



Citation : CDJ 2009 MHC 297

Court : Before the Madurai Bench of Madras High Court

Case No : CrI. O.P.(MD)Nos. 4093, 4094 & 4379 of 2008 CrI. O.P.(MD)Nos.4093, 4094 of 2008

Judges : THE HONOURABLE MR. JUSTICE S. NAGAMUTHU

Parties : Venkatesh Babu Versus The State rep. by its Inspector of Police, Kumbakonam

Appearing Advocates : For the Petitioner: J. John, K. Jeganathan, Advocates. For the Respondent: Siva. Ayyappan, Government Advocate (CrI. Side).

Date of Judgment : 24-04-2008

Head Note :

Comparative Citations:

2009 (1) LW(CrI) 80, 2009 (2) MLJ(CrI) 376,

Judgment :

Common Order:

The petitioners in CrI.O.P.(MD)No.4379 of 2008 are accused Nos.1 and 5 in C.C.No.282 of 2005 on the file of the learned judicial Magistrate No.II, Madurai, facing prosecution for an offence under Section 500 I.P.C. The petitioner in CrI.O.P.(MD)Nos.4093 and 4094 of 2008 is the sole accused in S.T.C.Nos.480 and 481 of 2006 on the file of the learned First Additional District Munsif cum judicial Magistrate, Kumbakonam, facing prosecution for an offence under Section 138 of the Negotiable Instruments Act (hereinafter referred to as "the N.I.Act").

2. Admittedly, on taking cognizance and after following the mandatory procedure contained in Section 200 Cr.P.C., the learned Judicial Magistrates have issued process under Section 204 Cr.P.C by way of Non Bailable Warrant (N.B.W) against the petitioners for the arrest of the petitioners and for their production before the Court. Apprehending arrest at the hands of the respondent / police, in execution of the said N.B.Ws, the petitioners have come forward with these Criminal Original Petitions under Section 438 Cr.P.C., seeking for anticipatory bail.

3. Now, the question which emerges for consideration is as to whether a petition for anticipatory bail under Section 438 Cr.P.C., is maintainable when there is apprehension of arrest for the accused on the basis of non bailable warrant issued by a Court on taking cognizance of an offence which is bailable.

4. The learned counsel for the petitioners Mr.K.Jegannathan, would submit that since N.B.Ws have been issued against the petitioners in gross violation of the mandatory provision contained in Section 204 Cr.P.C., the apprehension of the petitioners become reasonable and therefore the petitions for anticipatory bail under Section 438 Cr.P.C are maintainable though the offences are bailable. He would rely on a Judgment of a learned Single Judge of this Court in Regupathi vs. Govindan and

another reported in 2006 (2) M.L.J 336, wherein the-learned Judge has followed an earlier judgment of another learned Single Judge of this Court in Sarath Kumar vs. Inspector Of Police, Chennai reported in 2004 M.L.J (CRL) 421 and has held that though the offences are bailable, in view of the fact that Non Bailable Warrants have been is-sued against the accused, petition for anticipatory bail is maintainable.

5. Per contra, the learned Government Advocate (Criminal Side) Mr.Siva.Ayyappan would submit since the offences are only bailable, irrespective of the fact that there is apprehension of arrest in execution of the N.B.Ws, still the petitions for anticipatory bail are not maintainable since such a petition could be maintained only in respect of non bailable offences.

6. I have considered the rival submissions made by either counsel. A perusal of the judgments relied on by the learned counsel would show that the learned Judges have, of course, taken the view that despite the fact that the offences are bailable, petition for anticipatory bail is still maintainable in a case where N.B.Ws have been issued in violation of Section 204 of the Code of Criminal Procedure. The learned Judges have taken the view that though under Section 438 of the Code of Criminal Procedure, such petition for anticipatory bail could be maintained only with reference to non-bailable offences, by invoking the inherent power of the High Court under Section 482 of the Code of Criminal Procedure, even in cases relating to bailable offence, where there is Non-bailable warrant pending, the Court has got power to grant anticipatory bail. But, with due respect, I am not in a position to persuade myself to agree with the said view expressed by the Honourable Judges in view of the judgment of the Honourable Supreme Court in R.P. Kapur ..Vs.. State of Punjab reported in A.I.R. 1960 S.C. 866. In the said judgment, the Honourable Supreme Court while dealing with Section 561(A) of the Criminal Procedure Code 1898 (Section 482 of the present Code) has held as follows:-

"6. Before dealing with the merits of the appeal it is necessary to consider the nature and scope of the inherent power of the High Court under Section 561-A of the Code. The said section saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any court or other-wise to secure the ends of justice. There is no doubt that this inherent power cannot be exercised in regard to matters specifically covered by the other provisions of the Code. ". (Emphasis supplied)

Similarly, in State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and others reported in 2003 (8) S.C.C. 50 the Hon'ble Supreme Court has held as follows:-

"16. The High Court has also invoked powers under Section 482 Cr.P.C while granting bail to the respondents. Section 482 Cr.P.C saves the inherent power of the High Court. The High Court possesses the inherent powers to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. The power has to be exercised to prevent abuse of the process of the Court or to otherwise secure the ends of justice. But, this power cannot be resorted to if there is a specific provision in the Code for the redressal of the grievance of the aggrieved party. (See Madhu Limaye ..Vs.. State of Maharashtra (A.I.R. 1978 S.C. 47)). There being a specific provision for grant of bail, the High Court clearly erred in taking recourse to Section 482 Cr.P.0 while enlarging the respondents on bail." (Emphasis supplied)

7. In view of the above law laid down by the Hon'ble Supreme Court in the judgments cited supra, the inherent power of the High Court under Section 482 of the Code of Criminal Procedure cannot be invoked at all to issue any direction which could be otherwise issued under Section 438 of the Code of Criminal Procedure. Since the said law laid down by the Honourable Supreme Court is binding on all Courts, the view expressed by the learned Judges of this Court in the judgments cited supra that under Section 482 Cr.P.C., such a direction could be given cannot be held to be binding precedents.

8. When confronted with the above law laid down by the Hon'ble Supreme Court with regard to the inherent power of the High Court under Section 482 Cr.P.C., to issue directions as stated above, the learned counsel for the petitioners would submit that Section 438 Cr.P.C., should be understood in such a way to cover the cases where non bailable warrants have been issued in gross violation of Section 204, by treating the said of-fences as non bailable. He would further submit that in cases where non bailable warrants have been issued without following the mandatory provisions contained in Section 204 Cr.P.C., since there is apprehension of arrest on the basis of such warrants, the Court of Sessions as well as this Court under Section 438 Cr.P.C should be liberal in issuing appropriate directions for the release of the accused in the event of their arrest in execution of the non bailable warrants. But, I am not in a position to countenance the said argument. Classifying the offences into bailable offences and non bail-able offences is within the competence of the Legislature. The Legislature in its wisdom in the First Schedule of the Code of Criminal Procedure has made such a classification of offences into two categories viz., bailable and non-bailable. For any reason, if the argument of the learned counsel for the petitioners is accepted that though the offences involved in a particular case are bailable and still the said offences are to be treated as non-bailable offences for the purpose of entertaining an application under Section 438 Cr.P.C it would undoubtedly amount to creating one more classification categorizing a new set of offences. Such further classification is not within the competence or purview of this Court. Therefore, though non bailable warrants have been issued in cases involving bailable of-fences, may be in gross violation of Section 204 Cr.P.C., still no direction could be issued under Section 438 Cr.P.C since the offences cannot be treated at all as non bailable offences.

9. The view taken by me herein above was exactly the same taken by a learned Single Judge of this Court in J.K.S. Manickam ..Vs.. The Inspector of Police, Kumara Palayam, Salem District reported in 1994 (2) L.W.(Crl) 764, wherein the Hon'ble Judge has held as follows:-

“4. I am at a loss to understand how the present action is maintainable, on the facts and in the circumstances of the case. Admittedly, from a copy of warrant produced before Court, it is rather crystal clear that the petitioner had been facing trial for alleged offence under Section 138 of the Negotiable Instruments Act, 1881 (Act 26 of 1981) (for short "NI Act") before the IX Metropolitan Magistrate, Kanpur. The offence under Section 138 thereof must have to be construed as an offence falling under Classification II of the Schedule attached to CrI.P.C. An offence under Section 138 of N.I.Act is punishable with imprisonment, which may extend to one year or with fine, which may extend to twice the amount of the cheque or with both. Since the punishment prescribed therefore is less than three years, it is a bailable offence, as shown in Classification II of the Schedule attached to CrI.P.C. Once it is a bailable offence, it goes without saying that the present action, which is one for grant of anticipatory bail, is not maintainable”.

10. The next grievance expressed by the learned counsel for the petitioners is that it is the common practice of many trial Courts and learned Magistrates to remand the accused as and when they are produced in execution of such non bailable warrants in cases involving bailable offences thereby forcing the accused to apply for bail. He would further submit that it is also not uncommon that some of the trial courts issue notice to the respondent police or the complainant and then grant him bail or refuse bail. Because of the said practice, according to the learned counsel, the accused are made to languish in jails for few days though they are entitled to be released on bail forthwith as the offences are bailable.

11. At this juncture, it is appropriate to deal with the power of remand in detail. Under Section 167(2) Cr.P.C., the power of remand has been given to the Magistrates to remand the accused during the course of investigation. But, after cognizance has been taken either on a private complaint or on the Police Report, the power to be exercised to remand an accused to judicial custody is provided only in Section 309(2) Cr.P.C. A comparison of these two provisions would make it manifestly clear that

insofar as the power of remand under Section 167 Cr.P.C is concerned, the Magistrate has no discretion since there is a compulsion on him to pass an order of remand to appropriate custody, if he is satisfied with the materials available on record that such detention is required for completion of the investigation.

12. This Court, in *Elumalai Vs. State of Tamil Nadu* reported in 1983 L.W.(CrI) 121 has elaborately dealt with the power of the Magistrates to remand an accused to custody under Section 167 Cr.P.C wherein this Court has clearly held that such power should not be exercised in a mechanical fashion and the Courts should afford an opportunity to the accused before passing any such order of remand. But, such power to remand an accused to custody ceases the moment the Magistrate or the Court takes cognizance of the offences. After taking cognizance, the Court may either issue summons or issue warrants in lieu of summons to secure the presence of the accused in the Court as the case maybe. The said warrant may be either with endorsement as provided under Section 71 Cr.P.C., or without such endorsement. Either on receiving the summons or in execution of the warrant or on his volition if the accused is present in Court, then the Court has got two options before it. Under Section 309(2) Cr.P.C., the Court for reasons to be recorded may either postpone the commencement of enquiry or hearing or adjourn the same and then the Court may remand the accused to custody. It is needless to say that such custody should be only judicial custody. Here a close analysis of this provision would go to show that there is no compulsion for the Court to pass an order of remand invariably in all cases. Instead, the Court can resort to Section 88 Cr.P.C., which reads as follows:-

“88. Power to take bond for appearance:-When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial”.

13. On receiving summons or in execution of the non-bailable warrant or on his volition, if the accused is present in the Court and if the Court is of the opinion that there is no need to remand the accused under Section 309(2) Cr.P.C., the Court may direct the accused either to execute a personal bond with or without sureties as provided in Section 88 Cr.P.C. If the accused either refuses to execute the bond or fails to produce the surety as directed, then the Court shall remand the accused to judicial custody. Similarly, in appropriate cases, if the Court is of the opinion that the detention of the accused in custody is absolutely necessary for the smooth conduct of the enquiry or trial, the Court may under Section 309(2) Cr.P.C., remand the accused to judicial custody without resorting to Section 88 Cr.P.C.. To put it otherwise, it is absolutely the discretion of the Court either to remand him to custody under Section 309 Cr.P.C., or to direct him to execute bond with or without sureties under Section 88 Cr.P.C. At this moment, it should be remembered that such discretion is not available to a Magistrate under Section 167 Cr.P.C., since it is a statutory compulsion that the Magistrate has to necessarily remand the accused to custody if the investigation is not completed within the statutory period and if the other requirements are satisfied. If once the Court or the Magistrate remands an accused under Section 309 Cr.P.C in the circumstances enumerated above, then the remedy for the accused is to apply for bail. After such an order of remand is passed by the Court, Section 88 Cr.P.C., becomes inapplicable to such a situation.

14. After an accused is remanded to custody under Section 309 Cr.P.C., if he applies for bail, then the Court is not concerned about the process by which the accused was brought before the Court. It is totally irrelevant that the accused was brought before the Court in execution of non bailable warrant as stated herein above. While considering the question of bail, the Court has to see whether the offences are bailable or non bailable and if the offences are bailable, the Court or the Magistrate shall release him on bail forth-with under Section 436 Cr.P.C.

15. The next question as to what the position is, if the accused commits breach of bond executed under Section 88 Cr.P.C. It is needless to say that whenever any such breach of bond is committed,

under Section 446-A Cr.P.C., the bond stands automatically cancelled. Thereafter, if the accused either appears or produced before the Court, the Court has got power either to direct him to execute a fresh bond with or without sureties or to remand him to custody.

16. Yet another clarification required is in respect of the cases where the accused, who was released on bail commits breach of such bond. If any such breach of bail bond is made, as enunciated in Section 446-A Cr.P.C., the bond automatically stands cancelled. But, the order of bail granted earlier does not either automatically expire or gets cancelled. At that juncture, for breach of the bond, if non bailable warrant is issued at that stage also Section 438 Cr.P.C cannot be invoked. In execution of the said warrant, if the accused is brought before the Court, the Court has to necessarily direct the accused to execute a fresh bond unless and until the order of bail granted earlier is cancelled. It does not mean that in all cases where there is breach of bail bond committed by the accused, the Court has no option but to direct him to execute fresh bond with or without sureties. Where such breach is committed, the Court may cancel the order of bail after is-suing notice to the accused and after affording an opportunity to him. If once the bail is so cancelled, then, there is no question of the accused claiming his right to execute a fresh bond with or without sureties or to seek anticipatory bail. After the bail is cancelled if the accused is produced either in execution of the warrant or on his own, necessarily the accused has to be remanded to custody leaving the option to the accused to apply for fresh bail.

17. In the result, the following conclusions emerge:-

(1) On taking cognizance either on a Police Report or on a private complaint, the Magistrate or Court should strictly follow Section 204 Cr.P.C., to issue summons to the accused and if necessary, to issue a warrant in lieu of summons after recording reasons as provided under Section 87 Cr.P.C. At that stage, if the offence is non bailable, petition under Section 438 Cr.P.C is maintainable and if the offence is bailable, Section 438 Cr.P.C., cannot be involved.

(2) On appearance of the accused on his own or on receipt of summons or the accused being produced in Court in execution of the non bailable warrant issued under Section 204 Cr.P.C., the Court, if deems fit, may direct him to execute a bond with or without sureties as provided in Section 88 Cr.P.C., and to release him without remanding him to judicial custody.

(3) If the accused either refuses to execute a personal bond or fails to produce sureties as directed by the Court, then, the Court shall remand him to judicial custody.

(4) In appropriate cases, without re-sorting to Section 88 Cr.P.C., after recording reasons as enshrined in Section 309 Cr.P.C., the Magistrate or the Court may remand the accused to judicial custody.

(5) If once the accused is so remanded to judicial custody by the Magistrate or the Court, then the remedy for the accused is to apply for bail and thereafter he cannot offer to execute a bond with or without sureties under Section 88 Cr.P.C.

(6) When the accused so applies for bail, it is totally irrelevant as to whether the accused was brought before the Court in execution of non bailable warrant or by some other process. The Magistrate or Court should see whether the offences are bailable or non bailable and shall re-lease the accused forthwith on bail if the offence / offences are bailable.

(7) If the accused commits breach of bond executed under Section 88 Cr.P.C., or the bail bond executed under Section 441 Cr.P.C., then the bond stands automatically cancelled as provided under Section 446-A Cr.P.C. If the bail bond stands so cancelled, it will not automatically cancel the bail. It is for the Court to pass necessary order cancelling the bail, if the Court so deserves fit after affording an opportunity to the accused. Unless such an order cancelling the bail is made either under Section

437 or 439 Cr.P.C., the bail order granted earlier shall hold good. When the accused has committed such breach of bond or bail bond, he is not entitled to apply for anticipatory bail under Section 438 Cr.P.C., even if the offence is non bailable.

(8) Subsequent to the cancellation of the bail order, if the accused is produced either in execution of the warrant or if he appears on his own, the Court has no discretion, but to remand him to custody leaving the option for the accused to apply for fresh bail. If the accused appears or brought before the Court in execution of the non bailable warrant before cancellation of the bail, then the Court has to direct him to execute fresh bond with or without sureties.

(9) The provision for anticipatory bail contained in Section 438 Cr.P.C., is not applicable in respect of a case involving bailable offences though there is apprehension of arrest in execution of non-bailable warrant.

18. In the result, all these Criminal Original Petitions are dismissed as not maintainable and the petitioners are at liberty to approach the lower Courts for appropriate relief as indicated above.

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