relied upon a judgment of this Court in Krishnan v. Krishnaveni (1997) 4 SC 241. A perusal of the aforesaid judgment, however, shows

that the reliance by the learned Judge was misplaced. This Court in Krishnan''s case (supra) had held that though the power of the High Court u/s

482 of the Code is very wide, yet the same must be exercised sparingly and cautiously particularly in a case where the Petitioner is shown to have

already invoked the revisional jurisdiction u/s 397 of the Code. Only in cases where the High Court finds that there has been failure of justice or

misuse of judicial mechanism or procedure, sentence or order was not correct, the High Court may, in its discretion, prevent the abuse of the

process or miscarriage of justice by exercise of jurisdiction u/s 482 of the Code. It was further held, ""ordinarily, when revision has been barred by

Section 397(3) of the Code, a person-accused/complaint- cannot be allowed to take recourse to the revision to the High Court u/s 397(1) or

under inherent powers of the High Court u/s 482 of the Code since it may amount to circumvention of provisions of Section 397(3) or Section

397(2) of the Code.

We are of the opinion that no special circumstances were spelt out in the subsequent application for invoking the jurisdiction of the High Court u/s

482 of the Code and the impugned order is liable to be set aside on this ground alone.

11. Therefore two questions arise for determination:

a) Whether an application seeking pre-arrest bail is maintainable after an earlier application by the same applicant for the selfsame relief was

dismissed as not pressed?

b) Whether the prayer for pre-arrest bail in this case should be allowed?

An application for bail has authoritatively been held to be an interlocutory business. An application for pre-arrest bail is however slightly different

from an application for regular bail. In the case of an application for bail the applicant is already in custody. Therefore there is no likelihood of any

impediment being caused to the progress of investigation into the alleged crime by acceding to the prayer for bail in an appropriate case whereas in

the case of a prayer for pre-arrest bail the investigation into the alleged crime is likely to be seriously impeded by acceding to a prayer in a case

requiring an in depth investigation.

12. Section 41 of the Code of Criminal Procedure (hereinafter referred to as the Code) authorises the police to arrest any person in a cognizable

case without warrant whereas Section 438 of the Code is an overriding power vested in the Higher Courts empowering grant of bail in non-

bailable cases to persons apprehending arrest considering

(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 fleeing from justice; and

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

13. The key word in Section 41 of the Code of Criminal Procedure is not a mere accusation but (a) a reasonable complaint or (b) credible

information or (c) a reasonable suspicion in connection with a cognizable offence before power u/s 41 of the Code can be exercised. Whereas

Section 438 of the Code provides for pre-arrest bail in a case of non-bailable accusation. The Court has to strike a balance between the needs of

an arrest and the urgency to secure liberty to the citizen. The remedy provided u/s 438 of the Code is, as it were, a proviso to Section 41 of the

Code. Whether custodial interrogation of the accused is essential in the interest of investigation is one of the vital questions to be taken into

consideration while considering the prayer for pre-arrest bail.

14. The alleged atrocity or torture both physical and mental is alleged to have been inflicted by the Petitioners in the secrecy and privacy of the four

corners of the matrimonial home of the complainant. A reading of the complaint does not show that there is anything to be discovered by the police

by interrogating the accused persons. Nothing was suggested to show that the Petitioners are likely to either flee from justice or to tamper the

evidence. Therefore the prayer for pre-arrest bail according to us can be safely acceded to. The second issue is thus answered.

15. But the question of greater importance is with regard to maintainability of this application which is also the first issue. The judgment in the case

of Rajinder v. Basir (Supra) cited by Mr. Dey, learned Senior Advocate may not be of much assistance because in that case what was dismissed

as not pressed was an application u/s 482 for quashing of the proceedings which if successful would have brought about an end of the proceedings

but the same is not true as regards an application for pre-arrest bail. Had the application succeeded the proceedings would not have come to an

end. The application for pre-arrest bail is an interlocutory business to which the principles of res judicata shall not apply. But repetition of same

prayer without any subsequent event is also not permissible because that would operate against the finality of the order. The Full Bench of this

Court in the case of Sudip Sen (supra) considered the question whether a second application for anticipatory bail was maintainable and held as

follows:

We, therefore, sum up our conclusions thus:

(1) Whether the applicant/accused can move second application for anticipatory bail in case his first application is rejected; if yes, in what

contingencies before the same Court or to the superior Court?

(a) A person has a right to move either the High Court or the Court of Session for directions u/s 438, Code of Criminal Procedure at his option. In

case a person chooses to move the Court of Session in the first instance and his application for grant of anticipatory bail u/s 438 is rejected, he can

again move the High Court for the same reason u/s 438, Code of Criminal Procedure itself.

(b) Where a person chooses to straightway move the High Court in the first instance and his application is rejected on the same set of facts and

circumstances, he will not be entitled to move the Court of Session for the second time, but may invoke the extraordinary powers of the Supreme

Court by seeking leave to appeal in the Supreme Court.

(c) A person will be entitled to move the High Court or the Court of Session, as the case may be, for the second time. He can do so only on the

ground of substantial change in the facts and circumstances of the case due to subsequent events. However, he will not be entitled to move the

second application on the ground that the Court on earlier occasion failed to consider any particular aspect or material on record or that any point

then available to him was not agitated before the Court.

(2) Where his first application is granted, but his application for ordinary/regular bail is rejected by the trial Court u/s 437/439, Code of Criminal

Procedure.

16. A Division Bench of the Madhya Pradesh High Court in the case of Imratlal Vishwakarma and Others Vs. State of Madhya Pradesh, has held

that a second application for anticipatory bail is maintainable and it would not make any difference if the earlier application was dismissed on merit

or on account of having been withdrawn or not pressed. However the Division Bench of the MP High Court treated dismissal of an application on

merits and dismissal of an application as withdrawn or not pressed on the same footing and insisted upon new facts in order to enable the applicant

to maintain a second application as would appear from the paragraph 17 of the judgment which reads as follows:

In our opinion, the said principle would apply, on the basis of analogy, in connection with an application filed u/s 438, Code of Criminal Procedure

as well as has been tried to be elucidated by giving examples and, since the law does not preclude entertainment of any second application u/s 438,

Code of Criminal Procedure, it cannot be said that second application would not be maintainable in law. However, as has ""already been observed,

the said second bail application can of course be rejected even summarily when it is not based or necessitated on account of subsequent events

and developments or changed circumstances.

17. Withdrawal of a petition seeking pre-arrest bail without leave to apply afresh having been first obtained is likely to result in an estoppel. From

our experience we have found that applications are withdrawn for many reasons including when a favourable order is not likely to be passed by the

Bench taking applications u/s 438 of the Code or when the Petitioner wants to take a chance before the Sessions Court and such other strategic

reasons which it is not possible to exhaustively tabulate. There can be no denial of the fact that this practice cannot be encouraged on the specious

plea that an application for pre-arrest bail is an interlocutory matter. There may also be cases as in the present case where the application was not

pressed because the learned Advocate was of the view that all the evidence which he could have relied upon was not before the Court. But in such

a case he should have taken leave of the Court to apply afresh before having his application dismissed as not pressed.

18. In the case of Daryao and Others Vs. The State of U.P. and Others, Their Lordships were of the opinion, inter alia, as follows:

If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no

decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata

which has been argued as a preliminary issue in these writ petitions and no other.

19. On the basis of the discussion made above the first issue is answered as follows:

(a) In the case of an application for pre-arrest bail dismissed as withdrawn without leave to apply afresh including applications withdrawn without

disclosing reasons therefore a fresh application may be entertained provided the applicant satisfies the Court as to the circumstances which made

withdrawal of the application imperative and that the withdrawal was not for any strategic reason nor was there any lack of bona fide intentions.

(b) It is open to an accused to apply for pre-arrest bail directly to the High Court. It is also open to him to first apply before the learned Sessions

Judge and thereafter to apply to the High Court in the event his prayer for pre-arrest bail is refused by the learned Sessions Judge. If the accused,

in any case, applies directly to the High Court then he shall be deemed to have selected his forum. He cannot thereafter have his petition dismissed

as not pressed and go back to the learned Sessions Judge because he shall in that case be deemed to have waived that forum. There is however

no difficulty, if he chooses to come to the High Court after having failed or withdrawn his prayer before the learned Sessions Judge. (This view was

taken by us in Sahadev and Ors. v. The State of W.B. CRM 2877 of 2011 which has been reproduced herein to furnish a comprehensive answer

to the first issue.)

20. The prayer for pre-arrest bail, for the reasons indicated above, is allowed subject to the following conditions:

a) The Petitioner shall make himself available for interrogation by the Investigating Agency as and when required;

b) No direct or indirect threat or any inducement would be made to any person acquainted with the facts of the case so as to dissuade him from

disclosing such facts to the Court or to any police officer; and

c) Further and other terms as the concerned learned Court below may think fit and proper.

21. This order of anticipatory bail would remain operative for a period of 30 (thirty) days from date. He shall be entitled to apply for regular bail. If

and when such an application is made, the same shall be considered on its own merit by the appropriate regular Court.

22. In case of violation of any of the conditions, the regular bail to be granted by the learned Chief Judicial Magistrate, Hooghly, shall automatically

stand cancelled and the Petitioner shall be take into custody.

23. This application is, thus, disposed of.

24. Urgent xerox certified copy of this judgment, be delivered to the learned Advocate for the parties, if applied for, upon compliance of all

formalities.

Raghunath Ray, J.

25. I agree.