

Sri Braja Bhai vs State Of Orissa on 18 April, 2008

Equivalent citations: 2008(II)OLR161

Author: M.M. Das

Bench: M.M. Das

JUDGMENT

M.M. Das, J.

1. This application filed by the petitioner for grant of bail is the second journey of the petitioner to this Court under Section 439 Cr.P.C.

2. During the stage of investigation, the petitioner approached this Court for grant of anticipatory bail under Section 438 Cr.P.C. in BLAPL No. 12457 of 2006. This Court, while rejecting the said application for anticipatory bail, granted liberty to the petitioner to surrender before the learned Court below and move for regular bail, if he is so advised. The petitioner approached the Supreme Court in a Special Leave Petition against the order of this Court refusing to grant anticipatory bail. The Supreme Court after hearing the case, by order dated 20.3.2007 observed that the High Court, while disposing of the petition has granted liberty to the petitioner to surrender before the Court below and move for regular bail, if he is so advised, in which event, the said Court shall dispose of the bail application expeditiously in accordance with law. In view of the above direction, the learned Senior Counsel appearing for the petitioner sought permission to withdraw the Special Leave Petition with liberty to move for regular bail. The Supreme Court, therefore, disposed of the Special Leave Petition directing that if such an application is filed, the same shall be disposed of as expeditiously as possible, while dismissing the Special Leave Petition as withdrawn. Even, thereafter, the petitioner did not surrender before the Court below for which the prosecution moved for issuance of process against the petitioner under Section 82 and 83 of the Cr.P.C. The petitioner filed an application under Section 482 Cr.P.C. before this Court, challenging the process issued against him under Sections 82 and 83 Cr.P.C. While dismissing the said application under Section 482 Cr.P.C, this Court, without interfering with the order by which process was issued under the above provisions of the Cr.P.C, disposed of the said application by staying issuance of warrant against the petitioner for some period and directing the petitioner to surrender within the said period before the Court below and move for regular bail. It was also observed by this Court that in the event the petitioner does not surrender within the said period, the directions issued under Section 82 and 83 Cr.P.C. will be operative. The petitioner, thereafter, surrendered before the learned S.D.J.M., on 25.6.2007 and moved for bail. The said prayer being rejected, the petitioner moved the learned Sessions Judge, Cuttack, who also rejected his prayer for bail and, thereafter, the petitioner moved BLAPL No. 7038 of 2007 before this Court under Section 439 Cr.P.C.

3. Hearing of the said petition was concluded on 11.10.2007. The PUJA Vacation having intervened, judgment of the said bail application was delivered on 21.11.2007.

4. This Court, while disposing of the said bail application considered the submissions made on behalf of the petitioner and the State, the materials available in the case diary produced before this Court, as well the reasons assigned by the learned Sessions Judge while rejecting the prayer for bail. Considering all aspects of the matter, this Court dismissed the bail application by the said judgment dated 21.11.2007.

5. In the interregnum, charge sheet was filed against the petitioner and other accused persons for the alleged commission of offence under Sections 406/408/467/468/420/120-B/34 IPC. However, investigation was kept open on the prayer of the prosecution under Section 173(8) Cr.P.C. Upon filing of the charge sheet, the petitioner moved for bail, afresh, before the learned S.D.J.M. The same being rejected, he moved the learned Sessions Judge, who having rejected the prayer for bail, the petitioner has approached this Court in the present bail application under Section 439 Cr.P.C.

6. Mr. Patnaik, learned Counsel for the petitioner vehemently argued that the petitioner has been falsely implicated in this case and the prosecution has attempted to give a picture as if the petitioner is the main accused in relation to the commission of the alleged offences. Mr. Patnaik argued that in the absence of any material showing that the petitioner has misappropriated the sum of Rs. 50,00,000/- and another sum of Rs. 4,08,500/- from the account of "The Samaja", the petitioner cannot be branded as the prime accused and it having been found that the accused persons, namely, Srikanta Kumar Mishra, who was working as Manager (Finance) and now in custody and Shri D.C Sarangi, another employee of "The Samaja" have signed as Sunil Jain and Vinod Jain in the cheques encashed from the bank, as the bearers, the petitioner cannot be said to be the prime accused. Mr. Patnaik vehemently urged that since these facts have not been considered in the previous judgment of this Court by which the prayer of the petitioner for bail was rejected, the same should be considered along with the fact that one of the co-accused, who was a joint signatory in the cheques of a total value of Rs. 50,00,000/-, namely, Mrs. Manorama Mohapatra having been directed to be released on bail on surrendering and moving for bail before the Court below, this Court should consider these facts and direct release of the petitioner on bail.

7. Mr. Patnaik further urged that the report of the hand writing expert, from which, it was revealed that the signatures behind the cheques showing the names of the bearers of the said cheques, as Sunil Jain and Vinod Jain, were the hand writing of the said Manager (Finance), namely, Srikanta Kumar Mishra and Mr. D.C. Sarangi, the Accountant, was not available before this Court when the previous judgment was passed. He further submitted that the statements of the Manager, Punjab National Bank and the clerk of the Bank, Narayan Chandra Panda recorded under Section 164 Cr.P.C. was also not there before this Court and, therefore, those are subsequent developments and amounts to "changed circumstances" for which, this Court should consider the prayer for bail afresh on such changed circumstances. The other ground, on which Mr. Patnaik, pressed the bail application, was that the petitioner, in the meanwhile, has already remained in custody for more than nine months for the alleged offences and should be released on bail on that ground alone.

8. On perusal of the records, it is found that the statements of the above two witnesses under Section 164 Cr.P.C. were recorded on 26.9.2007 and the opinion of the hand writing expert was received by the I.O. on 28.9.2007 and those materials were available before this Court when the hearing of the previous bail application was concluded on 11.10.2007.

9. Mr. Pradhan, learned Counsel for the State submitted that it is a well established principle of law that a second bail application on the very same grounds, which were taken in the previous bail application, cannot be entertained as it would amount to an abuse of the process of the Court. He contended that in the earlier bail application, all points available to the accused-petitioner, as are being canvassed now, were urged and have been negatived by this Court, while rejecting the said application and, therefore, in the absence of any new or fresh ground, which, in the context, would mean any changed circumstances, it is not open for this Court to reconsider the same material and over rule its earlier findings in the previous order. He vehemently argued that since all the contentions raised in this application were already raised on behalf of the petitioner in the previous bail application, which was rejected on merit after considering each of such contentions, there is no scope on the part of the petitioner to raise the same points again, and, therefore, this petition should be rejected at the threshold. Various decisions of the Supreme Court as well as this Court were relied upon by the parties. However, this Court is of the view that it is not necessary to go into all the case laws cited by the respective parties as the said decisions were rendered on different sets of facts and it being a well established position of law that while deciding the cases on facts, more so, in criminal cases, the Court should bear in mind that each case must rest on its own facts and the similarity of facts in one case cannot be used to bear in mind the conclusion of fact in another case and that while considering the ratio laid down in one case, the Court will have to bear in mind that every judgment must be read as applicable to the particular facts proved or assumed to be true since the generality of expressions which may be found therein are not intended to be expositions of the whole of the law, but are governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides and not what logically follows from it. (See *Pandurang v. State of Hyderabad* , *Quinn v. Leathern* 1901 AC 495, *State of Orissa v. Sudhansu Sekhar Misra* , *Amblea Quarry Works v. State of Gujarat*).

10. In the case of *Kalyan Chandra Sarkar v. Rajesh Ranjan Alias Pappu Yadav and Anr.* , the Supreme Court has clearly laid down the principles on which successive bail applications are to be decided. In the aforesaid decision, the Supreme Court was considering the appeal by which the order granting bail in favour of the respondent therein by the High Court of Patna was under challenge. While discussing the facts of the said case, the Supreme Court held that previously also the prayer for bail of the respondent therein was allowed which was challenged before the Supreme Court and the Supreme Court while setting aside the order granting bail to the respondent held that the High Court could not have granted bail solely on the ground that the accused-respondent had undergone incarceration for a period of three years and that there was no likelihood of the trial being concluded in the near future. It was further held by the Supreme Court that the High Court could not have allowed the bail application on the sole ground of delay in conclusion of the trial without taking into consideration the allegation made by the prosecution in regard to the existence of prima facie case, gravity of offence and the allegation of tampering with the witnesses by threat and inducement when on bail. Observing thus, the Supreme Court further held that

non-consideration of the above factors and grant of bail solely on the ground of long incarceration vitiated the order of the High Court granting bail. It was observed that though an accused had a right to make successive applications for grant of bail, the Court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected and in such cases, the Court has also a duty to record what are the fresh grounds which persuaded it to take a view different from the one taken in the earlier application.

11. It is trite to state that though the provisions of res-judicata and such analogous principles are not applicable in a criminal proceeding, still a Court is bound by the doctrine of judicial discipline. The previous findings arrived at by a Court on a bail application, by which, the prayer for bail was rejected are to receive serious consideration while entertaining a bail application at a later stage and, in such event, a Court must give due weight to the grounds which weighed with the Court while rejecting the bail application previously. Ordinarily, the issues which had been canvassed earlier would not be permitted to be re-agitated on the same grounds as the same would lead to a speculation and uncertainty in the administration of justice. (See Kalyan Chandra Sarkar (supra)).

12. The Supreme Court, while considering the bail application filed against the order granting bail to the respondent in a subsequent bail application, in the aforesaid case of Kalyan Chandra Sarkar (supra), further observed that even though there is room for filing of a subsequent bail application in cases where earlier bail applications have been rejected, the same can be done " if there is a change in the fact situation or in law, which requires the earlier view being interfered with or where the earlier finding has become obsolete" (emphasis supplied). The Supreme Court in the aforesaid case finding that in a previous order, it having been held that there was existence of a prima facie case against the respondent concluded that there is no scope for re-agitating the said point on the part of the respondent while contending that there is no prima facie case made out against him.

13. The ratio of the aforesaid decision in the case of Kalyan Chandra Sarkar (supra), is therefore, clear that if while rejecting a bail application, the Court has already found existence of prima facie case against the accused and no change has occurred in the fact situation, the said prima facie case could not have disappeared when a subsequent application came up for hearing.

14. This Court finds that all the grounds canvassed by Mr. Patnaik in support of the prayer for grant of bail in the present bail application were previously urged before this Court and this Court, after analysing and meticulously considering all the materials available, rejected the previous bail application filed on behalf of the petitioner and while rejecting the bail application of the petitioner in the previous order, this Court arrived at a finding that there is a prima facie case made out against the petitioner in regard to the commission of the alleged offences and there is also likelihood of the petitioner absconding and threatening the prosecution witnesses if he is set at liberty by way of granting bail. The submission of Mr. Patnaik that certain materials were not taken into consideration while disposing of the previous bail application of the petitioner is found to be not acceptable as the entire case diary was produced before this Court and this Court specifically recorded that on closely scrutinizing the materials available in the case diary it arrived at the above findings.

15. Except the fact that in the interregnum, a charge sheet has been filed against the petitioner and other co-accused persons, there is no other changed circumstances brought to the notice of this Court calling upon this Court to take a different view than what was taken in the previous order. This Court is also unable to accept the contention raised on behalf of the petitioner that since one of the co-accused, namely, Smt. Manorama Mohapatra has been directed to be released on bail by the Court below on surrendering and moving for bail, similar order should be passed in favour of the petitioner, as this Court finds that the said co-accused Smt. Manorama Mohapatra stands entirely on a different footing than the present petitioner as per the materials produced before this Court.

16. The only other ground canvassed by Mr. Patnaik on behalf of the petitioner is that the petitioner, in the meantime, has remained in custody for about nine months and since the investigation has been kept open, though charge sheet has been filed against the petitioner and some other accused persons, as there is a chance of the trial not being concluded in near future, the petitioner, on that ground should be released on bail as he would be deprived from the personal liberty guaranteed under Article 21 of the Constitution.

17. It is a well established principle of law that the personal liberty is a Constitutional guarantee under Article 21 of the Constitution. But the said Article contemplates deprivation of personal liberty by procedure established by law. Specially under the Criminal Law, a person, who has been accused of commission of offences, which are non-bailable, can be detained in custody during the pendency of trial unless, of course, unless he is enlarged on bail in accordance with law. It has further been well established that such detention cannot be construed to be in violation of the guarantee provided under Article 21 of the Constitution, as, such detention is authorized by law. No doubt, even persons accused of non-bailable offences under certain circumstances can be released on bail, where the Court comes to the conclusion that there is no prima facie case made out against such person and if the Court records the reasons for allowing such bail that in spite of the existence of the prima facie case, there is a need to release such person on bail, where the facts of the case required it to do so. It is naive to state that an accused whose application for enlargement on bail is once rejected, is not precluded from filing a subsequent application for grant of bail, if there is change in the fact situation and in such event, the Court on appreciating the facts may release the accused on bail in spite of his earlier application being rejected. But in the present case, as already held above, the finding in the previous order of this Court that a prima facie case exists against the petitioner and further, that there is likelihood of the petitioner absconding and threatening the prosecution witnesses, if he is set at liberty by grant of bail, the petitioner is not entitled to be released on bail on the sole ground of consideration of the period of incarceration and chance of the trial being prolonged.

18. In the case of the same appellant, i.e., Kalyan Chandra Sarkar, who came up before the Apex Court in a previous application challenging the order of grant of bail to the respondent - Rajesh Ranjan (2004) 7 SCC 528, the Supreme Court categorically laid down that the mere fact that the accused has undergone certain period of incarceration by itself would not entitle the accused to be enlarged on bail nor the fact that the trial is not likely to be concluded in the near future, either by itself or coupled with the period of incarceration would be sufficient for enlarging the accused on bail. In the said case, the Supreme Court observed that while considering a bail application, the

Court must consider the nature of accusation, the severity of the punishment in case of conviction, the nature of supporting evidence, reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant and prima facie satisfaction of the Court in support of the charge.

19. As already discussed above, since this Court, while rejecting the previous bail application filed by the petitioner, has categorically come to the conclusion that there is a prima facie case, reasonable apprehension of tampering with the prosecution witnesses as well chance of absconding of the petitioner, this Court concludes that just because the petitioner has remained in custody for some more period, it alone cannot entitle him to be released on bail.

In view of the above, there is no fresh grounds to reconsider the prayer of the petitioner for grant of bail and this bail application is accordingly dismissed.