



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.01.2022

CORAM :

THE HON'BLE MR.MUNISHWAR NATH BHANDARI,
ACTING CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE P.D.AUDIKESAVALU
W.P.No.20119 of 2021

K.S.Ilangovan

.. Petitioner-in person

Vs

1.High Court of Judicature at Madras,
rep. by the Registrar General,
Madras High Court,
Tamilnadu.

2.Government of Tamilnadu,
rep. by its Chief Secretary,
Fort St. George,
Tamilnadu.

3.Union Territory of Puducherry,
rep. by its Chief Secretary,
Chief Secretariat,
Puducherry.

.. Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying for a writ of declaration, declaring Rule 12(4), Rule 13, Rule 27(4), (5) and (11), Judicial form No.73 and Rule 93 of the Criminal Rules of Practice, 2019 as ultra vires to the Constitution.

For the Petitioner : Mr.K.S.Ilangovan
Party-in-person

For the Respondents : Mr.B.Vijay
for respondent No.1



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: Mr.R.Shunmugasundaram
Advocate-General
assisted by
Mr.Hasan Md. Jinnah
Public Prosecutor
for respondent No.2

ORDER

(Order of the Court was made by
the Hon'ble Acting Chief Justice)

By this writ petition, challenge to the constitutional validity of Rule 12(4), Rule 13, Rule 27(4), (5) and (11) and Rule 93 of the Criminal Rules of Practice, 2019 (for short, "Rules of 2019") has been made.

2. The petitioner, appearing in person, has made a reference to Section 4 of the Oaths Act, 1969 (for short, "Act of 1969") for challenge to Rule 12(4) of the Rules of 2019. It is submitted that Rule 12(4) of the Rules of 2019 mandates an application under Section 438 Cr.P.C. to be accompanied by a sworn affidavit of the applicant. The Rule aforesaid offends Section 4 of the Act of 1969. Thus, it is to be struck down. A reference to the judgments of the Patna High Court in the case of Ramnath Sahni v. The State of Bihar, Criminal Appeal (DB) No.303 of 2015, decided on 22.04.2015 and the Karnataka High Court in the case of J.Jaikumar, Major v. Yogesh Lemichwal, Major, reported in 1997 STPL (LE-Crim) 4887 Kar have been made.

3. To appreciate the arguments of the petitioner, appearing in person, we are quoting Rule 12(4) of the Rules of 2019 as well as Section 4 of the Act of 1969:

"12. Bail in non-bailable cases.-

- (1) ...
- (2) ...
- (3) ...

(4) Application for relief under section 438 of the Code shall be accompanied by a sworn affidavit of the applicant."

"4. Oaths or affirmations to be made by witnesses, interpreter and jurors.-

(1) Oaths or affirmations shall be made by the following persons, namely:-

- (a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any



court or person having by law or consent of parties authority to examine such persons or to receive evidence;

(b) interpreters of questions put to, and evidence given by, witnesses; and

(c) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.

(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties."

4. Rule 12 is in Chapter III of the Rules of 2019. As per the said Rules, for bail in a non-bailable offence, the application under Section 438 Cr.P.C should be accompanied by a sworn affidavit. The provision of Section 4 of the Act of 1969 prescribes oaths or affirmations to be made by witnesses. It is not for an affidavit. Section 4 provides that, in criminal matters, an oath or affirmation to the accused person would not be administered unless he is examined as a witness. The provision aforesaid is for the oath or affirmation of a witness and unless the accused stands as a witness, the oath or affirmation is not required. The sworn affidavit required under Rule 12(4) of the Rules of 2019 is not an oath or affirmation before the Court. Thus, Rule 12(4) of the Rules of 2019 is not hit by Section 4 of the Act of 1969.

5. The petitioner appearing in person has made a reference of the judgment of the Patna High Court in the case of Ramnath Sahni (supra), where in paragraph 7, the Patna High Court recorded its finding that insistence on filing of affidavits in criminal cases, including bail petitions, amounts to violation of fundamental rights of the persons guaranteed under Articles



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21 and 22 of the Constitution of India. However, we find no discussion as to how the fundamental rights would be infringed for filing an affidavit. The Patna High Court has made an observation that if affidavit is to be filed, it would lead to corruption but the basis for such presumption has not been given.

6. Yet another judgment referred by the petitioner is in the case of J.Jaikumar, Major (supra) rendered by the Karnataka High Court. The judgment therein is not on the issue referred by the petitioner, but to clarify that the accused cannot be compelled to administer oath or affirmation as witness because he cannot be compelled to be a witness in the matter unless he himself comes as a witness or defence witness. The aforesaid proposition was laid while considering the issue as to whether in criminal cases a sworn affidavit should be insisted as in civil litigation. In any case, the interpretation of Section 4 of the Act of 1969 is not to the effect that an affidavit cannot be insisted from the accused person. Moreover, the judgment in the case of J.Jaikumar, Major (supra) upheld the requirement of filing of affidavit by the person approaching the High Court in the criminal cases. It is apposite to reproduce the following observation:

"9. Further, it has to be seen that the requirement under Chapter X of the High Court Rules is made applicable also to the criminal cases like the criminal petitions, criminal appeals and criminal revision petitions in the High Court. The object of requiring filing of affidavit of the person approaching the High Court in these criminal cases is to bind him on oath or affirmation as to the contents of such application like the affidavit regarding explanation of delay, affidavit praying for interim order, etc. By no stretch of imagination it can be held that by swearing to such affidavit the accused person is made to give a statement on oath amounting to incriminatory statement regarding the crime with which he has been charged or has been found guilty by the Courts below. In view of these, I do not think that the contentions raised by the counsel for the petitioners are maintainable."

[Emphasis supplied]

7. In the light of the observations made above, we are of the view that the requirement of filing of an affidavit by the applicant seeking bail under Section 438 Cr.P.C. is to bind him on oath or affirmation as to the contents of such application and not otherwise.



8. At this juncture, it needs to be observed that the Rules of 2019 were framed by the High Court after taking into consideration the suggestions from different subordinate courts. In many cases, it was found that without the knowledge of the accused, application under Section 438 Cr.P.C. was filed and after its dismissal, the issue was raised about the competence of a lawyer to file an application. To stop such practice, Rules of 2019 were framed and filing of sworn affidavit would in no way affect the rights of the accused or his liberty under Article 21 of the Constitution of India. For submission of the affidavit, the accused is not required to appear before the Court, but before the Oath Commissioner and such appearance before the Oath Commissioner cannot be said to be taking away the liberty of the accused. If the application under Section 438 Cr.P.C. is filed along with the sworn affidavit of the accused, the plea that the application was not filed by him cannot be raised in case application is rejected. In any event, it is a practice that advocate defending an accused in custody can file a memorandum of appearance instead a power to appear on behalf of the accused. In case of memo by the advocate, the necessity remains that the application has been filed on the instruction of the accused and it can be fortified by an affidavit filed along with the application. In view of the above, Rule 12(4) of the Rules of 2019 was brought for a purpose and is not otherwise offending Section 4 of the Act of 1969. Thus, we do not find substance for challenge to Section 12(4) of the Rules of 2019.

9. Challenge to Rule 13 of the Rules of 2019 has also been made. Rule 13 of the Rules of 2019 reads as under:

"13. Surety. - An advocate shall not be accepted as surety, unless the accused is his blood relative."

10. Rule 13 of the Rules of 2019 enjoins an advocate from being a surety, unless the accused is his blood relative. The petitioner, appearing in person, has made a reference to the Bar Council of India Rules, 1975 (for short, "Rules of 1975"), more specifically Rule 10, to show that the Bar Council has already stipulated a rule in that regard, thus, Rules of 2019 was not required again to restrain an advocate to stand as a surety. To appreciate the argument of the petitioner, Rule 10 of the Rules of 1975 is also quoted herein below:

"10. An Advocate shall not stand as a surety, or certify the soundness of a surety for his client required for the purpose of any legal proceedings."

11. Rule 10 of the Rules of 1975 restrains an advocate from being a surety, or certifying the soundness of a surety for his client required for the purpose of any legal proceedings. Rule



10 has two parts. First part, restrain the advocate to stand as a surety. The Rule aforesaid was brought by the Bar Council of India also to govern advocates and Rule 13 of the Rules of 2019 is almost similar to Rule 10 of the Rules of 1975. We do not find any illegality in restraining an advocate from being a surety, unless the accused is his blood relative.

12. An advocate is identified for the profession and for which the registration is given by the Bar Council of India. He is required to conduct himself by the Rules provided for the conduct of profession and thereby not to involve himself in any other activity which diminishes the status of the profession and the advocate. The petitioner in person could not show how the legal right of an advocate is affected if he is restrained from standing as a surety. Rule 10 of the Rules of 1975 has been brought for maintaining standards of professional conduct and etiquette. An advocate would not generally stand as a surety unless a blood relative is involved. An advocate should concentrate on professional work and to conduct as per Conduct Rules. We do not find any infringement of right of an advocate so as to declare Rule 13 of the Rules of 2019 as ultra vires. In view of the above, we do not find that the prayer made by the petitioner to be sustainable and, therefore, the challenge to Rule 13 of the Rules of 2019 is also not accepted.

13. The other Rule challenged by the petitioner is Rule 93 of the Rules of 2019. Rule 93 of the Rules of 2019 is quoted for ready reference:

"93. Magistrate taking action under section 144 of the Code to communicate the order to the Civil Court.- Whenever a Magistrate takes action under section 144 of the Code or any analogous provisions of law, he should immediately communicate a copy of his order to the Civil Court having original jurisdiction over the locality to which his proceedings refer. Similarly, the Civil Court will communicate to the Magistrate having local jurisdiction, any injunction issued by it with reference to matters which would fall within the scope of section 144 of the Code."

14. The petitioner, appearing in person, submitted that by sending a copy of the order passed under Section 144 of Cr.P.C. or any analogous provisions of law to the Civil Court, the right of a person would be affected to pursue remedy before the Civil Court. In view of the above, a prayer is made to strike down Rule 93 of the Rules of 2019. We do not find any illegality in Rule 93 of the Rules of 2019, as it only stipulates communicating a copy of the order to Civil Court on passing an order of action under Section 144 Cr.P.C. By the aforesaid



arrangement, the right of the parties are not affected. Rather, it is to advance the cause of justice, because non-communication of the action taken by the Magistrate Court under Section 144 of Cr.P.C. to the Civil Court may lead to contradictory action by the Civil Court and any attempt to suppress the material facts can be exposed. By incorporation of Rule 93 of the Rules of 2019 no rights are affected. We, therefore, do not find any ground to accept the challenge to the validity of Section 93 of the Rules of 2019.

15. The argument for challenge to Rule 27(4) (5) and 11 of Rules of 2019 has not been made.

16. For the foregoing reasons, we do not find any ground to declare the Rules of 2019 under challenge to be ultra vires the Constitution and, accordingly, the writ petition fails and it is dismissed. No costs.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

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To:

1. The Registrar General,
High Court of Judicature at Madras,
Madras High Court,
Tamilnadu.
2. The Chief Secretary,
Government of Tamilnadu,
Fort St. George,
Tamilnadu.
3. The Chief Secretary,
Union Territory of Puducherry,
Chief Secretariat,
Puducherry.

+1cc to Government Pleader SR. No.1150

W.P.No.20119 of 2021

KSM (CO)
PR (11/01/2022)