

16.12.2024
Sl. No.10
akd/as/PA

C. R. M. (A) 4166 of 2024

In Re: An application for anticipatory bail under Section 482 of the Bharatiya Nagarik Suraksha Sanhita, 2023 filed on 27.11.2024 in connection with Spl. (CBI) Case No.08 of 2024 arising out of RC No. RC0102022A0006 dated 09.06.2022 under Sections 120B/420/467/468/471/34 of the Indian Penal Code read with Sections 7/7A/8 of the Prevention of Corruption Act, 1988.

And

In Re: ***Sujay Krishna Bhadra***

... .. Petitioner

Mr. Milon Mukherjee .. Sr. Advocate
Mr. Anand Kesari
Mr. Soumen Mohanty
Mr. Ayan Poddar
Mr. Agnish Basu
Mr. Vipul Vedant

... .. for the petitioner

Mr. Dhiraj Trivedi .. Id. Dy. Solicitor General of India
Mr. Amajit De .. Spl. PP
Mr. Arijit Majumdar

... .. for the CBI

1. The petitioner has preferred the application praying for anticipatory bail in the instant case (hereinafter referred to as 'CBI case') while he is in custody in connection with a case registered by the Enforcement Directorate being PMLA Case No. KLZO-II/21-22 dated 24.06.2022 under Sections 3/4 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as PMLA case).

Facts :-

2. On 09.06.2022 Central Bureau of Investigation (CBI) registered RC Case No.0102022A0006 dated 09.06.2022 under Sections 120B/420/467/468/471/34 of the Indian Penal Code read with Sections 7/7A/8 of the Prevention of the Corruption Act, 1988 alleging as follows:-

(a) By order of the Hon'ble Single Judge of this court in WPA 9979 of 2022 (*Soumen Nandy vs. The State of West Bengal & Ors.*), CBI was directed to investigate offences committed by the office bearers of

the West Bengal Board of Primary Education in giving illegal appointments to ineligible candidates to the post of Assistant Teacher in primary schools. On 11.10.2015, Teachers Eligibility Test (TET), 2014 was conducted for appointment of Assistant Teachers to 16,500 vacancies in Government aided sponsored Primary/Junior basic schools across the State of West Bengal. It is alleged one Chandan Mondal @ Ranjan of Bagdah, North 24-Parganas entered into a conspiracy with the office bearers of the West Bengal Board of Primary Education and pursuant thereto facilitated the appointment of a large number of ineligible candidates as primary teachers against a substantial sum of money.

(b) During investigation of the CBI case, on 24.06.2022, Enforcement Directorate registered ECIR being PMLA Case No. KLZO-II/21-22 dated 24.06.2022 under Sections 3/4 of the Prevention of Money Laundering Act, 2002 to investigate the offence of money laundering in respect of the proceeds of crime in the aforesaid case;

(c) Petitioner was interrogated in the CBI case. His office was raided and a large volume of cash, mobile phones and documents were seized;

(d) On 18.05.2023 initial charge sheet was filed in the CBI case against Tapas Kumar Mondal, Kuntal Ghosh and Niladri Ghosh. Thereafter on 21.01.2024 supplementary charge sheet had been filed against two more accused. Further investigation is in progress;

(e) In view of the volume of unaccounted cash recovered from the petitioner, he was arrested on 31.05.2023 in connection with the PMLA case. He remained in custody for about 1½ years;

(f) On 25.11.2024, CBI made an application in the CBI case for issuance of production warrant against him. In the said application,

CBI alleged further investigation revealed that petitioner had acted in criminal conspiracy with Kuntal Ghosh and Santanu Banerjee whose sub-agents had collected huge bribes from undeserving candidates and had illegally secured appointments for such candidates through senior public servants including Partha Chatterjee, the then Education Minister, Government of West Bengal and others;

(g) Pursuant to such prayer, by order dated 25.11.2024 learned Judge issued production warrant directing the Superintendent of Presidency Correctional Home to produce the petitioner physically on 26.11.2024;

(h) On 26.11.2024 CBI made a prayer for police custody of the petitioner. However, the prayer could not be considered as the correctional home authorities submitted a report that petitioner could not be produced physically due to his ill-health. He had been admitted in the correctional home hospital. Correctional home authorities offered to produce the petitioner through electronic mode. As the CBI had prayed for police custody whose consideration required physical production of the petitioner, the Judge directed the Superintendent of Presidency Correctional Home to produce the petitioner on 28.11.2024;

(i) On 27.11.2024, petitioner approached this court praying for anticipatory bail;

(j) On 28.11.2024 Superintendent of Presidency Correctional Home again submitted a report that petitioner is unwell and is still in the correctional home hospital. He cannot be produced physically in court;

(k) On 30.11.2024, the Court again reiterated production warrant but till date petitioner has not either physically or virtually been produced before the court;

(l) On 06.12.2024, petitioner was granted bail in the PMLA case. But he has not been released as the production warrant in the CBI case had already been served on him through the correctional home authorities.

3. In this factual backdrop, this court is called upon to decide whether the application for anticipatory bail is maintainable or not.

Legal Proposition :-

4. Section 438 of the Code of Criminal Procedure (*Section 482 of the Bharatiya Nagarik Suraksha Sanhita, 2023*), inter alia, provides any person having reasonable belief that he may be arrested on the accusation of having committed a non-bailable offence may apply to the High Court or the Court of Sessions for a direction that in the event of arrest he shall be released on bail subject to the conditions engrafted in the said section or such other conditions as the court may deem fit and proper.

5. In *Dhanraj Aswani vs. Amar S. Mulchandani and Anr.*¹, the Hon'ble Apex Court, inter alia, held a person who is arrested in one case but having reason to believe that he may be arrested in connection with another case has a right to apply for anticipatory bail. The Bench held as follows :-

“60. Our examination of the matter has led us to the following conclusions :

- (i) *An accused is entitled to seek anticipatory bail in connection with an offence so long as he is not arrested in relation to that offence. Once he is arrested, the only remedy available to him is to apply for regular bail either under Section 437 or Section 439 of the CrPC, as the case may be. This is evident from para 39 of Gurbaksh Singh Sibbia (supra).*
- (ii) *There is no express or implied restriction in the CrPC or in any other statute that prohibits the Court of Session or the High Court from entertaining and deciding an anticipatory bail application in relation to*

¹ 2024 SCC OnLine SC 2453

an offence, while the applicant is in custody in relation to a different offence. No restriction can be read into Section 438 of the CrPC to preclude an accused from applying for anticipatory bail in relation to an offence while he is in custody in a different offence, as that would be against the purport of the provision and the intent of the legislature. The only restriction on the power of the court to grant anticipatory bail under Section 438 of the CrPC is the one prescribed under sub-section (4) of Section 438 of the CrPC, and in other statutes like the Act, 1989, etc.

- (iii) While a person already in custody in connection with a particular offence apprehends arrest in a different offence, then, the subsequent offence is a separate offence for all practical purposes. This would necessarily imply that all rights conferred by the statute on the accused as well as the investigating agency in relation to the subsequent offence are independently protected.*
- (iv) The investigating agency, if it deems necessary for the purpose of interrogation/investigation in an offence, can seek remand of the accused whilst he is in custody in connection with a previous offence so long as no order granting anticipatory bail has been passed in relation to the subsequent offence. However, if an order granting anticipatory bail in relation to the subsequent offence is obtained by the accused, it shall no longer be open to the investigating agency to seek remand of the accused in relation to the subsequent offence. Similarly, if an order of police remand is passed before the accused is able to obtain anticipatory bail, it would thereafter not be open to the accused to seek anticipatory bail and the only option available to him would be to seek regular bail.*
- (v) We are at one with Mr. Dave that the right of an accused to protect his personal liberty within the contours of Article 21 of the Constitution of India with the aid of the provision of anticipatory bail as enshrined under Section 438 of the CrPC cannot be defeated or thwarted without a valid procedure established by law. He is right in his submission that such procedure should also pass the test of fairness, reasonableness and manifest non-arbitrariness on the anvil of Article 14 of the Constitution of India.*
- (vi) Under Section 438 of the CrPC, the pre-condition for a person to apply for pre-arrest bail is a 'reason to believe that he may be arrested on an accusation of having committed a non-bailable offence.' Therefore, the only pre-condition for exercising the said right is the apprehension of the accused that he is likely to be arrested. In view of the discussion in the preceding paragraphs, custody in one case does not have the effect of taking away the apprehension of arrest in a different case.*
- (vii) If the interpretation, as sought to be put forward by Mr. Luthra is to be accepted, the same would not only defeat the right of a person to apply for pre-arrest bail under Section 438 of the CrPC but may also lead to absurd situations in its practical application."*

Arguments :-

6. Mr. Milon Mukherjee, learned senior Advocate argues petitioner was not named in the FIR in the CBI case. During investigation he was interrogated but was not arrested. During his long custody in the PMLA case, he was interrogated in jail and had cooperated with the investigation. After the conclusion of hearing of the bail application in the PMLA case and to preempt the impact of the bail order passed therein, belatedly

prayer was made for issuance of production warrant in the CBI case. No formal arrest had preceded such prayer. Mere issuance of production warrant would not preclude the right of the petitioner to seek pre-arrest bail. Production warrant issued on 25.11.2024 is no longer valid as the petitioner had not been produced before the jurisdictional court within 24 hours. In the interregnum, prayer for anticipatory bail was made and is maintainable in light of *Dhanraj Aswani* (Supra).

7. Per contra, learned Deputy Solicitor General contends the production warrant was issued on 25.11.2024 and was served upon the petitioner through the Superintendent of Presidency Correctional Home on the same day itself. Petitioner resorted to the subterfuge of ailment and avoided his production on the specious plea that he was unwell. Be that as it may, when a production warrant has already been served upon the person detained in jail, he shall be deemed to be arrested and there is no scope for entertaining the prayer for anticipatory bail.

Issue for decision :-

8. Issue which stems from the aforesaid submissions is as follows :-

Does service of the production warrant upon a person in custody amount to arrest of the said person by the police officer and thereby deprive the said person of his right to apply for anticipatory bail?

Analysis and findings :-

9. The answer to this question may be culled out from a proper interpretation of the ratio of the Hon'ble Apex Court in *Dhanraj Aswani* (Supra).

10. In paragraph 41 of the judgment, the Apex Court clarified the manner in which the accused already in custody in one case may be arrested in another case:-

“41. *** *** ***”

- a. First, no sooner than he is released from custody in connection with the first case, the police officer can arrest and take him into custody in relation to a different case; and
- b. Secondly, even before he is set free from the custody in the first case, the police officer investigating the other offence can formally arrest him and thereafter obtain a Prisoner Transit Warrant ('P.T. Warrant') under Section 267 of the CrPC from the jurisdictional magistrate for the other offence, and thereafter, on production before the magistrate, pray for remand;

OR

Instead of effecting formal arrest, the investigating officer can make an application before the jurisdictional magistrate seeking a P.T. Warrant for the production of the accused from prison. If the conditions required under 267 of the CrPC are satisfied, the jurisdictional magistrate shall issue a P.T. Warrant for the production of the accused in court. When the accused is so produced before the court in pursuance of the P.T. Warrant, the investigating officer will be at liberty to make a request for remanding the accused, either to police custody or judicial custody, as provided in Section 167(1) of the CrPC. At that time, the jurisdictional magistrate shall consider the request of the investigating officer, peruse the case diary and the representation of the accused and then, pass an appropriate order, either remanding the accused or declining to remand the accused. [See : State v. K.N. Nehru, 2011 SCC OnLine Mad 1984]”

11. In paragraph 44 it was further noted :-

"44. * *** *** ***"**

(c) If an accused is arrested with or without a warrant while he is already in custody in one offence, then it is only under Section 267 of the CrPC that he can be removed from such custody and produced before the Magistrate under whose territorial jurisdiction the other offence is registered.”

12. From a conjoint reading of the aforesaid observations it appears a police officer may arrest a person in custody in one case in two ways:-

- (i) by making a formal/paper arrest in custody and thereafter make an application for issuance of production warrant before the jurisdictional court for his production in court and seek remand; or
- (ii) in the alternative he may directly make an application before the jurisdictional court for issuance of production warrant for production of the accused and seek remedy.

13. Section 267 Cr.P.C. (302 BNSS) empowers a court to pass order directing the Officer-in-charge of a correctional home to produce a person

from custody before the Court to answer charge of an offence or for the purpose of any proceeding including investigation or to examine him as a witness. Upon the order under section 267 Cr.P.C being served, the Officer-in-charge of the correctional home cannot allow the person against whom the production warrant is issued to be released from his custody and must produce the said person before the Court on the day assigned unless he abstains from doing so for reasons recorded in section 268 Cr.P.C. Till the production warrant is served upon the person in custody through the Officer-in-charge of the correctional home concerned seeking his production in Court for the purpose of remand by police, the production warrant does not create an embargo on the release of the person from custody by pulling him in the control and dominion of the police seeking execution of the production warrant amounting to his arrest by the said police officer.

14. This position is succinctly stated in paragraphs 52 and 54 of the report as follows :-

“52. As pointed out in the preceding paragraphs, a police officer can formally arrest a person in relation to an offence while he is already in custody in a different offence. However, such formal arrest doesn’t bring the accused in the custody of the police officer as the accused continues to remain in the custody of the Magistrate who remanded him to judicial custody in the first offence. Once such formal arrest has been made, the police officer has to make an application under Section 265 of the CrPC before the Jurisdictional Magistrate for the issuance of a P.T. Warrant without delay. If, based on the requirements prescribed under Section 267 of the CrPC, a P.T. Warrant is issued by the jurisdictional Magistrate, then the accused has to be produced before such Magistrate on the date and time mentioned in the warrant, subject to Sections 268 and 269 respectively of the CrPC. Upon production before the jurisdictional Magistrate, the accused can be remanded to police or judicial custody or be enlarged on bail, if applied for and allowed. The only reason why we have delineated the procedure followed in cases where a person already in custody is required to be arrested in relation to a different offence is to negate the reasoning of the Rajasthan, Delhi and Allahabad High Courts that once in custody, it is not possible to re-arrest a person in relation to a different offence. When a person in custody is confronted with a P.T. Warrant obtained in relation to a different offence, such a person has no choice but to submit to the custody of the police officer who has obtained the P.T. Warrant. Thus, in such a scenario, although there is no confinement to custody by touch, yet there is submission to the custody by the accused based on the action of the police officer in showing the P.T. Warrant to the accused. Thereafter, on production of the accused

before the jurisdictional Magistrate, like in the case of arrest of a free person who is not in custody, the accused can either be remanded to police or judicial custody, or he may be enlarged on bail and sent back to the custody in the first offence. A number of decisions have held that although Section 267 of the CrPC cannot be invoked to enable production of the accused before the investigating agency, yet it can undoubtedly be invoked to require production of the accused before the jurisdictional Magistrate, who can thereafter remand him to the custody of the investigating agency. Such an interpretation of the provision would give true effect to the words 'other proceedings' as they appear in the text of Section 267 of the CrPC, which cannot be construed to exclude proceedings at the stage of investigation."

[Emphasis supplied]

"54. The option of applying for anticipatory bail in relation to an offence, while being in custody in relation to a different offence, will only be available to the accused till he is arrested by the police officer on the strength of the P.T. Warrant obtained by him from the court concerned. We must clarify that mere formal arrest (on-paper arrest) would not extinguish the right of the accused to apply for anticipatory bail. We say so because a formal arrest would not result in the submission of the accused, who is already in custody, to the custody of the police officer effecting a formal arrest in the subsequent case. However, if after effecting a formal arrest, the police officer on the strength of the same procures a P.T. Warrant from the jurisdictional Magistrate, the accused would have no other choice but to submit to that compulsion and the right of the accused to apply for anticipatory bail would thereafter get extinguished." [Emphasis Supplied]

15. The aforesaid enunciation make it amply clear when a production warrant is served upon the person in custody, the said person comes under the control and dominion of the police officer who seeks execution of the production warrant and for all practical purposes the said person submits to the custody of the said police officer. This amounts to arrest of the person in custody by police in execution of the production warrant in contradistinction to a formal / paper arrest which may precede a prayer to production warrant.

16. Referring to paragraph 60(iv) of the report it is argued since accused has not been produced before the jurisdictional court and prayer for police remand has not been allowed, the application for anticipatory bail is maintainable.

17. We are unable to read the ratio in *Dhanraj Aswani* (Supra) as proposed. Once the production warrant has been served upon the

accused in custody through the Officer-in-charge of the correctional home, the accused submits to the custody of the police officer seeking to execute the production warrant and cannot be released from custody unless he is produced in Court or the production warrant is recalled in view of the report of the Officer-in-charge of the correctional home concerned citing reasons for its non-execution. This amounts to arrest by the police in execution of the production warrant akin to execution of warrant of arrest in respect of a free individual. It is not a formal or paper arrest which is envisaged prior to issuance of production warrant.

18. It is true the correctional home authorities may refrain from producing the person in custody in court for reasons cited in Section 269 of the Code of Criminal Procedure (*Section 304 of the Bharatiya Nagarik Suraksha Sanhita, 2023*) which are as follows :-

- i) the person in custody is sick and unfit to be removed from prison, or;
- ii) is under committal for trial or under remand pending trial or pending preliminary investigation, or;
- iii) is in custody for a period which would expire before the expiration of the time required for complying with the order, or;
- iv) is a person to whom order under section 268 Cr.P.C does not apply and submit a statement of reasons to the Court issuing the production warrant.

19. In such eventuality it is open to the Court to accept the statement and recall the production warrant or in the alternative the Court may reiterate the warrant and demand production.

20. In the present case, production warrant was issued on 25.11.2024 directing production of the accused in custody on the next day i.e. 26.11.2024. The production warrant was served upon the petitioner

through the concerned correctional home on the same day and he is deemed to be arrested by the police in execution thereof in view of the ratio in *Dhanraj* (supra). On the next day prayer was made seeking his police remand. However, the prayer could not be considered due to the interdict of the Officer-in-charge of the correctional home who declined to produce the petitioner on the plea that he was ill and unfit to be removed from prison. Jurisdictional Court did not accept such plea and by order dated 26.11.2024 directed the petitioner to be produced on 28.11.2024.

21. At a stage when the production warrant had already been served upon the petitioner tantamounting to his arrest by the police in execution thereof and prayer for police remand had been preferred before the Jurisdictional Court, did the petitioner approach this Court for pre-arrest bail. Refusal of the Officer-in-charge of the Correctional Home to carry out the Court's order and produce the accused before the Jurisdictional Court is a post arrest event which is to be considered by the Jurisdictional Court either by recalling the production warrant or insisting on the petitioner's attendance on a subsequent date.

22. In the factual matrix of the case, it is strongly contended that sickness is a subterfuge and non-production of the accused was to abort the judicial process. We do not wish to make any comment on this matter. As discussed earlier, refusal of the correctional home authorities to produce the accused before the jurisdictional court is a post-arrest event following the arrest by police by service of the production warrant upon the petitioner and cannot vest jurisdiction in Court to entertain a pre-arrest bail application. These issues may be agitated during hearing of a bail application or in a writ of habeas corpus seeking release on the score of illegal detention.

Conclusion :-

23. In light of the aforesaid discussion, we are of the opinion the application for anticipatory bail is not maintainable and is, accordingly, dismissed.

24. It is open to the petitioner to seek appropriate relief in accordance with law, if so advised.

25. We clarify the Judge is at liberty to direct forthwith production of the accused physically to consider the prayer for police custody.

(Gaurang Kanth, J.)

(Joymalya Bagchi, J.)