

Calcutta High Court

Sri Pritam Sen vs The State Of West Bengal on 18 October, 2001

Equivalent citations: (2002) 1 CALLT 540 HC, 2002 (1) CHN 336

Author: D Sengupta

Bench: D Sengupta

JUDGMENT D.P. Sengupta, J.

1. The present revisional application is directed against an order dated 6.4.2001 passed by the learned Sub-Divisional Judicial Magistrate, South 24 Parganas in Jadavpur P.S. Case No. 190 of 2000 dated 26.5.2000 under Section 498A/406 of the Indian Penal Code.

2. The aforesaid case was registered with Jadavpur police station on the basis of a complaint lodged by one Swastika Sen. The present petitioner is the elder brother in-law of the defacto complainant Swastika. He was made accused in the aforesaid case along with the husband and other in-

laws of the complainant. The petitioner moved an application under Section 438 of the Code of Criminal Procedure before this Court and by an order dated 11.7.2000 such prayer for anticipatory bail was allowed by this Court.

3. It is submitted by the learned Advocate of the petitioner that after such anticipatory bail was granted, to the petitioner, who is a resident of Bangalore, was never contacted by the investigating agency nor he was ever called by the investigating agency for interrogation.

4. On completion of investigation charge sheet was submitted by the police against the petitioner and others. On receipt of the chargesheet the learned Magistrate took cognizance of the offence and issued bailable W/A against the petitioner and his mother. Smt. Sumita Sen, who is admittedly a resident of Haridwar. It is at this stage the present petitioner has come up before this Court in revision.

5. Mr. Guptoo, learned advocate appearing for the petitioner submits that the order passed by the learned Magistrate Issuing W/A against the petitioner, suffers from serious illegality. The learned Advocate submits that the petitioner was granted anticipatory bail by this Court and such anticipatory bail was not restricted to limited period. So, the petitioner was under no obligation to surrender in the Court of learned Magistrate. When the petitioner was on anticipatory bail the investigating officer, on completion of Investigation, submitted charge sheet. In the chargesheet, it is pointed out by Mr. Guptoo, the investigating officer also prayed for Issuing summons against the present petitioner and his mother as both of them were on anticipatory bail. Mr. Guptoo submits that under Section 204(1) (b) the learned Magistrate has got power to issue warrant, but such an order issuing warrant must be in conformity with the provisions of Section 87 of the Code of Criminal Procedure. Mr. Guptoo refers to the provision of Section 204 Cr.PC which runs as follows:-

"204. Issue of Process--(1) if in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be --

(a) a summons case, he shall Issue his summons for the attendance of the accused, or

(b) a warrant case, he may Issue a warrant, or, of he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having Jurisdiction.

(2)***** (3) ***** (4) ***** (5) Nothing in this section shall deemed to affect the provisions of Section 87.

6. Mr. Guptoo submits that the provision of Section 87 of the Code remains totally unaffected in view of the provision of Sub-section (5) of Section 204 of the Code. Section 87 Cr.PC runs as follows:-

"87. Issue of warrant in lieu of. or in addition to, summons.--A Court may, in any case in which it is empowered by this Code to issue a summons for the appearances of any person, issue, after recording its reasons in writing, a warrant for his arrest--

(a) if, either before the Issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reasons to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure."

7. Referring to the aforesaid provision of the Code Mr. Guptoo submits that recording of reasons is necessary for issuing a warrant either in lieu of or in addition to summons, and omission to do so vitiates the warrant. According to Mr. Guptoo since no reason has been assigned by the learned Magistrate, the warrant issued by him suffers from serious illegality.

8. The next point raised by Mr. Guptoo is that by such issuance of warrant by the learned Magistrate, the right of the petitioner to make application under Section 205 Cr.PC for exemption from personal appearance, has been away; because such a right under Section 205 Cr.PC as it appears from the Section Itself, is only available in a case in which summons has been Issued. In the present case since warrant has been Issued by the learned Magistrate, the petitioner is deprived of his right to make an application under Section 205 Cr.PC.

9. Mr. Guptoo relies on a judgment of Andhra Pradesh High Court reported in 1999 Cri.LJ. 1263 (C.H. Shivaprasad and Ors. v. State of A.P.). On Perusal of the said Judgment it appears that the only point which was for consideration by the High Court of Andhra Pradesh. Is whether the High Court or the Court of Sessions in exercise of the power and Jurisdiction under Section 438 Cr.PC was bound to limit the operation of the order only for a specified period or whether such Court was not competent to direct the release of the accused in the event of their arrest until the trial is over. It was held by the learned single Judge of the Andhra Pradesh High Court that the power and Jurisdiction of the High Court and the Court of Sessions under Section 438 Cr.PC is not limited or

circumscribed in any manner whatsoever requiring to limit the operation of the directions to release the accused person in the event of arrest.

10. The next judgment relied upon by Mr. Guptoo is reported in 1999 Cri LJ 12 (Hassan Singh v. State of Rajasthan). On perusal of the said Judgment it appears that the only point which fell for consideration before the learned single Judge of Rajasthan High Court, was whether the learned Judicial Magistrate was legally competent to take cognizance of the alleged offence under Section 498A/406 IPC and to inquire into and try the said offences. On perusal of the Judgment I find that the point involved in the said case is quite different from the present one and the same is not applicable in the present case. I do not find any reason to deal of the Judgment referred to above as it is not necessary in deciding the present case.

11. The next Judgment relied upon by Mr. Guptoo is reported in 1974 Cri LJ 176 (Subol Mondal v. The State), in the said judgment it was held by the Division Bench of this Court as follows:-

"Under Section 90 of the Code of Criminal Procedure, a Court may, in any case in which it is empowered by Criminal Procedure Code to Issue summons for the appearance of any person, Issue after recording its reasons in writing, a warrant for his arrest in lieu of or in addition to summons. In this case, the learned Magistrate issued warrant of arrest against the accused persons on 8.3.72 without recording his reasons in writing in accordance with Section 90 of the Code of Criminal Procedure. As provided in Section 204(2), the provisions of Section 90 are to be observed when Issuing process under Section 204(1). The order dated 8.3.72 shall, therefore, be set aside."

12. Mr. Bikash Bhattacharjee, learned Advocate appearing on behalf of the defacto complainant submits that the order passed by the learned Magistrate does not suffer from any Illegality. Referring to the provision of Section 438(3) of the Code of Criminal Procedure, Mr. Bhattacharjee submits that since the accused petitioner was granted anticipatory bail by this Court, the learned Magistrate was justified, in view of the provision of Section 438(3) Cr.PC, in issuing bailable warrant against the petitioner. Mr. Bhattacharjee draws the attention of the Court to the provision of Section 438(3) of the Code of Criminal Procedure, which runs as follows:-

"438 (1) ***** (2) *** (3) If such person is thereafter arrested without warrant by an officer-in-charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should Issue in the first Instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under Sub-section (1)."

13. Referring to the aforesaid decision Mr. Bhattacharjee submits that the learned Magistrate committed no wrong in Issuing a bailable warrant against the accused, who was on anticipatory bail on the date of taking cognizance of the offence, as the same is provided in Sub-section (3) of Section 438 of the Code of Criminal Procedure.

14. Mr. Bhattacharjee further submits that when the Magistrate takes cognizance of an offence and issues a bailable warrant in a warrant case, he may Issue a warrant and at this stage the learned Magistrate is not required to record any reason for issuing such warrant. According to Mr. Bhattacharjee this is not a fit case in which this Court should Interfere with the order passed by the learned Magistrate.

15. I have heard the learned Advocates of the respective parties. I have also perused the Impugned order as also other connected papers which are annexed to this application. The only point which is to be decided in the present revisional application is whether the learned Magistrate was Justified in issuing a warrant at the first instance at the time of taking cognizance of the offence against the accused petitioner, who was on anticipatory bail on such date of taking cognizance, without assigning any reason.

16. The grant of order of anticipatory bail under Section 438 of the Code of Criminal Procedure is not unconditional. Conditions can be imposed during Investigation as envisaged in Section 438(2) of the Code of Criminal Procedure. Section 438(2) of the Code relates to post--Investigation period and directs the Magistrate to act in commensurate with an order of anticipatory bail earlier granted. Order of anticipatory bail does not prevent arrest. It seeks to rule out detention subsequent to arrest. So arrest is permissible,

17. A Magistrate, who takes cognizance of offence founded on the accusation, whereupon anticipatory bail was granted earlier, is entitled to issue a bailable warrant in view of the provision of Section 438(2) Cr.PC if he 'decided that a warrant should Issue at the first Instance.'" The words "decides" and "at the first Instance" are of vital significance. The word "decides" postulates a judicial decision since a decision is to be taken in a judicial proceeding after taking cognizance of the offence, and the expression "at the first instance" brings into operation Section 87 of the Code of Criminal Procedure.

18. A decision taken by a Magistrate in a Judicial proceeding must be based upon reasons and when such decision relates to Issuance of warrant in a case in which the Court "is empowered by the Code to issue a summons for the appearance of any person", the eventualities mentioned in clauses [a) and [b) of Section 87 Cr.PC must be objectively tested by the Court

19. In the backdrop of the present case which relates to the commission of an offence under Section 498A/406 IPC, the learned Magistrate, in the fitness of the things, should not have Issued warrant against the petitioner at the first Instance without assigning any reason in compliance with provisions laid down in Clauses (a) and (b) of Section 87 of the Code of Criminal Procedure. The learned Magistrate should not have been oblivious of the fact that even after the grant of anticipatory bail the petitioners were not arrested, although such course of action was available to the investigating agency. In the event of the arrest, the conditions Imposed on the petitioner in the order of anticipatory bail would have been enforceable on the petitioner. After the filing of the chargesheet there was hardly, in the background of this case, any reason to subject the petitioner to the rigours of arrest notwithstanding the warrant issued in that regard being bailable one.

20. The petitioner, neither from the chargesheet nor from the other part of the records of the case, appears to be the persons having the propensity to evade the due process of law or stay away from Court, where their appearance is required. At least no such apprehension appears to have been entertained by the learned Magistrate while issuing the warrant.

21. In view of the discussions made above I dispose of the present application. I set aside the order impugned and send back the matter again to the learned Magistrate. I make it clear that though the order issuing warrant is set aside, it will be open for the learned Magistrate to reconsider the issue of warrant of arrest in the light of the discussions made above and with reference to Section 87 of the Code of Criminal Procedure.

22. The arguments advanced by the learned Advocate of the petitioner with regard to the right to make a prayer for exemption from personal appearance in Court, needs not consideration at this stage since the order issuing warrant is set aside. It is also made clear that this Court has not in any way decided the question of grant of exemption from the personal appearance to the petitioner and leave the issue entirely at the discretion of the learned Magistrate when such occasion will arise.

23. The present revisional application is accordingly disposed of.