



Citation : CDJ 2008 MHC 4332

Court : High Court of Judicature at Madras

Case No : H.C.P. No. 597 of 2008

Judges : THE HONOURABLE MRS. JUSTICE PRABHA SRIDEVAN & THE HONOURABLE MR. JUSTICE V. PERIYA KARUPPIAH

Parties : N. Raja Versus The Inspector of Police, Gobichettipalayam Police Station, Erode & Another

Appearing Advocates : For the Petitioner : M. Radhakrishnan, P. Pugalendhi, T. Maheshkumar, B. Sriramulu, Senior Counsel, as Amicus Curiae, Advocates. For the Respondents: P. Kumaresan, Additional Public Prosecutor.

Date of Judgment : 19-09-2008

Head Note :

Constitution Of India – Article 226 - Criminal Procedure Code – Section 441, 482, 438 – Indian Penal Code – Section 120B, 147, 148, 448, 384, 385 and 506(ii) - Writ of Habeas Corpus for a direction to the respondents to produce his friend before this Court and set him at liberty - The detenu was released and was not in custody on and after 24.4.2008. Therefore, the prayer, as sought for in this petition to produce the detenu and set him at liberty need not be ordered at this stage and we have no other option except to close the Habeas Corpus Petition. Since, we have not found the judicial custody of the detenu as illegal, there is no necessity to award any compensation for the said custody, as it is not found to be an appropriate case as per the principle laid down by our Apex Court in 1999 SCC (Cri) 1296 (cited supra) - heard this matter at length and had also sought the expertise of the Senior Counsel only to avoid recurrence of what happened in this case. It has become necessary for us to circulate this order to the notice of every Magistrate in Tamil Nadu and Puducherry for the purpose of understanding the procedures while accepting sureties and ordering or making enquiries regarding the solvency of such sureties under Section 441 Cr.P.C. Registry is directed to circulate this order through the Principal District Judge of every District in Tamil Nadu and through the Chief Judge, so as to bring the directions of this Court to the notice of Judicial Magistrates under their control - Before parting, we have to place on record our appreciation for the service rendered by the learned Senior Counsel in enlightening us on the points at issue as Amicus Curiae.

Comparative Citations:

2008 (2) LW(Crl) 1385, 2009 (1) MLJ(Crl) 308

Judgment :

(Prayer: Petition under Article 226 of the Constitution of India praying for issue of a Writ of Habeas Corpus for the relief as stated therein.)

V. Periya Karuppiyah, J.

This petition has been filed by the friend of the detenu A. Manikandan seeking issue of a Writ of Habeas Corpus for a direction to the respondents to produce his friend A. Manikandan, S/o. Annamalai before this Court and set him at liberty.

2. The reasons stated by the petitioner in the affidavit are as follows:

The petitioner is a cable operator. The detenu is a family friend of the petitioner. On 2.4.2008, a complaint was lodged before the 1st respondent by the defacto complainant stating that at 7.30p.m. on that day, six named accused had threatened him at knife point and demanded to vacate the land situated in Gobichettypalayam, where he was a tenant on account of a civil dispute between him and the landlord. Based on the said complaint, the 1st respondent had registered a case in Crime No. 221/2008 under Sections 120B, 147, 148, 448, 384, 385 and 506(ii) I.P.C. against the detenu and 7 others. The detenu filed an anticipatory bail application in CrI.O.P. No. 7904/2008 before this Court and he was also granted anticipatory bail on condition that he shall surrender before the Court and shall execute a bond for a sum of Rs.10,000/- with two sureties, each for a like sum to the satisfaction of learned Judicial Magistrate, Gobichettypalayam. Accordingly, on 23.4.2008, the detenu had surrendered before the learned Judicial Magistrate, Gobichettypalayam and produced two sureties. The learned Judicial Magistrate, instead of releasing the detenu, had sent the surety documents for verification and ordered remand of the detenu to judicial custody until the verification was over. As this order, contrary to the order of passed by this Hon'ble Court, violates Article 21 of the Constitution of India, the present Habeas Corpus Petition has been filed.

3. Heard Mr. M. Radhakrishnan appearing for Mr. P. Pugalenthi, learned counsel for the petitioner, Mr.P. Kumaresan, learned Additional Public Prosecutor for respondents 1 and 2 and Mr.B. Sriramulu, learned Senior Counsel as Amicus Curiae.

4. Learned counsel for the petitioner submitted that the petitioner is a friend of the detenu. The detenu, A. Manikandan, was wrongly foisted with the case in Crime No. 221/2008 for offences under Sections 120B, 147, 148, 448, 384, 385 and 506(ii) I.P.C. on the allegation that the said detenu and others had threatened the defacto complainant at knife point on 2.4.2008 in a civil dispute between the landlord and the tenant (defacto complainant). The detenu A. Manikandan had filed an anticipatory bail application in CrI.O.P. No. 7904/2008. This Court also granted him anticipatory bail on 10.4.2008 on condition that he shall surrender before the Court and shall execute a bond for a sum of Rs.10,000/- with two sureties, each for a like sum to the satisfaction of learned Judicial Magistrate, Gobichettypalayam. Learned counsel would submitted that the detenu Manikandan had, in obedience to the order passed by this Court, produced two sureties before the learned Judicial Magistrate, Gobichettypalayam on 23.4.2008, and surrendered himself for obtaining anticipatory bail. Contrary to the procedure to be followed while accepting surety affidavits and ordering execution of bond, the learned Judicial Magistrate, Gobichettypalayam had sent the surety documents for verification on the objection of the learned Assistant Public Prosecutor and ordered remand of the detenu to judicial custody instead of releasing him. This order, according to the learned counsel, violates the right of liberty guaranteed under Article 21 of the Constitution of India.

5. Learned counsel for the petitioner also contended that the learned Judicial Magistrate Gobichettypalayam, was totally wrong in remanding the detenu Manikandan to judicial custody when he was armed with the anticipatory bail order granted by this Court and the said order of remand passed by the learned Judicial Magistrate is illegal and therefore, the respondents are necessarily to be directed to produce the said detenu before this Court. It is the further submission of the learned counsel for the petitioner that the correct procedure to be followed in such circumstance is not to remand the person, who has got anticipatory bail, but to return the papers for being produced with correct particulars or to reject the surrender of the said person so as to make him appear on some other day after the documents are verified or scrutinised and report is filed by the authorities

concerned. He cited AIR 1978 SC 597 (Maneka Gandhi V. Union of India) and submitted that the orders passed by the Courts as well as the procedures emphasised for accepting the sureties must be compatible with Article 21 of the Constitution of India and it must be reasonable, just and fair. He also submitted that the remand order passed by the learned Magistrate is quite illegal and therefore, the detenu may be granted necessary compensation for the illegal custody undergone by him.

6. Mr.P. Kumaresan, learned Additional Public Prosecutor submitted that there is no dispute that anticipatory bail was granted by this Court to the detenu. In CrI.O.P.No. 7904/2008 by order dated 10.4.2008, the detenu was directed either to furnish sureties to the Police when the Police intended to arrest him or to appear before the learned Magistrate concerned to execute a bond for a sum of Rs.10,000/- with two sureties to the satisfaction of the said Magistrate and also to appear before the respondent Police daily at 9 a.m and 6.30 p.m. for a period of 8 weeks. It is also submitted that the detenu was not arrested by the Police, but he appeared before the learned Judicial Magistrate, Gobichettypalayam and filed a petition for surrender even though he was not asked to do so and the surrender of the detenu was accepted by the learned Magistrate. However, on the objection by the investigating agency that the sureties have to be verified by the Court before accepting them, the learned Judicial Magistrate, Gobichettypalayam grew suspicious and posted it for enquiry into the genuineness of the sureties. Since, the learned Magistrate had accepted the surrender, she had bona fide remanded the accused/detenu to judicial custody till enquiry Thereafter, on the next day, when the decision of the Rajasthan High Court reported in 1987 CrI.L.J. 269 (State of Rajasthan V. Lalsingh) was brought to her notice, she passed an order of release of the accused/detenu and there is no illegality on the part of the learned Judicial Magistrate in remanding the accused/detenu. Learned Additional Public Prosecutor submitted that it was the accused/detenu, who voluntarily filed a petition for surrender despite this Court's direction to appear before the said Judicial Magistrate only for the purpose of executing the bond. According to him, the question of awarding compensation does not arise since the learned Judicial Magistrate, Gobichettypalayam had passed a judicial order and thereafter, on the very next day, the judicial custody was revoked. In support of his contention, learned Additional Public Prosecutor relied on 1999 SCC (Cri) 1296 (Mary Angel and Others V. State of T.N.) to support his stand, that inherent powers of the High Court conferred under Section 482 Cr.P.C. have to be exercised sparingly and judiciously only for the purpose mentioned in the said Section in the most appropriate cases, while awarding costs.

7. Since the question involved in this case is in respect of an order passed by the learned Judicial Magistrate, Gobichettypalayam and the petitioner is claiming that the said order is illegal and the procedures to be followed in such cases when surrender petitions are filed voluntarily by persons who obtained anticipatory bail are to be clarified and suitable instructions are to be given to the Lower Courts, we requested the learned Senior Counsel, Mr.B. Sriramulu, to assist the Court as Amicus Curiae in this case. Accordingly, the case was heard on 19.08.2008.

8. Learned Senior Counsel Mr.B. Sriramulu, submitted that the anticipatory bail granted by this Court in favour of the accused/detenu in CrI.O.P. No. 7904/2008 does not speak about the surrender of the detenu for execution of the bond as directed by this Court. However, surrender application had been filed by the detenu before the Court concerned and an order has also been passed by the learned Judicial Magistrate, Gobichettypalayam on the said petition. He submitted that the learned Judicial Magistrate could have either accepted the surrender or rejected the same as unnecessary depending on whether the sureties deserved acceptance or rejection or she could have ordered for enquiry regarding the genuineness of the sureties. But, the learned Judicial Magistrate, had, on the wrong notion that once surrender petition is admitted, it has to be accepted, and that if the matter had to be postponed regarding the acceptance the petitioner had to be remanded and had passed the order of remand. He made his submission regarding the procedure to be followed by the Judicial Magistrates in case of accepting the sureties in anticipatory bail orders granted by High Courts. The Court below, following the procedure, should endeavour to read and interpret the relevant provisions so as to bring then in harmony with the constitutional principles. For that purpose, he insisted that Judicial

Magistrate, Gobichettypalayam ought to have gone through the provisions of Section 438 Cr.P.C. Apart from that, he would also urge in his arguments that the surrender petition, eventhough it was filed before the learned Judicial Magistrate, Gobichettypalayam, ought to have been ordered as not required, since this Court had already directed in the anticipatory bail order to appear before the said Magistrate for execution of the bond. Learned Senior Counsel further submitted that the anticipatory bail granted by the High Court was for the purpose of granting pre-arrest relief to the person, who had applied for and when the person, who had got anticipatory bail appears before the Court concerned, he should not be refused bail and the Court concerned could grant interim bail even if it is not satisfied with the solvent sureties produced by the said person. He also distinguished between regular bail granted by Courts under Sections 437 and 439 Cr.P.C. and anticipatory bail granted under Section 438 Cr.P.C.

9. Further, the learned Senior Counsel submitted that the learned Judicial Magistrate should have also considered that remanding a person, who surrendered before her armed with an anticipatory bail order granted by the High Court is violative of Articles 14 and 21 of the Constitution of India. In this context, he relied on the words in AIR 1978 SC 429 (G. Narasimhulu V. Public Prosecutor, A.P.) to the effect that " personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 of the Constitution of India." He also submitted that remanding of the detenu by the learned Judicial Magistrate, despite the order of anticipatory bail granted by this Court would also amount to violation of Article 21 of the Constitution of India. He submitted that this Court can suitably exercise the power conferred under Section 482 Cr.P.C. and pass justifiable orders in the facts and circumstances of the case in order to render justice. Learned Senior Counsel also referred to 1987 Cr.L.J. 269 (cited supra) wherein the Rajasthan High Court had laid down promptly the procedure to be followed by Judicial Magistrates while accepting sureties or ordering enquiry under Section 441 Cr.P.C. in the case of anticipatory bail. He submitted that the learned Judicial Magistrate, Gobichettypalayam had followed the said procedure on the next day and released the detenu on the basis of the said judgment. Learned Senior Counsel also cited 1984(2) Crimes 503 (Valson V. State of Kerala) wherein a similar question of remand was involved. Finally, the learned Senior Counsel would sum up his arguments, that the learned Judicial Magistrate, Gobichettypalayam, ought not to have passed the order of remand in the surrender petition filed before her merely because it was voluntarily filed by the detenu himself.

10. We have given our anxious consideration to the arguments advanced by either side and by the learned Amicus Curiae. The admitted facts culled out from the arguments ending with the order of remand have already been narrated above. By virtue of the order of the remand passed by the learned Judicial Magistrate, Gobichettypalayam, the detenu was in judicial custody on the night of 23.4.2008 and on the next day, till he was released by the learned Magistrate (i.e, on 24.4.2008).

11. In AIR 1978 SC 429 (cited supra) in respect of violation of Article 21 of the Constitution of India, the Supreme Court held thus:

"Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognized under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a limitative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. The last four words of Art. 21 are the life of that human right."

12. Now, we have to see whether the order passed by the learned Judicial Magistrate, Gobichettypalayam is an intentional one with a view to detain the detenu in judicial custody so as to characterise such an order as illegal or unlawful. As per the judgment of the Rajasthan High Court reported in 1987 Cr.L.J. 269 (cited supra), the procedure to be followed in the case of doubt

regarding sufficiency of sureties had been enunciated while accepting sureties especially in anticipatory bail. The relevant passage would run as follows:

"If the personal bond and surety bonds are furnished and affidavit is filed by the surety about his status, generally, the same should be accepted. If the Court has any doubt, then the proper course is to accept it as an interim measure, release the accused and then send it for verification and if on verification the status of surety is found less, then the accused should be called upon to furnish fresh surety in the amount for which he has been ordered to furnish."

The validity of remand order passed by a Magistrate sending the accused to custody in the absence of solvency certificates was discussed in 1984 (2) Crimes 503 (cited supra). In the said judgment, it has been categorically found that the remanding of the accused while rejecting the solvency of sureties is found to be unjust. The relevant paragraphs would run as hereunder:

"7. Ordinarily, it must be possible for the criminal court to act on the affidavit produced by the surety. An affidavit is a solemn document solemnly affirmed. Prima facie, the affidavit is entitled to be taken at its face value. It could be accepted even without tax receipt or document in appropriate cases. As a matter of practice, surety produces tax receipts or other documents along with the affidavit. Ordinarily, from an examination of the tax receipts, the court must be in a position to assure itself about the sufficiency of the surety. In extreme cases where the court, for valid reasons, chooses to reject the sureties offered, it must certainly be possible for the court to grant interim bail on the basis of the affidavit or affidavit supported by tax receipt or release the accused on his own personal bond.

8. This liberal interpretation of the bail provisions is certainly warranted in the light of the judicial recognition of the expanding horizons of Article 21 of the Constitution. In *Maneka Gandhi V. Union of India*, the Supreme Court emphasized that any procedure, in order to be compatible with Article 21 of the Constitution must be reasonable, just and fair. Any provision of law which lays down a procedure which is not reasonable or just or fair carries with it the risk of being regarded as unconstitutional and illegal. Hence, the endeavour of courts must be to read and interpret the relevant provisions so as to bring them in harmony with the constitutional principles."

13. So from the above, we see that the Court had the option of accepting the sureties, if for some reason the Court was not inclined to do so, the Court shall grant interim bail. The learned Judicial Magistrate, Gobichettypalayam herself had understood the mistake committed by her on 23.4.2008 and on the very next day, she had revoked the said order. There is no dispute that anticipatory bail was ordered by this Court in favour of the detenu and to avail such relief, he was directed by this Court to appear before the Magistrate concerned to furnish sureties for the purpose of executing the bond. The said order does not direct the detenu either to file a surrender petition or surrender before the Magistrate concerned for the purpose of furnishing sureties. The detenu had voluntarily filed the petition for surrender, which is not warranted. Even though such a surrender petition is filed, the learned Judicial Magistrate, ought to have gone through the order of anticipatory bail granted by this Court and passed orders accordingly in the surrender petition by returning the same as unnecessary or dismissing the same and postpone the case in order to facilitate the detenu when she had decided to accept the sureties after making an enquiry into the solvency of the sureties. The irony in the present case is that the detenu, who had obtained anticipatory bail from this Court had been sent to jail by the Magistrate. Had he not obtained bail he may not have filed the surrender petition, and this order of remand would not have been passed.

14. There is no dispute that satisfaction of the Judicial Magistrate is necessary before accepting the sureties furnished by the accused. The said procedure is recommended under Section 441 Cr.P.C. When a person is offered as a surety, he is required to swear to an affidavit containing relevant averments such as his financial ability to satisfy the bail condition in case of breach and his readiness to produce the accused in Court when required to do so. However, the option of the Judicial

Magistrate is always there to accept the affidavit sworn in by the surety in proof of such facts contained therein and to satisfy about the sufficiency and fitness. Only thereafter, the bond could be executed and the accused will be released under Section 442 of the Code.

15. It has become necessary for us to go through the explanation offered by the learned Judicial Magistrate, Gobichettypalayam for the query put forward by this Court. She would mention in her letter dated 14.7.2008 in D.No. 838/2008 that on a perusal of the F.I.R. and the surrender petition filed by the accused/detenu, the detenu was found to be a person belonging to Pudukottai District and the sureties affidavits followed by their oral examination disclosed that they belong to Aalankudi Taluk, Pudukottai District. Therefore, she took care in ascertaining the genuineness of the sureties and as such, insisted the accused as well as his counsel to submit documentary evidence regarding proof of solvency of sureties, for which the learned counsel for the accused sought for 2 days' time. The said letter further shows that the learned Additional Public Prosecutor simultaneously filed a petition in C.M.P. No. 1864/2008 on 23.4.2008 cautioning the Court to verify the solvencies of the sureties and when the remarks of the counsel for the accused were called for, he prayed time to file counter. Therefore, the matter was passed over till 5.45p.m. and there was no counter filed till such time and therefore, the surrendered accused/detenu had to be remanded as there was no other option. She would further submit that there is no violation of law or even equity against the accused/detenu.

16. Considering the above explanation offered by the learned Judicial Magistrate, Gobichettypalayam, who passed an order of remand, we again go through the circumstances under which the remand order was passed by her. While granting anticipatory bail, this Court had only directed the detenu to appear before the learned Judicial Magistrate, Gobichettypalayam while furnishing sureties. The detenu was not asked to file a surrender petition. Learned counsel for the petitioner could not answer as to why the detenu had chosen to file a surrender petition except to state that this is the practice. To that extent, he is in some ways responsible for the sorry situation. However, even in the case where surrender petition has been filed, it is for the Judicial Magistrate to exercise her powers in accordance with law. She should have paused to consider the propriety of sending a person who has obtained anticipatory bail from the Superior Court, to jail. It was a wrong order. It was amenable to correction by this Court. But, we do not see any "mala fide" on the part of the learned Judicial Magistrate, Gobichettypalayam in passing the order of remand. Even though the said order of remand was not correct, it was made correct quickly. Therefore, the order passed by the learned Judicial Magistrate, Gobichettypalayam is purely an irregularity and it cannot be termed as illegal.

17. We have to deal with the question of compensation. As submitted by the learned Additional Public Prosecutor, the judgment of the Apex Court reported in 1999 SCC (Cri) 1296 (cited supra) would go to show that the inherent powers of the High Court should be sparingly and judiciously used for the purpose of awarding compensation or costs. The relevant passage would run as follows:

"Section 482 Cr.P.C. stands independently from the other provisions of the Code and it expressly saves the inherent powers of the High Court. There fore, to prevent abuse of the process of the Court or otherwise to secure the ends of justice, the High Court is empowered to pass "such order" which may include order to pay costs to the informant (complainant) and the language of the section does not in terms place any fetter. This power is not conditioned or controlled by any other section nor is curtailed by any provisions which empower the Court to award costs."

When we go through the aforesaid judgment, we could see that the power to award costs for the unlawful order should be sparingly used by the High Court under Section 482 Cr.P.C., in appropriate cases. We have already come to the conclusion that the order of remand passed by the Judicial Magistrate on 23.4.2008 was even though not correct, it was rectified immediately on the next day and therefore, the said order was not illegal, but only an irregular order. Therefore, we are not inclined to award compensation.

18. The detenu was released and was not in custody on and after 24.4.2008. Therefore, the prayer, as sought for in this petition to produce the detenu Manikandan and set him at liberty need not be ordered at this stage and we have no other option except to close the Habeas Corpus Petition. Since, we have not found the judicial custody of the detenu as illegal, there is no necessity to award any compensation for the said custody, as it is not found to be an appropriate case as per the principle laid down by our Apex Court in 1999 SCC (Cri) 1296 (cited supra).

19. In the facts and circumstances of the case, it has become necessary for us to give the following directions to the Judicial Magistrates to follow while accepting sureties when anticipatory bail has been granted by the High Court or Sessions Court:

(i) Whenever an anticipatory bail order passed by the High Court or Sessions Court is produced for the purpose of acceptance of sureties or compliance, the Judicial Magistrate concerned, shall go through the order of anticipatory bail thoroughly and act in accordance with the directions made therein;

(ii) Unless the anticipatory bail directs the accused to surrender or to file a surrender petition, it is not necessary for the Judicial Magistrate concerned to entertain surrender or pass orders on the surrender petition;

(iii) If for any reason, the Judicial Magistrate concerned entertains any doubt or suspicion over the sureties furnished, the Judicial Magistrate can postpone the acceptance of sureties, but the affidavit furnished by the sureties can be accepted in proof of the facts contained therein relating to the sufficiency or fitness of sureties and pass an order of interim bail and release the accused and on enquiry, if it is found by the Judicial Magistrate concerned that the sureties furnished are insufficient, then the Judicial Magistrate may order the accused to find sufficient sureties and on his failure to do so, may reject the sureties;

(iv) The Judicial Magistrate concerned cannot pass an order of remand in cases where the High Court or the Sessions Court had granted anticipatory bail to the accused as long as the bail is in force;

(v) The aforesaid directions shall be followed by all the Judicial Magistrates scrupulously while discharging their duty of accepting sureties in case of anticipatory bail.

20. Though the detenu had been set free on 24.2.2008, we have heard this matter at length and had also sought the expertise of the Senior Counsel only to avoid recurrence of what happened in this case. It has become necessary for us to circulate this order to the notice of every Magistrate in Tamil Nadu and Puducherry for the purpose of understanding the procedures while accepting sureties and ordering or making enquiries regarding the solvency of such sureties under Section 441 Cr.P.C. Registry is directed to circulate this order through the Principal District Judge of every District in Tamil Nadu and through the Chief Judge, Puducherry so as to bring the directions of this Court to the notice of Judicial Magistrates under their control.

21. Before parting, we have to place on record our appreciation for the service rendered by the learned Senior Counsel Mr.B. Sriramulu in enlightening us on the points at issue as Amicus Curiae.