

Hyderali vs State Of Kerala on 5 August, 2008

Author: K.Hema

Bench: K.Hema

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Bail Appl..No. 4274 of 2008()

1. HYDERALI, S/O MOIDEENKUTTY HAJI,
... Petitioner

Vs

1. STATE OF KERALA, REPRESENTED
... Respondent

2. THE STATION HOUSE OFFICER,

3. THE CIRCLE INSPECTOR, CBCCID, ERNAKULAM.

For Petitioner :SRI.K.RAMAKUMAR (SR.)

For Respondent :PUBLIC PROSECUTOR

The Hon'ble MRS. Justice K.HEMA

Dated :05/08/2008

O R D E R

K. HEMA, J.

Bail Appl.No. 4274 of 2008

Dated this the 5th day of August, 2008.

ORDER

This petition is filed by the 9th accused for anticipatory bail.

Facts briefly:

2. According to prosecution, huge amount of money, running to crores was misappropriated by several persons from government exchequer, by using certain forged documents. The crime was detected when the first accused was arrested and interrogated by the Sub Inspector of Police. He allegedly created fake bills purported to be issued to several persons for the purchase of bitumen (tar) from the Bharath Petroleum Corporation Ltd ('BPCL', for short) and Indian Oil Corporation ('IOC', for short). Those persons include government contractors, engineers, office bearers of District Panchayath, Grama Panchayath etc. Such bills were presented by several persons and to claim huge amount of money from the government and the money was paid also.

3. The petitioner is one of such government contractors, who was in possession of such forged bills created by the first accused and knowing the same to be forged and intending that the same shall be fraudulently or dishonestly used as genuine.

He made a claim for more than Rs.11 lakhs from the government, on the strength of such forged bills created and supplied by first accused, purporting to be issued by Bharath Petroleum Company or Indian Oil Company for the purchase of bitumen. The investigation is proceeded against 9 accused for offences under sections 465, 468, 471, 474, 20, 511 of 420, 420 read with 34 of IPC.

4. Petitioner's contentions: According to learned counsel for the petitioner, petitioner is absolutely innocent of the allegations made. The petitioner, as a government contractor, had taken up a contract for road-work and he also submitted bills before the Executive Engineer's office for purchase of tar. The physical verification of the tar used for the work was done by Engineers and those are entered in a measurement book also. The bills produced by him were duly countersigned by the officials concerned after verification and upon satisfaction that the tar is used. The bills are accepted only thereafter.

5. It is also submitted by learned counsel for petitioner that other similarly placed accused in this crime were granted anticipatory bail by different benches of this Court, as per different orders issued on their applications for anticipatory bail and hence, petitioner is also entitled to get the same relief from this court. It is also pointed out by him that even the third accused who allegedly obtained more than Rs.40 lakhs also was granted anticipatory bail, but the petitioner has not even obtained the money but only made a claim. Therefore, the High Court cannot speak in two voices, he added.

6. In a case of this nature, the guilt or involvement of the petitioner can be proved by documentary evidence and a custodial interrogation of the petitioner may not be necessary and if at all it is required, it can be done, even after granting anticipatory bail, learned counsel for petitioner submitted. According to him, if anticipatory bail is not granted, it will only ensure custodial torture by the police by using third degree method and, hence, the prayer for anticipatory bail may be granted by this Court.

7. Respondent's contentions: Learned Director General of Prosecution vehemently opposed this bail application. He submitted that when the first application for anticipatory bail was filed in this case by the third accused, he had vehemently opposed the application and this fact was recorded also, in the order. It was pointed out that huge loss of money, to the tune of crores, was caused to the Government, in connection with the construction and maintenance of road by the use of fake bills and this was detected only when the first accused was arrested and questioned.

8. Learned Director General of Prosecution also brought to my notice that he had addressed the authorities concerned and vigilantly taken steps to alert the Government on the oral observations made by this Court during the pendency of this petition, and accordingly, a special team of investigators headed by senior police officials in the State is constituted, as per the immediate orders issued by the Director General of Police. A thorough investigation is being conducted into the crime and petitioner is required for custodial interrogation for an effective investigation in this case. Therefore, it may not be proper to grant anticipatory bail to the petitioner in an offence of this nature.

9. However, regarding the question, whether anticipatory bail can be refused to petitioner alone, since other co-accused were granted the same relief, learned Director General of Prosecution submitted that he can only agree with the submissions made by learned counsel for petitioner on this score. Thus, resultantly, both sides would agree that anticipatory bail can be granted to the petitioner, since three different Benches of this court granted anticipatory bail to the co-accused who are also contractors.

10. But, can I agree? Heard both sides in detail. Perused the case diary consisting of as many as seven thick volumes. This includes the case diary relating to the crime registered as crime no. 999/2007 of the same station, in connection with "unnatural death" of first accused and the "work file" also. On going through the case diary and on consideration of the arguments advanced by both sides, I find that I shall not mechanically act on the unanimous submissions made by both sides and grant anticipatory bail to petitioner on the ground that other accused were granted the same relief.

11. According to me, power under section 438 of the code is not intended to be invoked on the basis of any compromise or consensus of opinion expressed by both sides. It shall also not be exercised on any concession extended to an accused by the opposite party, either. The court shall not grant the relief on the mere request for it. Of course, it may appear on an apparent reading of sub-section (1) of section 438 of the code that anticipatory bail can be granted, if the twin factors in the section exist viz., i) that a person has reason to believe that he may be arrested ii) that such arrest may be on an accusation having committed a non-bailable offence. But, such an allegation can be made by any person who is an accused in a case involving a non-bailable offence and hence, granting of anticipatory bail does not depend upon satisfaction of the above twin conditions alone.

12. Then, when can it be granted? It is only if the court "thinks fit" that the court may grant the relief, as referred to in the provision. How can this satisfaction be arrived at? For reaching a conclusion whether it is a fit case or not to grant anticipatory bail, the court shall keep in mind, various aspects. These include, the nature of offence or the allegations made against the accused.

Another factor is the need for custodial interrogation by the police. There are, of course, various other factors also, which even the legislature could not or did not elaborate in the provision but left to the discretion of the court to decide on the facts of each case when anticipatory bail can be granted and when the court can "think fit" to allow the relief. It is held in *Bharat Chaudhary v. State of Bihar*, ((2003) 8 SCC 77), as follows: "

"The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation."

13. Nature of offence: I shall first consider the nature of offence allegedly involved in this case. The case diary reveals various shocking instances, how huge amount of money running to crores could be dishonestly and fraudulently siphoned off from the government exchequer by various government contractors, Engineers, officials of PWD, Grama Panchayath, District Panchayaths etc. etc. This was done by using fake bills supplied by first accused. The case diary also shows that just like the first accused there were some other persons also who were engaged in similar activity of fabricating bills and supplying the same to various persons who are in need of the fake bills to claim huge money from government.

14. In many cases, on the strength of each of such fake bills (which are purported to be issued for supply of bitumen (tar) from BPCL and IOC), more than two lakhs were claimed and disbursed by government to various government contractors and other persons. This mode of misappropriation and forgery was carried on, since a very long time past at least from 1995 onwards. The first accused prepared the bills with the help of his computer, lap top etc. He also got some bills printed at a Press and many persons approached him to get such fake bills. He charged an amount of Rs. 2000 to Rs 5000 for each bill and supplied them to various persons including Engineers working in PWD.

15. The first accused gave the details of many persons, local authorities, engineers in the PWD etc. etc. during custodial interrogation. More details were collected from his lap top, computer, pen drive, forged bills etc., which were siezed from the house and office of first accused, pursuant to the information given by the first accused to the Sub Inspector under section 27 of the Evidence Act. He had, in his lap top and pen drive, the names and details of various persons who were involved in the offence. Several forged bills were also seized from his possession which contain the details of several engineers, contractors etc. A rough estimate itself reveals that a huge financial loss to the tune of crores of rupees is caused to the government.

16. The first accused was questioned on more than one occasion. Several valuable information regarding the persons who were involved in the offence was received from the first accused. He was scheduled to be questioned on 27.12.2007 by the Crime Branch officials. He must be expected to divulge much more details about the persons who were involved in the crime. But, he was found missing on the evening of 26.12.2007 and his dead body floated in the river on 29.12.2007. When learned Additional Chief Judicial Magistrate released him to police custody and also when he was released on bail, he cautioned the State about the safety of the fist accused by making specific observations in this regard. But, a very valuable source is 'left to be lost' for ever and the cause of death is still under investigation.

17. In such circumstances, no doubt, no court can overlook the seriousness and gravity of the offence and the nature of allegation made. State itself is the aggrieved in this case and this court cannot ignore the interest of the State. The larger interests of the public or the State is certainly one of the factors to be taken into account while an application for anticipatory bail is considered. Therefore, the gravity and nature of offence committed, the specific allegations made against petitioner, the societal interest are all factors which only dissuade this Court from granting anticipatory bail to the petitioner.

18. Need for custodial interrogation: As already referred to by me earlier, Supreme Court has made it clear that the need for custodial interrogation is a factor to be looked into in an application for anticipatory bail. According to learned counsel for the accused, even if petitioner is required for custodial interrogation, it is enough if a condition is imposed that petitioner shall make himself available for interrogation. With due respect, I can only disagree with this.

19. Custodial Interrogation means? "Custodial interrogation" does not mean mere questioning of the accused by the police. It has a different connotation in law. To constitute "custodial interrogation", there must be: (i) "custody" of the accused by police and also (ii) "interrogation" by the police. If an accused is released on bail, he is set at liberty by the court and he is not under anybody's custody. When bail is granted, custody ceases. The question of police custody does not arise thereafter, unless the bail is cancelled. By granting bail, accused is absolutely released from police custody and it may not be proper to say that the accused is in "custody" of police, after he is released on bail. If there be any interrogation by the police while on bail, it cannot be termed to be "custodial interrogation" it is mere "interrogation" without police custody. This is clear from what the Constitution Bench of the Supreme Court held in *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565) thus :

"to grant bail, as stated in Wharton's LAW LEXICON, is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial".

20. So, strictly speaking, there will not be any "custodial interrogation" by police, once the accused is released on bail. If a police officer interrogates the accused in a case, after his release on bail, it will not amount to "custodial interrogation", because the police cannot claim his "custody". He is an absolutely free person upon his release on bail, being not under anybody's custody, much less, the police custody.

21. Custodial interrogation is legal: It is also relevant to note that "custodial interrogation" is not forbidden by law. On the other hand, it is legal and recognized by the statute. Under section 167(2) of the code, the Magistrate is empowered to release the accused to "police custody" and such custody is allowed, mostly for the purpose of interrogation. During such period, an accused is interrogated by the police in police custody and recovery may also be effected. But, even such custody cannot be given to the police, after expiry of the first fifteen days of remand. That is the settled legal position.

Therefore, the custodial interrogation at the early stage of investigation after the arrest has some statutory importance.

22. The police has the right to keep the accused in their custody for some time after the arrest and it is enough that the accused is produced before Magistrate within 24 hours. During this period, between arrest and production, the accused is subjected to some restraint and he will be under the physical control by the police. His movements will be restricted and it can then be said that he was in "police custody". It is during such custody that he is subjected to "custodial interrogation" and recovery of various material objects are effected through him.

23. Custodial interrogation - purpose. Thus, "custodial interrogation" appears to have a specific purpose which is recognized by law also. The confession, statement or information given to the police officer while in police custody is given certain amount of sanctity also, as per law. Such statements are admissible under section 27 of Evidence Act under certain circumstances. Section 26 of the Evidence Act also indicates that confession made by an accused while in custody of a police officer, in the immediate presence of a Magistrate, may be proved against an accused. Thus, statement or confession made by an accused in police custody can be proved against him, as per law. The confession made by an accused to a police officer in police custody is admissible under certain enactments like TADA Act etc.

24. Thus, the police can, in law, procure or elicit confession, statement or information, which is admissible in law or not, by interrogation of the accused in police custody. Such interrogation is ordinarily referred to as "custodial interrogation". The court may accept or reject the materials collected during such custodial interrogation, after putting them to judicial scrutiny.

25. Denial of custodial interrogation if proper? But, it may not be proper to deny an investigator an opportunity for "custodial interrogation" of an accused, in fit cases. Unless there are strong reasons to avoid an accused being subjected to "custodial interrogation", the court shall not stand in the way of the police discharging their official duty, which is sanctioned by law. It must be remembered that investigating agency also plays a very vital role in criminal justice system. The evidence- collection is a part of investigation, as per law. The aggrieved or the victim ordinarily approaches the police and not the court, for redressing their grievance, immediately after an offence is committed.

26. As per the provisions of the code, when a crime is committed against him or her, he may move the police first, unless otherwise prescribed. On doing so, the investigator may proceed to collect evidence relating to such crime. The accused may also be subjected to custodial interrogation, especially in cases where certain facts whether incriminating or not are in his exclusive knowledge. Such materials are collected legally by interrogation of the accused in "police custody". There is no illegality in "custodial interrogation". But it is legally recognized by statute.

27. So, when the investigator alerts the court on the need for custodial interrogation, the court must pay due attention to the need expressed and if the court finds that his request is reasonable, the court shall not refuse the same and deny the opportunity to "custodial interrogation", as permitted by law. It must be remembered that it is based on the materials collected by the investigator, which

includes evidence through custodial interrogation also, that he forms an opinion whether there is a case to place the accused before the court for trial or not by filing of a charge-sheet under Section 173.

28. Referring to "investigation", the Supreme Court in *Union of India v. Prakash P. Hinduja*, (2003) 6 SCC 195 held as follows:

"Section 2(h) CrPC defines "investigation"

and it includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. It ends with the formation of the opinion as to whether on the material collected, there is a case to place the accused before a Magistrate for trial and if so, taking the necessary steps for the same by filing of a charge-sheet under Section 173."

The purpose of "custodial interrogation" is also thus, a factor which has to be borne in mind.

29. Interrogation means? The word, "interrogate", as per dictionary means, "to ask somebody a lot of questions over a long period of time, especially in an aggressive way" (vide Oxford Dictionary). Such 'aggressiveness' within a reasonable limit may not amount to torture, because the very expression "interrogation" itself is attached with some sort of aggressiveness. Therefore, any allegation of a possible aggressiveness in questioning by police may not be a sufficient ground to deny to the police, their opportunity to have "custodial interrogation" of the accused. This is intended for collecting evidence and to redress the grievance of the victim by bringing the accused before law. When the police officer confronts a guilty person, needless to say, he may not readily give answers to all the queries made. He may be reluctant to avoid the inconvenient truth and hence it may require sustained questioning of the accused over a long period and in some cases, in an aggressive manner also.

30. A few observations made by the Supreme court may be relevant in this context. While setting aside an order of anticipatory bail granted by Andhra Pradesh High court, rejecting the plea for "custodial interrogation", the Supreme Court in *State rep. by the CBI v. Anil Sharma*, (1997) 7 SCC 187 held as follows:

"We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such

an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders".

31. The ground realities have to be understood by the courts and it shall not be impractical, especially when the investigation is at the initial stage. It must be remembered that it is the duty of the investigating agency to collect sufficient materials and place them before court. So, in short the court has to strike a balance between the right of a victim to be protected by law and also the freedom or liberty of the accused which shall not be interfered with, except in accordance with law. While the liberty of a citizen is of grave concern of the court, that alone must not be the concern. The court must see the other side of the coin as well, and justice must be delivered to both sides equally.

32. In the above circumstances, the argument by learned counsel for petitioner to the effect that it would suffice, if a condition is imposed while granting anticipatory bail that he shall subject himself to interrogation by police cannot be accepted.

33. Interrogation Vs. Custodial Interrogation:

I have already elaborated on what "custodial interrogation" is. It will be clear from the discussion made that any direction given to the accused as per a condition imposed while granting bail to subject himself to "interrogation" may not, in strict terms, constitute "custodial interrogation". Because, in such cases, there is no submission of the accused to "police custody"

because he is free, well-protected and insulated by order for an anticipatory bail. "Bail is basically release from restraint, more particularly, release from the custody of the police", as the Supreme Court held in Gurbakh Singh Sibbia's case. Hence, interrogation effected by police while the accused is on anticipatory bail cannot be termed as "custodial interrogation", especially since there is no cancellation of bail, before the accused is so interrogated, in accordance with or compliance of the condition imposed while granting bail.

34. It is true that sub-section (2) of section 438 of the code lays down that a condition may be imposed that the accused shall make himself available for "interrogation" by the police as and when directed. It is relevant to note that the expression used is, "interrogation" and not "custodial" interrogation. The legislature is aware that after granting bail, in the event of arrest, there cannot be any "custodial interrogation," though mere "interrogation" may be possible.

35. At any rate, imposition of a condition arises only after the court "thinks fit" to issue a direction under sub-section (1) of Section 438. The court is empowered to impose certain conditions as stated in sub-section(2) of section 438, only when the court makes a direction under sub-section(1) and, not before. That means, the order passed under Section 438(1) takes effect immediately in the event of arrest and the accused has to be released on bail immediately thereafter. Therefore, any

interrogation of the accused by the police in cases where the accused is released on bail, as per an order issued under Section 438(1) of the Code, will not constitute "custodial interrogation."

36. It is worthy to bear in mind that anticipatory bail application is filed by a person who wishes to evade arrest, custodial interrogation and detention in custody also, whether "police custody" or "judicial custody". Such a person may either be guilty or not guilty. But, the court presumes him to be innocent, even if he is actually guilty and proceed on such presumption of innocence. But, an investigator may not be able to proceed on any such presumption because, from the evidence collected during investigation, he will be able to form a reasonable belief about the guilt of the person.

37. So, while exercising jurisdiction under section 438 of the code, at the very early stage of investigation, that is, even before the arrest is effected, it may not be proper, under all circumstances, to apply the presumption of innocence blind-fold, and refuse the request for "custodial interrogation". The court has to weigh the materials before it and consider the request made by the Investigator for "custodial interrogation" and decide whether it is a reasonable one and if such custodial interrogation will be necessary to bring out the truth and also for an effective investigation.

38. The court's concern shall not, at that juncture be one- sided that too, on the sole theory of presumption innocence of the accused or on any pre-conceived notion that the accused will be subjected to custodial "torture". The court shall be concerned about the victim also and his or her grievances, on whose behalf the police acts and collects evidence. It is wise to remember that police also has their own vital role to play. If the court interferes with such role, without sufficient reason, the net result may be lawlessness in the society. The victim of a crime may become yet another victim at the hands of the criminal justice delivery system also. In such circumstances, it is wise to remind oneself that an order passed without application of mind may end up in drastic results and the police will be prevented from collecting sufficient materials and place them before the court to prove the alleged offence. The court must be able to distinguish the genuine request and the fake one.

39. Now, back to the facts: On going through the case diary and considering the nature of allegations made, it appears to me that this is a case where several facts relating to the offence may be within the exclusive knowledge of the petitioner. Therefore, custodial interrogation of petitioner may also be necessary for an effective investigation to elicit the various details pertaining to the offence which are in the exclusive knowledge of the petitioner. It is pertinent to note in this context that it is only because the Sub Inspector interrogated the first accused in police custody that all the basic materials relating to the offence could be collected at the very early stage of the investigation itself.

40. Had the first accused not been interrogated, it would not have been possible to get the very valuable information relating to the names and details of persons who are associated with him in connection with the crime; to whom he had supplied the fake bills; who had used the forged bills prepared by him; how and where he created the bills; where he had stored the details of the bills etc., etc. It would not have been possible for the police to effect recovery of various material objects,

documents etc., on the very next day of the registration of the crime.

41. The details of the bills used by the petitioner, the details of the nature of work for which he used them, from where he obtained the bills and through whom he obtained the same, whether he had obtained similar bills from any other person and if so, his details etc. are all relevant details which can be procured by custodial interrogation of the petitioner. If anticipatory bail is granted at this stage, I am of view that it may result in permanent loss of a source of valuable information relating to a serious offence like this. If the police ever feels the need to interrogate petitioner in police custody, I do not want to refuse such opportunity to them, in best the interest of the State, which unfortunately does not appear to be the concern of the State at present.

42. No cause for apprehension of torture: On the facts of this case, there need not be any apprehension that petitioner will be subjected to any custodial torture. Even the first accused did not have any complaint of torture, though voluminous materials were elicited by custodial interrogation through him. It appears to me that this is a case where accused were favoured and cradled by the police, particularly the higher officials. There is an inordinate delay in bringing several names to the array of accused, even after getting sufficient materials to implicate various persons as accused. Even now, no steps are taken against many persons against whom the case diary contain sufficient materials to proceed against.

43. Interference on police by police ? There appears to be a deliberate attempt on the part of the higher officials to divert the junior officials from proceeding against a probable accused. It is clear from the case diary that the Sub Inspector who detected the crime himself had collected sufficient materials, as early as on the very next day of the registration of crime, ie., on 7.11.07, to establish that the bills issued in the name of Sri N.K. Abdul Kader were forged. His full address and the details were shown in the First Information Statement itself. It is also seen from the case diary that anticipatory bail application filed by Sri.V. Mohanan, Perumbavur, Ernakulam on 2.6.2008 before this court as B.A.3765/2008. He is not yet arrested but, when the Circle Inspector (CB CID) was proceeding to investigate into the role of the contractors, a curious direction was issued by the IG(Crimes).

44. At page 130 of case diary Volume V that there is a written instruction from IG (Crimes) CB CID on 10.6.2008 thus:

"only after all invoices used for purchasing bitumen during the period under review are seized from the offices of Executive Engineers of PWD all over Kerala especially in Malabar area can they be scrutinised for identify false invoices". Accordingly, the Circle Inspector (CB CID) recorded at page 132 and 133 of case diary volume V that the investigation relating to the contractors was being temporarily stopped and he was proceeding to inspect all offices of PWD(R) and collect all details about all the bills submitted by the contractors, as directed by the IG(Crimes).

45. Circle Inspector (CB-CID) kept away ? It is not understood why the Circle Inspector was kept away from the investigation being conducted into the involvement of the contractors against whom

there were sufficient materials even on the very next day of the arrest of the first accused. It appears that the Circle Inspector, CBCID was almost prevented by the interference of the higher officials from laying his hands on anybody against whom materials were collected. It also appears that the instructions given were more to avoid the investigators from booking the culprits rather than aiding them to accelerate the progress in investigation. The context in which the directions issued is certainly conspicuous. It is pertinent to note that as per the case diary that Inspector General Of Police (Crimes) CB CID himself had looked into the case file and given instructions in connection with the investigation in this case. Superintendent of Police , Crime Branch CID had also been dealing with the case.

46. Still, after sending away the Circle Inspector for a roving search into all the PWD offices for a "beat-about-bush", Superintendent of Police , Crime Branch CID prepared and signed a statement intended to be filed in court in connection with the anticipatory bail application filed by Sri. Mohanan and stated therein as follows: "till now, the petitioner is not included in the array of accused, since the investigating officer has not got sufficient time to go through the files concerned". How can he get any time ? The Circle Inspector, Crime Branch CID, had by then started his long journey to the various PWD offices in obedience of the direction issued by the IG(Crimes) since he was directed to finish the work by 30.6.2008.

47. Thus, the Investigating officer was away from station for a period of 20 days, not been able to do any thing fruitful. The investigation by the Circle Inspector appears to have been diverted by unwanted interference. Even now, the said Mohanan is not made an accused, presumably, due to lack of time ? It is also curious to note that on the day on which the dead body of the first accused was seen floating, Circle Inspector was urgently relieved from duty to take up special duty at Sabarimala. The Additional Sub Inspector conducted investigation into the "unnatural death" of the first accused, and why the Sub Inspector who detected the crime did not take up the issue is another mystery.

48. Contents of case diary highly disturbing: As a whole, the case diary reveals a very deplorable and shocking state of affairs. I will be doing an injustice to the society, if I fail to at least mention some striking instances noted by me. This is essential also, to decide whether any monitoring by Magistrate is required in this case in the light of the dictum laid down by the Supreme Court in Sakiri Vasu v. State of Uttar Pradesh and others ((2008)2 SCC 409). As early as on 7.11.07, i.e., on the very next day of the detection of the crime and arrest of the first accused, the Sub Inspector Hill Palace Police Station collected very valuable materials in connection with the crime, (including the names and details of the persons to whom the first accused supplied forged bills to claim more than Rs. 2 lakhs per bill) he did not do anything on the next day. The investigation in this case came to almost an abrupt stop, thereafter. The Sub Inspector did not do anything on 8.11.2007, not even a whisper on this case. His enthusiasm and vigour appear to have vanished, within just hardly one and half days.

49. Investigation in a stand still ? The investigation practically came to a stand still. The case diary depicts the picture of an enthusiastic Sub Inspector who conducted a thorough investigation and found out materials within a period of just one day being totally silenced. The reasons are obvious. It

is mentioned in the case diary that several agencies, Government contractors and named persons, Panchayat, quasi- governmental organizations, private persons etc., are all involved in the offence and certain lists were prepared, C.D. etc. are kept in the file. After collecting all such details relating to various contractors and other persons and also the details of the various fake bills used by them, it is not likely that he would become inert by himself.

50. But what transpired? Some "strong invisible hands"

presumably, from the Police Department itself appear to have played their role in this case, which stood adverse to the progress of investigation. It appears that the Sub-Inspector was waylaid and restrained him from proceeding any further. The Circle Inspector, his immediate superior, at the early stage of investigation, wrote a letter to the Assistant Commissioner to entrust the investigation in this case to another agency. That is all what a senior officer like the Circle Inspector has contributed to this file. He cannot be said to be ignorant of the importance of the matter, but he appears to have given clear indications to the Sub Inspector. The signal seems to be a red light and not indeed, a green one.

51. No enquiry about person mentioned in FIR: The fact that bills which were prepared by the first accused for the use of one N. K. Abdulkader, Ponath House, Koratty, Chalakudy, Thrissur District (whose name and address were given in the First Information Statement itself) were forged was established on 7.11.07 itself. For this purpose, the Sub Inspector questioned officials of BPCL and IOC also and documents were also seized. Each bill issued in the name of N. K. Abdulkader was for an amount of Rs.2,43,710/- . It is seen from the contents of First Information Statement that those were fabricated by first accused under instructions of one Rafique, attached to P.B.Khabirkhan Transport Company. But, absolutely nothing till today, to trace out any of these persons.

52. Any police officer, whether experienced or inexperienced, or even a layman will be aware of the need to make an investigation into the involvement of the persons who are named in the FIR. This is a State where investigation is very often conducted by police to find out even persons who are not named in the FIR and implicate them after collecting materials. But, it is surprising that even though months have elapsed and the investigation is taken over by the Crime Branch also, nothing is done so far to investigate into the involvement of persons who are specifically mentioned in the FIR.

53. No steps against third accused: So also, bills issued in the name of the third accused were found to be forged in the investigation conducted by the Sub Inspector, as early on 7.11.07 itself, on the very next day of the first accused's arrest. As per the case diary, he had claimed more than Rs.2 lakhs, as per each bill and about 20 such bills were given to him by the first accused. Such details are in the case diary on 7.11.07 itself. Documents were also seized to prove that he used forged bills. But, the name of the third accused was brought into the array of accused after a very long time. Later, anticipatory bail was granted to him also.

54. Others also not implicated: The case diary further reveals that just like the first accused, certain other persons were also engaged in similar activities and they had also fabricated bills in the same

manner and given for similar use. Their names and details also find a place in the case diary. Though the Crime Branch has taken over the investigation, no attempts are made even now to book them. Nobody seems to be interested in bringing the offenders to light. Instead, there appears to be a deliberate attempt by an invisible force, to protect them.

55. First confession statement, manipulated ? Even the evidence so far collected appears to be manipulated. The first confession statement of the first accused was recorded by the Sub Inspector on 6.11.07, as seen from the case diary. It is in this statement that the various details of the persons to whom the first accused gave the forged bill were recorded. But, there appears to be an erasure of three such names on the last page of the confession statement (vide overleaf page 55 of case diary Vol.I). The first confession statement of first accused is now seen at pages 49 to 55 in the case diary in volume I. The erasure is visible even by a naked eye. This statement alone is unsigned by the Sub Inspector.

56. It is clear from the case diary that whenever the Sub Inspector recorded a statement or prepared a Mahazar or the like, he had been affixing his signature. At page 363 of volume-I of the case diary and overleaf, another confession statement of the first accused is seen recorded by him on 19.11.2007. It is signed by the Sub Inspector. All the entries made by him are seen signed, such as, mahazar, search list, search memo, statements of various witnesses etc. etc. But the confession statement (at pages 49 to 55) alone appears to be in a peculiar handwriting which is different from the hand writing in other pages and it is unsigned also.

57. Death of first accused: It is relevant to note that the first accused who gave such details to the Sub Inspector died under suspicious circumstances. The investigation into that crime is also not free from suspicion. It is seen from the two orders passed by the Additional Chief Judicial Magistrate that learned Magistrate expressed his concern over safety of the first accused. While granting bail to the first accused and also while releasing him to police custody, the court expressed such concern. In the bail order, he mentioned, "safety of the accused is the concern of the State". It is not usual to make such observations, unless the accused himself expressed such apprehension. But, no investigation was directed into the source of any possible threat to the first accused.

58. It is also to be noted that the accused was to appear before the crime branch office on 27th of December. But, he was allegedly found missing since the previous evening on 26th. Being on bail, it is unlikely that he will anticipate any danger from the police during interrogation. But, whether any persons who were involved in the crime feared exposure of their involvement at the hands of the first Accused was not looked into. Nobody seems to be interested in ascertaining such details and absolutely no investigation is done in this line.

59. It is also to be seen that the dead body was found floating in river with his hands lifted up, with his face upwards. No forensic expert is questioned to find out whether such position of the body will indicate a suicide or a homicide. Though he was missing from 26th onwards, and body was recovered on 29th, the autopsy was conducted much later. Why there was a delay, is unknown. The investigation is conducted into this crime by the Additional Sub Inspector. It is not understood why the Sub Inspector who detected the crime and arrested the accused did not take up the investigation

or no steps were taken by the Circle Inspector to get that case also transferred to the Crime Branch.

60. Judicial monitoring required ? There are various other glaring facts which deserve to be commented upon, in relation to the investigation. But, I would exercise judicial restraint at this stage of investigation though I have to state the flaws and laches to some extent to consider whether judicial monitoring is required. It is quite evident that both the cases did not catch the attention which those deserved from the investigating agency. A step-motherly attitude was shown to both cases, though the State is expected to bestow more care and concern over those cases, since State itself is the victim. There is no hope that the matters will improve any further. Still, the court is not powerless, especially in the wake of the decision reported in *Sakiri Vasu v State of Utter Pradesh* and others ((2008)2 SCC 409).

61. On a consideration of the various facts I find that this is a fit case in which powers of the Court is to be invoked to protect the interest of the State, even though the State itself neglected its own cause. Appropriate orders will have to be issued for a judicial monitoring of the investigation, in the best interest of the society and public at large. There may not be any surprise if the society does not repose confidence in this type of investigation. None can ever blame when society clamour for investigation by other agencies. But the courts have their own limits, especially in a bail application. Whatever possible as per law alone can be done and shall be done by passing appropriate orders.

62. Petitioner if similarly placed ? Now, I shall deal with the last question-- whether petitioner is entitled for anticipatory bail because it was granted to other contractors. It was argued that petitioner and the other accused (to whom anticipatory bail was granted) are government contractors. Same offence was also alleged against them also. Therefore, having granted anticipatory bail to the others, petitioner shall also be granted anticipatory bail. On a first blush, it may sound a good argument. True, it may appear that each of the accused are similarly placed and that is only because they are all contractors and the offence for which they are proceeded against are also the same.

63. But, on going deeper into the facts carefully, it is revealed from the case diary that prima facie, each of accused committed distinct offences. The date, time, place, the quantum of money involved, the nature of the work done, the manner in which the forged documents are obtained, the person through whom the bills are obtained, the manner in which the offence is committed, are all different. If three murders are committed by three different persons by using different materials supplied by another accused, one by strangulating, another by stabbing and yet another by poisoning on different dates, time and place, those may constitute three distinct offences, though the section may fall under section 302 IPC. But in such a case, the fact that one of the accused is granted anticipatory bail may not be made a ground to grant the same relief to the other.

64. The manner in which the offence is committed by each of the accused, the witnesses relating to the offence, information which can be gathered from each accused may also be different from each other. By questioning a particular accused, whatever information can be gathered may not be the same when another accused is questioned. He may have to speak regarding different factors . The nature of his involvement in the offence and the modus operandi adopted by him in the commission

of offence may be different from other accused.

65. Considerations under Section 438 Cr.P.C different from those under Section 439 Cr.P.C: Therefore, the conventional rule that if an accused is granted bail similarly placed accused shall also be granted bail may not apply in a fact-situation like this. Post-arrest and pre-arrest bail differ substantially. Though in a case of post-arrest bail, an accused may be entitled to be released on bail, on the ground that a similarly placed accused is granted bail, it may not have universal application in an application for anticipatory bail. That is for the reason that the relevant considerations for grant of post-arrest bail and pre-arrest bail differ. In the post-arrest stage, information would have already been collected and recovery would also have been effected.

66. But, on a pre-arrest stage, no recovery would have taken place. The accused would not have been arrested. He would not have been interrogated in custody. In such circumstances, the relevant facts which may stand scrutiny in a pre-arrest bail under section 438 and a post-arrest bail under section 437 or 439 may materially differ. Therefore, anticipatory bail cannot be granted or refused to an accused mechanically, without proper application of mind, on the mere ground that another co-accused was granted the relief.

67. Regarding the difference in the relevant consideration in pre-arrest and post-arrest bail, the Supreme Court in *Pokar Ram v. State of Rajasthan*, (1985) 2 SCC 597 held thus:

"Relevant considerations governing the court's decision in granting anticipatory bail under Section 438 are materially different from those when an application for bail by a person who is arrested in the course of investigation as also by a person who is convicted and his appeal is pending before the higher court and bail is sought during the pendency of the appeal.....This is necessary to be stated because the learned Judge in the High Court unfortunately fell into an error in mixing up all the considerations, as if all the three become relevant in the present situation".

I gain support from the above ruling also. Thus, while looking at the issue from any angle, I find that the petitioner does not deserve anticipatory bail.

68. Before I conclude: But, before I conclude, I have to mention another very important aspect, without which, this order will not be complete. Different Benches of this Court on different dates granted anticipatory bail to different accused who are all government contractors (vide orders in B.A.Nos.1366,1948, 2463, 2755, 3689 and 4003 of 2008). The first order was passed on 17.3.2008 in B.A.No.1366 of 2008.

69. Later, the second accused was granted anticipatory bail as per order dated 31.3.2008 in B.A.No.1948/2008. The fifth, sixth, seventh and eighth accused were also granted the same relief, one after the other. Anticipatory bail was granted mainly on the ground that both sides agreed that if anticipatory bail is granted to one accused in a crime, similarly placed accused shall also be granted the same relief. Even a person who is not yet implicated as accused also was granted anticipatory bail. This Bench also granted bail to other co-accused on the same ground.

70. But, it is clear from all those orders that the case diary which now runs to VIII volumes had not been placed before this Court while those applications were heard by different Benches. But after having spent considerable time on the huge volumes of case diary by myself now, by burning much of the midnight oil, several disturbing facts have come to the notice of this Court. The State did not take up the matter, either before this Court or before the Supreme Court for cancellation of anticipatory bail to any of the accused, but sailed along with the accused. After taking the strain to closely go through the case diary (after calling for the same), this Court has now pointed out the various facts which are disturbing. It is evident that the investigation of this case as well as in the case of "unnatural death" is not in safe hands.

71. Summing up my discussion, I hold that though it may appear to be unusual to reject anticipatory bail to seemingly, similarly placed accused, for the various reasons discussed in this order, I find that nothing shall be a reason for this court to prevent miscarriage of justice. There is a compelling necessity, on the facts and circumstances of this case, in the larger interest of public justice, (which, unfortunately the State does not seem to be concerned about) that the State considers whether the case of the co-accused deserves to be looked into again for appropriate remedy, especially in the light of the various facts pointed out by this court, after going through the case diary at length. The learned Director General of Prosecution who is also a Minister of Justice may advise the state appropriately.

72. Preserve evidence: In the peculiar facts and circumstances of this case, I also find that the evidence and data already collected in investigation need be preserved. Unless some order is passed, it is likely that the evidence so far collected may also be destroyed or manipulated by some "invisible hands". Taking into consideration, the evident unwarranted interference of the "invisible force" which diverts and controls the course of investigation in this case, which appears to have been connived at by the State itself, I find that a lawful interference of the judiciary is essential in this case, at the investigation stage of the relevant two cases. Lest, I strongly feel, public interest will be the causality and there will be no point in lamenting later, at the stage of trial, about the poor plight of the case. This is a typical case where the case diary reveals that in this 'God's own country', there is 'accused's own police'.

Taking all the above facts into consideration, on the peculiar facts and circumstances of this case, I pass the following order:

- i) The prayer for anticipatory bail by the petitioner is rejected.
- ii) The case diaries in Crime Nos. 819/07 and 999/07 shall be handed over to the Director General of Police or a senior official specially deputed by him on his behalf, to receive the same.
- iii) Registrar General shall ensure that the attested photo copies of the entire case diary are taken at the cost of the State and those are handed over in sealed covers, to the Director General of Police or to a senior official who is specially deputed by him to receive the same on his behalf from this court. The attestation shall be done only

by an official of the Registry of this Court.

iv) The Director General of Police is also directed to keep in safe custody, the attested photo copies so handed over, to be produced in court, as and when directed and if so required.

v) The Additional Chief Judicial Magistrate Court,
Ernakulam is directed to monitor the

investigation in the two cases referred to in this order (Crime nos. 819/2007 and 999/07), by strictly following the dictum laid down in Sakiri Vasu v. State of Uttar Pradesh and others, (2008)2 SCC 409, in accordance with law.

vi) The Director General of Prosecution shall alert the State on the various striking facts pointed out regarding investigation and also the need to consider whether any steps have to be taken, in accordance with law, in the case of the accused who were already granted anticipatory bail by the different Benches of this Court, in the light of the facts now emerged and as pointed out in this order.

This petition is disposed of accordingly.

K.HEMA, JUDGE vgs/krs