The State Of Maharashtra vs Shri Ananda Tukaram Akale And Tasgaon ... on 27 November, 2007

Equivalent citations: 2008(110)BOM.L.R.181

Author: V.C. Daga

Bench: V.C. Daga

ORDER

V.C. Daga, J.

Page 0184

1. Heard learned A.P.P. for the applicant State, learned Counsel for the respondent No. 1 accused and learned Counsel for respondent No. 2- bank. Perused record.

2. The State of Maharashtra has moved this application for cancellation of anticipatory bail so as to arrest the respondent No. 1- accused Shri Ananda Tukaram Akale ("the accused" for short).

Factual Matrix:

3. The factual matrix giving to the present application, in short, is as under:

4. The accused is a businessman running the business of agency under the name and style "Shreekripa Agency" at Kavate Mahankal, district Sangli. He is operating as agent for M/s.Ambuja Cement. The nature of business is to buy cement from the manufacture and sell the same in the open market.

5. In the year 2002, the accused opened an account bearing Current Account No. 9 with Tasgaon Co operative Bank, Kavate-Mahankal Branch ("said bank" for short). In the year 2003, accused opened another account bearing Current Account No. 375 with the Sangli Branch of the said bank. The accused used to deposit cash in Kavate-Mahankal Branch and used to issue cheques in order to get the money transferred to Sangli Branch of the said bank through telephonic or telegraphic transfer. Simultaneously, he used to issue cheques drawn on the Sangli Branch in favour of M/s.Ambuja Cement so as to enable M/s.Ambuja Cement to claim the amount of cheques from and out of the amount deposited with the Kavate-Mahankal Branch and transferred to Sangli Branch. It appears that the said bank transactions moved smoothly till the year 2005.

6. It appears that sometime in the month of June, 2006, while updating the pass-book of the accused it was noticed by the clerk of Kavate- Mahankal Branch that the balance reflected in the pass-book was not tallying or Page 0185 matching with the bank ledger. Since the entries did not match, the clerk of the bank and one Mr.Hingmare, Bank Manager, requested accused for pass-book and promised him to return it after making up-to-date enquiry.

7. It appears that while updating pass-book, the bank officials suspected some foul game. Consequently, they approached the accused requesting for deposit challens, cheque book counters and pass-books for audit purposes which the accused claims to have handed over.

8. The complainant- bank after about a week or so informed the accused that there appears to be some fraud in the bank and that without depositing full amounts in the bank account, telephonic or telegraphic transfers were effected from Kavate-Mahankal Branch to Sangli Branch of the said bank.

9. The accused, thereafter, claims to have met the Chairman of the said bank at its head office at Tasgaon and claimed custody of the documents vis-a-vis deposit challens, cheque book counters and passbooks. According to him, he did not get positive response from the bank, therefore, he claims to have filed private complaint on 29th August, 2006 registered as Criminal Complaint No. 68/2006 with the Court of judicial Magistrate, First Class, Kavate-Mahankal ("J.M.F.C." for short). The learned Magistrate on 31st August, 2007 was pleased to direct investigation under Section 156(3) of Code of Criminal Procedure, 1973 ("Cr.P.C." for short).

10. In the meanwhile, the accused apprehending his arrest, filed an application for anticipatory bail on 14th September, 2006. However, since no offence was registered against him at that time, his application came to be rejected for want of cause of action.

11. It appears that the investigating officer filed report on 17th October, 2006 before the learned Magistrate stating therein that no fraud has taken place in the bank and the customers have not been defrauded and that all transactions were found proper and in order.

12. On the same date, i.e. on 17th October, 2006, F.I.R., being C.R. No. 87/2006, at the instance of the complainant-bank, came to be registered with the Kavate-Mahankal Police Station under Section 406, 408, 409, 467, 405, 471, 477A read with Section 34 of Indian Penal Code (I.P.C.).

13. It appears that after registration of F.I.R., the investigating officer sent for the accused for interrogation and to seek certain documents such as bank deposit slips, original pass books, etc. Ultimately, they were seized from the accused.

14. The accused, thereafter, on 20th October, 2006, moved another application to seek pre-arrest bail. On 21st November, 2006, the learned Sessions Judge Sangli was pleased to grant him interim relief with direction to attend the police station every day for the purposes of interrogation.

15. The learned Sessions Judge, after due notice to the State, was pleased to grant anticipatory bail in favour of the accused by an order dated 18th December, 2006, by-passing regular Court, without

limiting duration of the anticipatory bail.

16. It appears that learned Sessions Judge was impressed with the pre-emptive action taken by the accused leading to filing of private criminal Page 0186 complaint vide Criminal Case No. 68/2006 before J.M.F.C., much before the F.I.R. filed by the bank. Learned Sessions Judge, prima facie; observed that the misappropriation must have taken placed in the bank itself. The learned Judge also went on to observe that some persons from the head office of the bank must be hand-in-glow with the officers of the local branch of the bank without which the misappropriation of such a large magnitude could not be possible.

17. The prosecution has now moved the application for cancellation of anticipatory bail contending that the order granting bail is erroneous as the same is based on perfunctory reasons and that the custody of the accused is necessary to find out modus operandi adopted by the accused and to recover missing forged documents such as deposit challens, old passbooks, cheque counters, which according to the prosecution are still in the custody of the accused. It is also alleged in the application that the accused is the ultimate beneficiary of the fraud which has taken place in the bank and most of the paying slips recovered from the custody of the accused do not bear the signature of the cashier, though, they have impression of rubber stamp. That there is a variance in the amount mentioned on the face of the deposit slips and on over leaf thereof. It is further alleged that in order to mislead the investigating agency, the accused has produced deposit slips, the reverse sides of which are pasted with counters of other slips. According to the prosecution, the offence is of serious nature. That conspiracy to cheat and defraud the public institution in a systematic manner; with the involvement of the bank officials along with accused cannot be ruled out; as such custody of the accused is necessary.

18. The complainant bank has also filed application for intervention to support the application moved by the prosecution seeking cancellation of anticipatory bail granted in favour of the accused.

Rival Submissions:

19. The learned A.P.P., appearing for the State, made oral submission in consonance with the grounds raised in the application seeking cancellation of anticipatory bail granted in favour of the accused and went on to highlight some of the entries from the documents seized by the investigating officer which are catalogued hereinbelow:

> (A) (i) The deposit slip dated 19th July, 2003 showing deposit of Rs. 7,000/- cash does not bear signature of the cashier. There is no entry in the cashbook of the bank. So far as journal book maintained by the accused in the regular course of his business is concerned, it does not have any entry showing deposit of Rs. 7,000/-. On the contrary, in the journal book, the amount shown to have been deposited is Rs. 64,500/-, whereas there is no deposit slip in existence showing this deposit of Rs. 64,500/-.

(ii) The another deposit slip shows deposit of Rs. 30,000/- which bears the initials of the cashier but there is no corresponding entry in the books maintained by the accused so as to establish deposit of Rs. 30,000/- on that day.

In substance, the accounts books of the accused show deposit of Rs. 64,500/-, whereas deposit slip shows deposit of Rs. 7,000/-+ Rs. 30,000/-. Page 0187 The details of deposit on the over leaf of the deposit slip do not tally with the amount mentioned on the front page of the deposit slip. Correspondingly, bank ledger shows deposit of Rs. 64,500/-, whereas there is no consolidated deposit slip of Rs. 64,500/-.

...From the above factual scenario emerging from the documents seized from the custody of the applicant, learned A.P.P. sought to argue that though amount of Rs. 64,500/- reflecting in books of accounts of the accused tallies with the banks ledger, but there is no deposit slip evidencing deposit of Rs. 64,500/-, whereas there are only two deposit slips of Rs. 7,000/-and Rs. 30,000/- i.e. showing aggregate deposit of Rs. 37,000/-only. From these facts supported by material on record, learned A.P.P. went on to argue that the difference of Rs. 27,000/ seems to be the amount of misappropriation. In her submission, the said misappropriated amount must have been shared by the banks staff in connivance with the accused.

...At this stage, on being asked, to the learned Counsel for respondent No. 1- accused, who is assisted by the Accountant of the accused, to reconcile these entries with the paying-in-slips/ deposit slips, learned Counsel for the applicant though tried to explain it but, prima facie; could not establish missing link to take her submission to the logical end. Ultimately, in desperation she submitted that all deposit slips have been handed over to the investigating officer.

(B). The learned A.P.P. with the aforesaid entries moved on to another entry dated 23rd April, 2005. The amount of deposit as per the deposit slip dated 23rd April, 2005 is Rs. 89,000/-. It bears initials of the cashier of the bank with the seal of the bank, whereas the journal book maintained by the accused shows deposit with the bank in the sum of Rs. 95,572 and Rs. 10,000/-, but there are no deposit slips showing deposit of these amounts i.e. total deposit of Rs. 1,05,572/-.

...The journal of the accused, as a matter of fact, shows that two deposits were made on two occasions on 24th March, 2005. One in the sum of Rs. 95,752/- and another in the sum of Rs. 10,000/- which is clear from the entries made in the journal book maintained by the accused. If that be so, according to learned A.P.P., accused ought to have been in possession of two deposit slips showing deposit of Rs. 95,572/- and Rs. 10,000/-.

...According to the learned A.P.P., assuming for the sake of argument that consolidated deposit of Rs. 1,05,572/-was made, in that event, deposit slip of Rs. 1,05,572/- ought to have been in existence, whereas the deposit slip seized by the investigating officer is for Rs. 89,000/- only. Learned A.P.P., thus, submits that again there is a difference of amount amounting to Rs. 16,572/- for which there is no explanation.

In order to buttress her above submission, she highlighted that as per books of accounts of the accused Rs. 1,05,572/- have been deposited with the bank, whereas deposit slip represents deposit of Rs. 89,000/-only.

At this stage,on being asked to explain these entries, learned Counsel for the accused, again assisted by the Accountant of the accused, could neither throw light nor could reconcile these entries nor could offer any explanation so as to answer the question sought to be raised by the learned A.P.P. Page 0188 (C). With the aforesaid entries, the learned A.P.P. moved on to another entry dated 28th March, 2005. Again deposit slip shows deposit of Rs. 38,000/- by the accused, whereas his journal book shows deposit in the bank in the sum of Rs. 95,000/- + Rs. 1,500/-.

Again there is discrepancy in the ledger and the deposit slip. The deposit in the bank as per the deposit slip is less than what is shown in the journal book maintained by the accused. Similar is the scenario on 29th March, 2005. The deposit slip shows Rs. 2,15,000/-, whereas the journal shows deposit of Rs. 1,10,000/- + Rs. 89,000/-.

20. The learned A.P.P. not only referred to the aforesaid three entries in support of her submission to demonstrate prima facie involvement of the present accused in commission of offence of misappropriation and playing fraud on the bank but went on to cite numerous such entries which could not be reconciled during the course of hearing.

21. Mr.Patwardhan, learned Counsel appearing for the intervenor-bank also supported learned A.P.P. and came out with number of such other entries and demonstrated that they cannot be reconciled.

22. The learned Counsel for the respondent No. 1 accused also found it difficult to offer any explanation, who, ultimately, said that whatever documents the accused had in his possession, he has handed over to the investigating officer.

23. The learned A.P.P. and Mr.Patwardhan, appearing for the intervenor- bank jointly submitted that the custodial interrogation of the accused is necessary, firstly, to recover missing link of documents such as paying slips; which can only be in the possession of the accused. They further submit that once the custody of the accused is granted, then custody of the bank officials, whose bail applications are rejected, can also be taken and all of them can be interrogated together so as to find out the fraud and trace money which is a public money siphoned by all the accused in connivance with each other.

24. Mr.Patwardhan also pointed out that some of the bank officials have been suspended. They are not only facing criminal prosecution but also facing departmental inquiries. He further submits that the rubber stamps, which were used to show deposits in the bank, will also have to be recovered. That is how the case of custodial interrogation was sought to be made out.

25. The learned A.P.P., lastly, relying upon the judgment of the Apex Court in the case of Sallauddin Abdulsamad Shaikh v. State of Maharashtra and some other judgments taking similar view, urged

that the learned Sessions Judge could not have granted anticipatory bail for an unlimited period. She submits that as per the law laid down by the Apex Court, anticipatory bail should be for a limited duration only and, ordinarily, on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted. She, Page 0189 thus, tried to find fault with the impugned order even on this count in addition to the grounds raised and already referred to hereinabove.

26. The learned A.P.P. also relied upon the judgment of the Apex Court in the case of C.B.I. v. Anil Sharma and went on to urge that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of Cr.P.C. According to her, the Apex Court has further observed that effective interrogation of the suspected person is of tremendous advantage in disintering 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 denial. She also placed reliance on judgment of the Apex Court in the Himanshu Desai v. State 2006 (1) Cr.L.J. 186 (SC).

27. Per contra, learned Counsel appearing for the respondent No. 1-accused took me through the affidavit-in-reply filed on record and tried to highlight the legal scenario leading to cancellation of bail. She placed reliance on the judgment of the Apex Court in the case of Bhagirat Singh v. State of Gujarat ; wherein the Apex Court has laid down the principles reading as under (H.N.):

> Very cogent and overwhelming circumstance are necessary for an order seeking cancellation of the bail. Even where a prima facie case is established, the approach of the court is the matter of bail is not that the accused should be detained by way of punishment but whether the presence of the accused would be readily available for trial or that he is likely to abuse the discretion granted in his favour by tampering with evidence.

28. With the aforesaid legal foundation, learned Counsel for respondent No. 1- accused went on to urge that the order granting anticipatory bail can be set aside or recalled only on the ground of lack of jurisdiction or breach of condition or misuse of opportunity. According to her, none of these grounds are available in the present case for which the bail can be cancelled. She further submitted that the order has been passed by the court of competent jurisdiction and it is not the case of the prosecution that discretion has been transgressed by the Sessions Court to unconstitutional level lacking jurisdiction warranting interference at the hands of this Court. She further submits that whatever documents the accused had in his possession have already been handed over to the investigating officer. The accused does not have any more documents in his possession. She further submits that whatever documents are in possession of the investigating officer can be investigated by him and the Page 0190 accused can be interrogated and necessary information can be sought from him. She also stated that respondent No. 1 accused is ready to co-operate with the investigating officer without any reservation.

29. The learned Counsel for respondent No. 1 accused also pressed in to service another judgment of the Apex Court in the case of Joginder Kumar v. State of Uttar Pradesh and went on to submit that no arrest can be made only because it is lawful for the police officer to do so. The arrest and detention in the police lockup of a person can cause incalculable harm to the reputation and self esteem of a person. She, thus urged that no case is made out by the State for cancellation of anticipatory bail granted by the Sessions Court in favour of the accused as such the present application is liable to be dismissed.

CONSIDERATION:

Let me first consider the parameters for grant of pre-arrest bail.

PARAMETERS:

30. The Apex Court in the case of Bharat Chaudhary v. State of Bihar , observed that the object of Section 438 of the Code is to prevent undue harassment of the accused persons by pretrial arrest and detention. The gravity of the offence is an important factor to be taken into consideration while granting anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the courts concerned while entertaining a petition for grant of anticipatory bail.

31. In the case of Adri Dharan Das v. State of West Benal , the Apex Court said that the power exercisable under Section 438 of the Cr.P.C. is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty, then power is to be exercised under Section 438 of the Code. The power being of important nature it is entrusted only to the higher echelons of judicial forums i.e.the Court of Session or the High Court. It is the power exercisable in case of an anticipated accusation in non-bailable offences.

32. The Apex Court in the case of Gurbaksh Singh v. State of Punjab , observed as follows:

> We would, therefore, prefer to leave the High Court and the Court of Sessions to exercise their jurisdiction under Section 438 by a wise and Page 0191 careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these Courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the Legislature has conferred upon them, by laying down inflexible rules of general application.

33. The Apex Court, in the case of State represented by the C.B.I. v. Anil Sharma , while emphasizing importance of custodial investigation observed as follows:

> 6. 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 disintering many useful information 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 disintering offences would not conduct themselves as offenders.

34. In the case of K.K. Jerath v. Union Territory, Chandigarh 1998 Cri.L.J. 2555 it is observed as under:

> 5. We do not wish to enter into any detailed discussion on these legal aspects raised by the learned Counsel for the respondents as this Court in the several decisions referred to by the learned Counsel for the petitioner has explained the scope of the provisions of Articles 20(2) and 21 of the Constitution and Section 486 of the Code of Criminal Procedure and their inter-relationship. We may only State in considering a petition for grant of bail necessarily if public interest requires detention of citizen in custody for purpose of investigation could be considered and rejected as otherwise there could be hurdles in the investigation even resulting in tampering of evidence.

35. A three Judges Bench of the Apex Court in the case of Pokar Ram v. State of Rajasthan observed as under:

> Page 0192 Relevant considerations governing the Courts 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.

36. Similar observation have been made by the Apex Court in the case of Anil Sharma (supra) that the consideration which should weigh with the Court while dealing with a request for anticipatory bail need not be the same as for an application to release on bail after arrest.

ON MERITS:

37. Having heard rival parties, examined the law laid down by the Apex Court, it is, no doubt, true that the Apex Court has repeatedly observed that for seeking cancellation of bail very cogent and

overwhelming circumstances are necessary but essentially, these observations are to be found in the cases wherein the question of cancellation of regular bail was involved.

38. The Apex Court in the case of State of Gujarat v. Narendra K. Amin 2007 ALL MR (Cri) 2936 (SC) was pleased to observe that the Sessions Court while granting anticipatory bail must consider that whether the accused is in a position to influence, induce or coerce witnesses to desist from furnishing relevant information to the investigating agency. The Court should also take into account the need for custodial interrogation of the accused.

39. In the case of Puran v. Rambilas , the Apex Court ruled that one of the ground for cancellation of bail could be where ignoring material and evidence on record and perverse order granting bail in a heinous crime and that too without giving any reasons is passed. Such an order would be against the principles of law. Interest of Justice would also require that such a perverse order be set aside and bail be cancelled. The Apex Court further observed that arbitrary and wrong exercise of discretion by the trial Court has to be corrected. It further reiterated law laid down in the case of Gurucharan Singh v. State (Delhi Admn.) AIR 1978 SC 179. In this case, it has been observed by the Apex Court that under Section 439(2), the approach should be whether the order granting bail was vitiated by any serious infirmity for which it was right and proper for the High Court, in the interest of justice, to interfere.

40. Bearing in mind the law laid down by the Apex Court, let me turn to another contention that pre-arrest protection ought to have been granted for a limited period under Section 438. In my considered view, there is substance in the submission of learned A.P.P. The Sessions Court has not taken into account all the facts and circumstances involved in the case. Page 0193 On the contrary, pre-arrest bail order is passed even before the investigation could take proper shape. Hence Court below should not have granted permanent pre-arrest bail.

41. It is needless to mention that the facility, which Section 438 gives, is generally referred to as "anticipatory bail". Any order of bail can be effective only from the time of arrest of the accused. Manifestly, there is no question of release on bail unless the accused is arrested and, therefore, it is only after the arrest is effected the order becomes operative. The power exercisable under Section 438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty then power is to be exercised under Section 438.

42. Number of judgments have highlighted that Sections 438 and 439 of Cr.P.C. operate in different fields. It is clear from the bear reading of the provisions that for making an application in terms of Section 439 a person has to be in custody. Section 438 deals with "Direction for grant of bail to person apprehending arrest."

43. Keeping the aforesaid legal provisions in mind and Law leading to cancellation of bail, one more deep routed settled principle of law flowing from the judgment of the Apex Court in the case of Sallauddin (supra); needs to be taken note of; wherein the Apex Court has observed as under:

> Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realised that when the Court of Sessions or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.

44. In the recent judgment of the Apex Court in the case of Naresh Kumar Yadav v. Ravindra Kumar and Ors. in Appeal (Cri.) No. 1462/2007, the Apex Court went on to highlight that if the protective umbrella of Section 438 is extended beyond what was laid down in Sallauddins case (supra) the result would be clear by-passing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies up to higher Courts, the requirements of Section 439 would become dead letter. No part of a statute can be rendered redundant in that manner. The Page 0194 Apex Court, thus, observed that anticipatory bail should, normally, be granted for a limited duration.

45. It is, no doubt, true that as per the judgment in Bhagirathsingh (supra), as laid down by the Apex Court, the Court is not powerless to grant bail for the entire period of trial but the recent development of law leans in favour of granting limited bail, especially, when the investigation is at the premature stage. The very same aspect has been highlighted in Adri Dharan Das (supra).

46. In the above view of the principles of law as set out and the peculiar factual scenario involved, I direct that during the period of four weeks from today, the respondent No. 1- accused shall surrender before the regular Court and shall seek regular bail which the Court below shall be free to decide in accordance with law in the light of various cases referred herein.

47. I make it clear that I did not express any opinion on the merits of the case. When the bail application would be moved in terms of Section 439 of Cr.P.C. before the concerned Court, the same shall be considered in its proper perspective in accordance with the law laid down by the Apex Court in the matter of grant of bail and importance of custodial interrogation. If the application for bail is moved, the concerned Court shall do well to dispose it of with expeditious despatch provided sufficient advance notice is given to the State.

48. Any observation made in this order shall not be construed as finding or expression on merits of the case at the time of trial.

49. In the result, application is partly allowed in the terms of this order.