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Calcutta High Court

Case No: C.R.M. No''s. 1898, 2223, 2588 and 5496 etc. etc. of 1999

Mahesh Kumar Sarda alias Maheswari	APPELLANT
Vs	
Union of India (UOI)	RESPONDENT

Date of Decision: March 2, 2000

Acts Referred:

- Constitution of India, 1950 - Article 214, 225
- Criminal Procedure Code, 1973 (CrPC) - Section 2, 438, 81
- General Clauses Act, 1897 - Section 3(25)

Citation: (2001) 1 ALD(Cri) 127 : (2000) CriLJ 2951 : 104 CWN 689 : (2000) 4 RCR(Criminal) 129

Hon'ble Judges: S.B. Sinha, J; M.H.S. Ansari, J; D.P. Sengupta, J

Bench: Full Bench

Advocate: Sasanka Kumar Ghosh, for the Appellant;Kazi Safiullah, PP., S.K. Mahata, S. Mallik, Ratna Ghosh, Jharna Biswas, H. Saha, Himangshu De, Debasish Roy and S. Bandopadhyay, for the Respondent

Judgement

S.B. Sinha, J.

The reference to this Bench has been made by a Division Bench of this Court consisting of G.R. Bhattacharjee and Malay Kumar Basu, JJ., questioning the correctness of a judgment of another Division Bench in Sadhan Chandra Kolay v. State consisting of S.K. Tiwari and D.P. Sarkar (II), JJ., reported in 1999 (1) CLJ 20 on the following two questions :-

1. Whether the decision of the Division Bench in Sadhan Chandra Kolay v. State 1999 (1) CLJ 20, insofar as the same holds that petition for anticipatory bail u/s 438, Cr.P.C. in connection with any offence of an outstation cannot be entertained by this Court, and as such, such a petition is not maintainable, is correct view of the Full Bench decision of this Court in Sailesh Jaiswal v. State of West Bengal 1998 Cri LR 342.

2. Whether in view of the majority decision of the Full Bench in Sailesh Jaiswal v. State of W. B. 1998 Cri LR 342, this Court has jurisdiction to grant anticipatory bail in a fit case to a limited extent as mentioned therein, even in an outstation case.

2. The questions raised before us are limited, inasmuch as evidently, the question as to whether this Court in exercise of its jurisdiction u/s 438 of the Code of Criminal Procedure can entertain an application for grant of anticipatory bail in respect of an offence committed outside its jurisdiction, has been considered by a Five Judges'' Special Bench in Sailesh Jaiswal v. State of West Bengal. The main judgment in Sailesh Jaiswal''s case has been delivered by Panigrahi, J. wherewith V.K. Gupta, J. and N.A. Chowdhury, J. concurred. Mishra, C. J. however, while recording His Lordship''s agreement with the view that the exercise of jurisdiction of anticipatory bail by High Court or the Court of Sessions beyond the local limits of the jurisdiction is limited to the extent of a bail for the transitional period, proceeded to assign additional reasons therefore. Bhattacharjee, J. however, disagreed with the majority view.

3. In Sadhan Chandra Kolay (supra) the Division Bench, interpreting the decision of Special Bench however, held :-

On the other hand in the self-same judgment the then Chief Justice of this Court, namely, Mr. Justice Probha Shankar Mishra, in his deliberation has made it clear that the jurisdiction u/s 438, Cr.P.C. shall be exercised by the Sessions Judge or the High Court within the territorial jurisdiction of which the offence was committed. It has been made clear that passing any direction to any Court outside the State, where the territorial jurisdiction does not extend, would be an exercise in excess of the power conferred by the statute. But at the same time in paragraph 37 of the self-same judgment, the Hon''ble Ex-Chief Justice clearly expressed that he concurred with the view expressed by the Hon''ble Mr. Justice Basudeva Panigrahi.

4. In Sadhan Chandra Kolay, (supra), the Court upon considering the meaning of ''High Court'' as contained in Section 2(e) of the Criminal Procedure Code as also Article 214 of the Constitution of India vis-a-vis provision of Section 81 of the Code observed :-

This particular power u/s 81 of the Cr.P.C. can be exercised by the Magistrate only when a person is arrested in connection with an offence committed outside the territorial jurisdiction of that Magistrate and where for the arrest of such person, a warrant has been issued by the Magistrate within whose territorial jurisdiction the offence was committed. This power of granting bail as contemplated by Section 81, Cr.P.C. is a provision for granting bail during transitional period and this power can be exercised only by the Magistrate or Sessions Judge as mentioned in the statute itself. But Section 81, Cr.P.C. does not confer any such power on the High Court of the State; because, the High Court is a Court of record and as such the accused after arrest cannot be produced before the High Court as required by Section 81, Cr.P.C.

Therefore, it is not clear what the Full Bench has tried to convey by the expression ''the jurisdiction is limited to the extent of consideration of bail for the transitional period....

Interpreting the judgment in Sailesh Jaiswal, it was held :-

Thus considering the position of law of different aspects of this particular point, we are not ready to accept the interpretation as advanced by the learned Advocate for the petitioner of the Full Bench decision in Jaiswal''s case (supra). This decision never in clear terms lays down that the High Court can exercise the power and jurisdiction u/s 438, Cr.P.C. beyond the territorial jurisdiction of the State. In short, we hold that the petition for the anticipatory bail u/s 438, Cr.P.C. in connection with an offence of any outstation cannot be entertained by this High Court and as such the petition is not maintainable and accordingly disposed of.

5. As indicated hereinbefore, the Division Bench disagreed with the said views in Sadhan Kolay (supra).

6. It is not and cannot be disputed that the decision of the Special Bench is binding on all other Benches including this Bench,

7. What is, therefore, required to be considered is as to whether the Hon''ble Judges in truth and substance differed in their views although apparently recorded their concurrence.

8. Having considered the rival submissions made at the Bar, and having perused the decision of the Special Bench in Sailesh Jaiswal, we are of the opinion that the Division Bench in Sadhan Chandra Kolay was not correct in its interpretation of the Special Bench judgment.

9. It is not a well settled principles of law that a judgment cannot be read as a statute. For the purpose of considering the ratio of the decision the entire decision has to be read and the same must be construed reasonably and fairly.

10. For the aforementioned purpose, even the observations made and/or findings recorded in other parts of the judgment must also be taken into consideration if any ambiguity appears therein.

11. A bare perusal of the said judgment, however, leaves no manner of doubt that the majority judgment in Sailesh Jaiswal in no uncertain terms has laid down that a High Court cannot exercise its power u/s 438 of the Code of Criminal Procedure for issuing direction that in the event of arrest the applicant shall be released on bail in terms of Section 438 of the Code of Criminal Procedure meaning thereby upon considering the matter on merits as would appear from the following observation of Panigrahi, J.:-

It seems abundantly manifest that on a larger principle of criminal administration of justice the Court having jurisdiction to enquire and try the offence should alone be

competent to entertain such application. The jurisdiction for grant of bail or anticipatory bail is within the periphery of place of investigation unless a statute expressly provides otherwise. Therefore, it is axiomatic that the Court having territorial jurisdiction ordinarily should seize the jurisdiction to entertain the application for anticipatory bail.

12. The learned Judge referred to various decisions delivered by different High Courts including this Court but chose to accept the Full Bench decision of Patna High Court in Syed Zafrul Hassan and Another Vs. State, , . The Full Bench of Patna High Court in the aforesaid case considered various decisions rendered by different High Courts as also the decision of the Supreme Court of Samarias Trading Co. Pvt. Ltd. Vs. S. Samuel and Others, , as also the provisions of Articles 214 and 225 of the Constitution of India read with the provision of Section 3(25) of the General Clauses Act, and held :-

To finally conclude on this aspect the answer to the question posed at the outset is rendered in the negative and it is held that Section 438 of the Code does not permit the grant of anticipatory bail by any High Court or any Court of Session within the country where the accused may choose to apprehend arrest. Such a power vests only in the Court of Session or the High Court having jurisdiction over the locale or the commission of the offence of which the person is accused.

13. In arriving at such a conclusion, the Full Bench considered the Division Bench judgment of this Court in B.R. Sinha and Others Vs. The State, and Dr. L.R. Naidu v. State of Karnataka, reported in 1984 Cri LJ 757 and recorded their Lord-ships disapproval thereto.

14. Having arrived at a decision that High Court or the Court of Sessions in such a situation cannot exercise its power u/s 438 of the Code of Criminal Procedure on merit, the Court considered as to whether keeping in view the provisions laid down in Chapter II of the Code of Criminal Procedure, such a power can be exercised for transitional period. Panigrahi, J., analysed the phraseology used in Section 438 of the Code and held :-

In case, either the High Court or the Court of Sessions on reference of material produced before it that there is likelihood of a person being arrested in non-bailable offence, it could grant anticipatory bail directing such person to be released on execution of bond or by imposing any other condition which the arresting officer deemed fit, just and proper. After such person being released on anticipatory bail by the arresting officer, these accused persons within reasonable time but in no case beyond 24 hours of arrest shall appear before the Court within the jurisdiction of which he ordinarily resides. Either the Magistrate, Chief Judicial Magistrate or the Court of Sessions upon consideration of the material placed by the arresting officer and on hearing the Public Prosecutor of the locality in which the offences alleged to have been committed shall pass an appropriate order regarding regular bail u/s 81

of the Code of Criminal Procedure, the exercise of jurisdiction of anticipatory bail by any other Court namely the High Court or the Court of Session beyond the local limits of the jurisdiction is limited to the extent of consideration of a bail for the transitional period but it has no jurisdiction to transgress into the limits of the local jurisdiction of the Court within which offence is alleged to have been committed. With the above observation, the reference of the Division Bench has been answered.

15. A conjoint reading of the said paragraph together with His Lordship''s findings in other paragraphs, in our considered view, leaves no manner of doubt that His Lordship made the aforesaid observations keeping in view the fact that this Court or a Court of Session upon reference of the materials produced before it can grant anticipatory bail only for a transitional period by directing such person to be released on execution of bond or by imposing a condition which the arresting officer deems fit, just and proper. But once such a person is released by the arresting officer, the accused person must within a reasonable time but in no case beyond 24 hours of arrest shall appear before the Court within the jurisdiction of which he ordinarily resides, whereupon the Magistrate, Chief Judicial Magistrate of the Court of Session, as the case may be, may pass an appropriate order of regular bail in terms of the second proviso appended to Section 81 of the Code of Criminal Procedure.

16. As indicated hereinbefore, Gupta and Chowdhury, JJ. having agreed with the said view, the majority decision must be held to have arrived at the aforementioned finding. The majority decision was, thus, although binding upon the Division Bench in Kolay, the learned Judges chose to proceed further and sought to analyse the judgment of Mishra, C. J. Such a course was not open to them. In Dukhi Shyam Benapani v. Parasmal Rampuria, reported in 1998 Cri LR 236, a Special Bench of this Court held that a learned single Judge could not have taken a view contrary to that of the Division Bench. Mishra, C. J. also, however, in our considered opinion, did not come to a different conclusion as was sought to be stated by the Division Bench. In Sailesh Jaiswal (supra), Mishra, C. J. stated :-

Any order u/s 438 of the Code by this Court, other than the limited jurisdiction for the transitional period, that is arrest and release on bail by the arresting authority or the Magistrate on whose orders the person arrested is required to be produced before the Judicial Magistrate having jurisdiction in the other State or Union Territory, shall be in excess of jurisdiction." (Emphasis Supplied) Having said so, the learned Judge proceeded to observe :-

It is not just the threat of arrest or residence of the person sought to be arrested which is only to give jurisdiction for bail u/s 438 of the Code. It is the information that he is sought to be arrested in connection with a non-bailable offence that the jurisdiction to grant anticipatory bail is exercised. Such positive information shall leave no room to think of any course other than the person apprehending arrest moving the High Court of the State or Union Territory within whose jurisdiction the

police station, at which the case is registered, falls.

17. The aforementioned findings read with the findings recorded in paragraph 29 of the judgment, thus, clearly demonstrate that Mishra, C.J., also had come to the conclusion that the power u/s 438 of the Code of Criminal Procedure cannot be exercised by a Court having no territorial jurisdiction other than the limited jurisdiction for the transitional period, that is, arrest and release on bail by the arresting authority or the Magistrate on whose order person arrested is required to be produced before the Judicial Magistrate having jurisdiction in the other State of Union Territory. Mishra, C.J. was, therefore, of the opinion that anything done in excess thereof shall be without jurisdiction.

18. However, the Division Bench in Sadhan Chandra Kolay, (supra) without considering the matter in great details, sought to proceed on the basis that this Court has no jurisdiction in terms of Section 81 of the Code of Criminal Procedure.

19. It is true that the High Court cannot exercise its jurisdiction u/s 81 of the Code of Criminal Procedure, as the power to grant bail is confined to the authorities mentioned in the second proviso appended thereto, but as indicated hereinbefore, in view of Sailesh Jaiswal (supra) High Court can exercise a limited jurisdiction so that a person upon arrest may not be taken into custody by the arresting officer, but such arresting authority may be directed to release him on bail subject to the fulfilment of the terms and conditions as may be imposed together with terms and conditions whether by way of execution of bond or otherwise that he shall, within a reasonable time, and not beyond the period of 24 hours, appear before the Courts as mentioned in the second proviso appended to Section 81 of the Code of Criminal Procedure and obtain a regular bail from such authority on such terms and conditions as the Court may deem fit and proper.

20. For the reasons aforementioned, we are of the opinion that Sadhan Chandra Kolay the Division Bench misinterpreted the decision of the Special Bench of this Court in Sailesh Jaiswal (supra). The view taken by it, thus, being contrary to the Special Bench decision cannot be sustained and is accordingly overruled.

21. The reference to this Bench is answered accordingly. Let the matters be placed before the appropriate Bench for passing appropriate order in the light of the aforementioned decision.

M.H.S. Ansari, J. and D.P. Sengupta, J.

22. We agree.