

IN THE HIGH COURT OF ORISSA: CUTTACK

ABLAPL No. 5399 of 2017

An application under section 438 of the Code of Criminal Procedure in connection with C.T. case No. 2702 of 2016 pending in the Court of S.D.J.M., Bhubaneswar.

Sanjaya Narayan Sahoo Petitioner

-Versus-

State of Odisha Opposite party

For Petitioner - Mr. Devashis Panda

For Opp. Party: - Mr. Chita Ranjan Swain
Addl. Standing Counsel

For informant - Mr. Srinivas Mohanty

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

Date of Hearing: 18.04.2018

Date of Order: 01.05.2018

S. K. SAHOO, J. The petitioner Sanjaya Narayan Sahoo has filed this application under section 438 of Cr.P.C. seeking pre-arrest bail in connection with C.T. Case No.2702 of 2016 pending in the Court of learned S.D.J.M., Bhubaneswar which arises out of Kharavela Nagar P.S. Case No.188 of 2016 for offences punishable under

sections 294, 323, 354, 420, 427, 468, 471 of the Indian Penal Code.

2. One Pravati Swain, wife of Ashok Kumar Gupta filed a complaint petition in the Court of learned S.D.J.M., Bhubaneswar on 13.5.2016 against her husband and the petitioner who is an advocate of Bhubaneswar Bar. The said complaint petition was sent by the learned S.D.J.M., Bhubaneswar under section 156(3) of Cr.P.C. to the Inspector in charge, Kharavela Nagar police station for registration of the case and investigation and accordingly on 12.06.2016 Kharavela Nagar P.S. Case No.188 of 2016 was registered.

It is the case of the complainant-victim that her husband Ashok Kumar Gupta married to another lady and tortured her demanding more dowries for which one F.I.R. was lodged by her against her husband who was an employee of Oriental Bank of Commerce. Since the service of her husband would have been affected due to institution of the first information report, in order to save his service, he made an attempt for amicable settlement. The victim, her husband and their respective family members decided to dissolve the marriage between the victim and her husband and it was agreed upon that the victim would be paid a sum of Rs.35,00,000/- (rupees thirty

five lakh) as permanent alimony by her husband. The victim engaged the petitioner as her advocate who was known to her to safeguard her interest. The petitioner was engaged as an advocate in Civil Proceeding No.32 of 2016 which was filed by the victim and her husband jointly under section 7 of the Family Courts Act, 1984 read with section 28 (1) of this Special Marriage Act, 1954 in the Court of Judge, Family Court, Bhubaneswar. It is the case of the victim that on the advice of the petitioner, she signed the divorce petition and agreement for permanent alimony and she received only Rs.9.5 lakh on 11.01.2016 but her husband in criminal conspiracy with the petitioner cheated her sum of Rs.18.5 lakh. Both the accused persons denied their liability to pay money to the victim after taking fraudulent illegal deed of divorce. On the deed of divorce, the petitioner took her signatures illegally giving her an impression regarding receipt of payment of Rs.7 lakh in the month of March 2016. The victim engaged a new advocate doubting the conduct and character of the accused persons and through her new advocate, she came to know that fraud/cheating has been practised on her. On 12.05.2016 when the victim asked her husband about such fraud/cheating, he abused her in filthy language, pushed and dragged her before public with intent to disrobe her and threatened to kill her.

3. Mr. Devashis Panda, learned counsel appearing for the petitioner contended that the victim is an educated lady and she is working as Asst. Manager in Andhra Bank at Power House Branch, Bhubaneswar and she has deliberately suppressed her status in the complaint petition as well as in the original mutual divorce proceeding. It is contended that the victim married Ashok Kumar Gupta on 08.08.2013 before the Sub-Registrar, Bhubaneswar but after marriage, dispute arose between the parties. When the victim came to know about the marital status of her husband, she lodged an F.I.R. against her husband and other in-laws' family members and accordingly, Bhubaneswar Mahila P.S. Case No.347 of 2015 was registered under sections 498-A/417/342/494/506/34 of the Indian Penal Code read with section 4 of the Dowry Prohibition Act. It is further contended that after lodging of the F.I.R. by the victim, the matter was amicably settled between the parties and as per their own decision, a divorce proceeding was filed. It is further contended that as per the agreement between the parties, a sum of rupees nine lakh fifty thousand was transferred from the account of the husband of the victim to the account of Panchu Swain who is the father of the victim on 11.01.2016 on the date of filing of the divorce petition. Subsequently on 19.03.2016 the husband of the victim issued four cheques in favour of the victim, total

amounting to rupees seven lakh which was also encashed by the victim. It is contended that the victim and her husband executed a mutual divorce deed before the D.S.R., Bhubaneswar on 19.03.2016 and in the said deed of divorce, there was no mention about the quantum of permanent alimony. It is contended that the petitioner has never executed any document with regard to the quantum of permanent alimony and the victim never produced any original document with regard to permanent alimony as alleged before the Court or before the Investigating Officer and therefore, the conduct of the victim is suspicious. It is further contended that after filing of the complaint petition/F.I.R., the victim filed a petition before the learned Judge, Family Court, Bhubaneswar for declaration of the registered divorce deed dated 19.03.2016 as fraudulent and void with a further prayer for permanently restraining her husband in using the divorce deed for any purpose and also for recovery of Rs.18,50,000/- (rupees eighteen lakh fifty thousand) only from her husband and the said proceeding was registered as C.P. No.330 of 2016 which was ultimately dismissed on 16.01.2017. It is further contended that after changing the counsel, the victim has instituted a false case against the petitioner to harass him on the accusation of preparation of forged document and cheating. It is further contended that if any outstanding dues

was there towards permanent alimony, the victim could have instituted appropriate proceeding for recovery of such amount from her husband and the petitioner has been unnecessarily dragged into the dispute between the victim and her husband. It is further contended that there is no chance of absconding or tampering with the evidence and since the petitioner is an advocate of Bhubaneswar Bar, unless he is released on anticipatory bail, he will face unnecessary humiliation in the society. The petitioner filed an additional affidavit annexing certain relevant documents.

Mr. Srinivas Mohanty, learned counsel appearing for the victim in his imitable style vehemently opposed the prayer for bail and contended that the conduct of the petitioner as an advocate is highly suspicious and he was in hand in glove with the husband of the victim although he was the advocate for the victim and he conspired with the husband of the victim, created forged documents in order to cheat the victim who without knowing the niceties of law reposed trust on the petitioner and believed the petitioner and signed on different documents as told to her by the petitioner on good faith and she was unaware about the ill intention of her husband and also the petitioner. It is contended by the learned counsel for the victim that knowing

full well that a mutual divorce petition can only be entertained by the learned Judge, Family Court, Bhubaneswar, a divorce deed as per mutual consent was prepared on the advice of the petitioner wherein nothing was mentioned about the permanent alimony deliberately and the victim put her signatures thereon on good faith as advised by the petitioner. It is contended by the learned counsel that after coming to know about the illegal activities of her husband and the petitioner, the victim filed Civil Proceeding No.330 of 2016 before the learned Judge, Family Court, Bhubaneswar for declaring the registered deed dated 19.03.2016 purporting divorce as fraudulent and void and also permanently restraining her husband for using the divorce deed 19.03.2016 for any purpose and for recovery of rupees eighteen lakh fifty thousand from her husband. The learned Judge, Family Court, Bhubaneswar vide order dated 16.01.2017 declared the registered deed 19.03.2016 as illegal, void and inoperative and restrained the husband of the victim permanently from using the said deed till a decree of divorce dissolving the marriage between the victim and her husband is pronounced by a competent Court. The prayer for recovery of rupees eighteen lakh fifty thousand as was claimed by the victim from the salary of her husband stood dismissed.

Mr. Chita Ranjan Swain, learned Addl. Standing counsel produced the case records and opposed the prayer for bail and contended that the allegation against the petitioner is serious in nature and being an Advocate, since he has flouted the professional ethics, he is not entitled to be released on anticipatory bail.

4. During hearing of the bail application, on 05.07.2017 the learned counsel for the State took time for recording the 164 Cr.P.C. statement of the victim and accordingly, the 164 Cr.P.C. statement of the victim was recorded on 12.07.2017.

In her statement recorded under section 164 Cr.P.C., the victim has stated, inter alia, that when dissention started with her husband Ashok Kumar Gupta, she agreed for a mutual divorce with permanent alimony of Rs.50,00,000/- (rupees fifty lakh) only and accordingly, she instructed the petitioner who was her friend and an advocate to prepare the divorce agreement with a sum of Rs.50,00,000/- (rupees fifty lakh) only. She stated that the petitioner took her signatures in Vakalatnama, stamp papers and also in blank papers but the petitioner prepared an agreement for permanent alimony of Rs.35,00,000/- (rupees thirty five lakh) only. The original agreement was not given to the victim and after ten days, a xerox copy of the agreement

was given to her. She further stated that Rs.9.5 lakh was given to her by way of cheques and in the agreement, it was written that Rs.15.5 lakh would be given in the month of February 2016 which was not given to her. In March 2016, cheques amounting to Rs.7,00,000/- (rupees seven lakh) only in total were given to her and some of her signatures were taken in the Marriage Registration Office in the deed of divorce and it was told to her that notice would be issued to her and the balance amount of Rs.8.5 lakh would be given to her afterwards. It is further stated that the petitioner avoided receiving phone calls from her and she came to know from her husband that there has already been divorce between them and accordingly, she filed a petition to cancel the deed of divorce. It is further stated in her 164 Cr.P.C. statement that after she lodged F.I.R. against the petitioner, the petitioner came to her Branch Office and threatened her to kill and she also received a legal notice on behalf of the petitioner demanding 10% of the alimony which she received from her husband.

5. On going through the case records and documents filed by the respective parties, it appears that an agreement for permanent alimony was executed between the victim and her husband namely Ashok Kumar Gupta on 11.01.2016 before Sri

P.K. Nanda, Notary Public, Bhubaneswar wherein it is mentioned that due to misunderstanding between the parties, they decided to divorce each other and divorce suit bearing C.P. No.32 of 2016 was filed before the Family Court, Bhubaneswar. It is further indicated that the husband of the victim agreed to pay a sum of Rs.35,00,000/- (rupees thirty five lakh) to the victim and on that day he paid a sum of Rs.9,50,000/- (rupees nine lakh fifty thousand) to the victim by way of a cheque. It is further indicated that the husband of the victim shall pay a further sum of Rs.15,50,000/- (rupees fifteen lakh fifty thousand) to the victim in the month February 2016 and before the close of C.P. No.32 of 2016 filed before the Marriage Officer, Bhubaneswar, the husband of the victim would pay Rs.10,00,000/- (rupees ten lakh) to the victim for permanent alimony/compensation.

According to the victim as per her 164 Cr.P.C. statement, by taking her signatures in stamp papers and blank papers, such a document was prepared.

On bare perusal of the agreement for permanent alimony, it appears that the petitioner as advocate has certified that the agreement was drafted by him as per the instruction of the parties. If the victim had specifically instructed to the petitioner to prepare divorce agreement with a sum of

Rs.50,00,000/- (rupees fifty lakh), there was no earthly reason on the part of the petitioner to prepare an agreement for permanent alimony with a sum of Rs.35,00,000/- (rupees thirty five lakh) without intimating the victim in that respect. The victim was not provided with the original of the agreement for permanent alimony instantly but after ten days, she was given a xerox copy. It appears that the agreement paper was purchased by Ashok Kumar Gupta, husband of the victim on 11.01.2016 from C.R. Prusty, Stamp Vender and he has also received the original agreement on 11.01.2016 which would be evident from the endorsement made in the agreement.

On 11.01.2016 a petition for divorce by mutual consent under section 28 of the Special Marriage Act, 1954 was filed before the Judge, Family Court, Bhubaneswar by the victim and her husband which was registered as Civil Proceeding No.32 of 2016. In the said petition, the victim is shown to have been identified by the petitioner on 11.01.2016 before Jagynesar Acharya, Notary Public, Bhubaneswar. Most peculiarly there is no mention about any fixation of permanent alimony between the parties which is to be given by the husband of the victim to her. Similarly in the agreement for permanent alimony, it is mentioned that C.P. No.32 of 2016 was filed before Marriage

Officer, Bhubaneswar which is not correct. Therefore, prima facie it appears that on 11.01.2016 agreement for permanent alimony was executed so also petition for divorce by mutual consent was filed before the learned Judge, Family Court, Bhubaneswar in C.P. No.32 of 2016. The agreement for permanent alimony was drafted by the petitioner and he also certified the contents of the agreement to have been drafted as per the instruction of the parties. The petitioner has also identified the victim before the Notary Public on the very day in the petition for divorce by mutual consent.

The petitioner has filed an additional affidavit before this Court which is dated 02.08.2017 in which he has mentioned in paragraph 7 that he had no knowledge about the quantum permanent alimony which is obviously an incorrect statement in view of the fact that he has himself drafted the agreement for permanent alimony and certified the same to be correct on 11.01.2016 before Mr. P.K. Nanda, Notary Public, Bhubaneswar. Again in paragraph 10 of the additional affidavit dated 02.08.2017, the petitioner has mentioned that he had never executed any document with regard the quantum of permanent alimony which is again an incorrect statement. It is further mentioned that the victim never produced any original document

with regard to quantum of permanent alimony before any Court or before the investigating officer which creates serious doubt. When as per the endorsement made in the agreement for permanent alimony, the original agreement was retained by the husband of the victim on 11.01.2016 and a xerox copy of the same was handed over to the victim after ten days by the petitioner as per her 164 Cr.P.C. statement, the averments taken in the additional affidavit in that respect loses all its sanctity.

On 19.03.2016 a divorce deed per mutual consent was presented before the Registering Officer, Bhubaneswar in which the victim's husband was the first party and the victim was the second party and in this divorce deed, nothing was mentioned about the fixation of permanent alimony. According to the victim, this mutual divorce deed was procured illegally without explaining the contents of the deed to her and when she came to know about the same, she filed a petition before the Judge, Family Court, Bhubaneswar vide Civil Proceeding No.330 of 2016 to declare the divorce deed dated 19.03.2016 as fraudulent and void and also with a prayer to restrain her husband from using the divorce deed for any purpose and for recovery of Rs.18,50,000/- from her husband.

The learned Judge, Family Court, Bhubaneswar vide judgment and order dated 16.01.2017 in Civil Proceeding No.330 of 2016 declared the divorce deed document dated 19.03.2016 as illegal, void and inoperative and the husband of the victim was also permanently restrained from using the said deed till a decree of divorce dissolving the marriage between the parties is pronounced by a competent Court. However, the prayer of the victim directing her husband for recovery of Rs.18,50,000/- (rupees eighteen lakh fifty thousand) from his salary was not accepted.

Most peculiarly the petitioner in his additional affidavit filed before this Court has mentioned in paragraph 11 that the petition filed by the victim before the learned Judge, Family Court, Bhubaneswar in Civil Proceeding No.330 of 2016 was dismissed vide judgment dated 16.01.2017. This is apparently a false statement.

The learned counsel for the victim has drawn the attention of this Court to the legal notice issued on behalf of the petitioner on dated 20.05.2016 to the victim by S & S Legal Services wherein it is indicated that she had promised to give 10% of the amount of permanent alimony which she would get and therefore, she has to clear Rs.2,20,000/- (rupees two lakh

twenty thousand) within fifteen days of the receipt of the notice and if failed, legal proceeding is to be instituted. It is contended by the learned counsel for the informant that an advocate like the petitioner demanding percentage on the permanent alimony is against professional ethics which is not permissible in law.

On 20.03.2018 Miss Sandhyarani Singh, Inspector of Police, Kharvela Nagar police station was present and she submitted that as per the agreement between the parties, a sum of Rs.18,50,000/- (rupees eighteen lakh fifty thousand) is yet to be paid to the victim by her husband. The learned counsel for the petitioner submitted on that day that the balance amount as per agreement has also been paid to Panchu Swain, the father of the victim. Taking note of such submission of the learned counsel for the petitioner, the Inspector in charge of Kharavela Nagar police station was asked to file an affidavit in that respect. The Inspector in charge filed an affidavit which is dated 27.03.2018. In the affidavit she has mentioned that as per the agreement of permanent alimony of Rs.35,00,000/-, the father of the victim Panchu Swain and the victim have received a sum of Rs.16,50,000/- and they have not received the rest of the amount of Rs.18,50,000/- from the husband of the victim.

Therefore, the statement which was made by the learned counsel for the petitioner on instruction that the balance amount as per agreement has also been paid to Panchu Swain is also not correct.

6. In view of the forgoing discussions, it prima facie appears that there is ring of truth in the statement of the victim that her Vakalatnama along with her signatures in stamp papers and blank papers were collected by the petitioner. The conduct of the petitioner who was the advocate for the victim is also highly suspicious. Reflection of permanent alimony of Rs.35,00,000/- (rupees thirty five lakh) instead of Rs.50,00,000/- (rupees fifty lakh) in the agreement for permanent alimony dated 11.01.2016, non-mentioning of the permanent alimony amount in Civil Proceeding No.32 of 2016 filed before the learned Judge, Family Court, Bhubaneswar on the same day, presenting a divorce deed as per mutual consent on dated 19.03.2016 before the Registering Officer, Bhubaneswar without mentioning the permanent alimony amount which was declared to be illegal and void and inoperative by the learned Judge, Family Court, Bhubaneswar in Civil Proceeding No. 330 of 2016 indicates prima facie conspiracy between the petitioner and the husband of the victim. The victim

entrusted the petitioner to conduct her case on good faith as he was known to her but the petitioner has breached the trust and acted against the interests of the victim.

7. The legal profession which is essentially a service-oriented profession is the major component of the justice delivery system. Role of the legal profession in strengthening the administration of justice is unique. The relationship between the lawyer and the client is one of trust and confidence. The client entrusts the whole obligation of handling legal proceedings to an advocate and the advocate has to act with utmost good faith, integrity, fairness and loyalty. Nothing should be done by any member of the legal fraternity which might tend to lessen in any degree the confidence of the public in the fidelity, honesty and integrity of the profession. The conduct of members of the legal profession who do not follow ethics contributes to obstruction of administration of justice. If a legal practitioner fails to understand the significance of the profession and his role in providing access to justice and assisting the citizens in securing their fundamental and other rights then he has no right to continue as a member of this noble profession. Any violation of the principles of professional ethics by an advocate is unfortunate and unacceptable.

In Re: Sanjiv Dutta and Ors. reported in (1995)

3 Supreme Court Cases 619, it is held as follows:-

“20. The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the Court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society. Both as a leading member of the intelligential of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behavior. It must not be forgotten that the legal profession has always been held in high esteem and its members have played an enviable role in public life. The regard for the legal and judicial systems in this country is in no small measure due to the tiredness role played by the stalwarts in the profession to strengthen them. They took their profession seriously and practised it with dignity, deference and devotion.

If the profession is to survive, the judicial system has to be vitalised. No service will be too small in making the system efficient, effective and credible. The casualness and indifference with which some members practise the profession are certainly not calculated to achieve that purpose or to enhance the prestige either of the profession or of the institution they are serving. If people lose confidence in the profession on account of the deviant ways of some of its members, it is not only the profession which will suffer but also the administration of justice as a whole. The present trend unless checked is likely to lead to a stage when the system will be found wrecked from within before it is wrecked from outside. It is for the members of the profession to introspect and take the corrective steps in time and also spare the Courts the unpleasant duty. We say no more."

It prima facie appears that the petitioner has completely betrayed the trust reposed in him by the victim. He has even gone to the extent of claiming percentage on the permanent alimony given to the victim which is illegal. The Bombay High Court in **Re: K.L. Gauba reported in A.I.R. 1954 Bombay 478** held that fees conditional on the success of a case and which gives the lawyer an interest in the subject matter

tends to undermine the status of the profession. The same has always been condemned as unworthy of the legal profession. If an advocate has interest in success of litigation, he may tend to depart from ethics. In the case of **Mr. 'G', A Senior Advocate of the Supreme Court reported in (1955) 1 Supreme Court Reporter 490**, the Hon'ble Supreme Court held that the claim of an advocate based on a share in the subject matter is a professional misconduct. In case of **B. Sunitha -Vrs.- The State of Telengana and Ors. reported in (2018) 69 Orissa Criminal Reports (SC) 400**, it is held that claim based on percentage of subject matter in litigation cannot be the basis of a complaint under section 138 of the N.I. Act.

8. After evaluating the available materials on record with utmost care and caution, considering the nature and gravity of the accusation, availability of the prima facie material to constitute the ingredients of the offences, the manner in which the petitioner betrayed the trust reposed on him by the victim and tried to mislead this Court by filing additional affidavit in giving incorrect and false statement and the possibility of tampering with the evidence, I am not inclined to exercise the discretionary power under section 438 of the Code by granting pre-arrest bail to the petitioner.

Accordingly, the ABLAPL application being devoid of merits, stands dismissed.

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S. K. Sahoo, J.

Orissa High Court, Cuttack
The 1st May 2018/Pravakar/Sukanta