

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.BHAVADASAN

THURSDAY, THE 30TH APRIL 2009 / 10TH VAISAKHA 1931

Bail Appl..No. 2133 of 2009()

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(RC 1 (a)/09/CBI/KER/COCHIN)

PETITIONER/ACCUSED:

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MUHAMMED KASIM, AGED 39 YEARS,  
S/O.LATE MUHAMMED, HALOOKAKKADA HOUSE,  
ANDROTH ISLAND, UNION TERRITORY OF LAKSHADWEEP.

BY ADV. SRI.P.SANJAY  
SMT.A.PARVATHI MENON

RESPONDENT(S)/COMPLAINANT:

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CENTRAL BUREAU OF INVESTIGATION (CBI),  
COCHIN BRANCH, REP.BY INSPECTOR OF POLICE (CBI),  
COCHIN BRANCH.

ADV. SRI.M.V.S.NAMBOOTHIRY,SC, C.B.I. FOR R1

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION  
ON 28/04/2009, THE COURT ON 30/04/2009 PASSED THE  
FOLLOWING:

**P. BHAVADASAN, J.**

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B.A. No. 2133 of 2009  
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Dated this the 30th day of April, 2009.

**ORDER**

Apprehending arrest in relation to RC 1 (a)/09/CBI/Ker/Cochin, petitioner has moved this court under Section 438 of Criminal Procedure Code seeking anticipatory bail.

2. Petitioner claims to be the Managing Director of M/s. MM Associates, engaged in various kinds of business. He has business links in Lakshadweep and his office is in Calicut. Petitioner would point out that on 28.3.2009 officers of CBI conducted a raid in his office at Kochi and seized several documents. He came to understand that the seizure was in relation to the crime mentioned above for having committed offence under Section 13(1)(d) of Prevention of Corruption Act, 1988 as against him and certain officials. Petitioner would point out that on an earlier occasion, he was charged by the CBI and after standing trial he was acquitted. Petitioner would point out that the respondent is after him and he is finding it difficult to carry on his business smoothly. Petitioner claims that he had not committed any offence. He would say that he had always co-operated with the investigation by the CBI and there is no reason for any grievance on that count. Pointing out that the officers of the respondent may falsely implicate him and arrest him, petitioner has approached this court.

3. Copy of the petition was served on the Standing Counsel for the respondent on 13.4.2009. When the petition came up for admission on 15.4.2009 time was sought for getting instructions by the counsel for respondent and the case was posted to 21.4.2009. On 21.4.2009, when the matter was taken up for hearing, it was submitted by the counsel for the petitioner that the officers of the respondent had arrested the petitioner on 20.4.2009 and has attempted to make the petition infructuous.

4. Learned counsel appearing for the CBI did not dispute the above statement regarding the arrest. Pointing out the impropriety of the action taken by the respondent, this court had occasion to pass an order which reads as follows:

“This is an application for anticipatory bail presented on 13.04.2009 with copy to Mr.M.V.S.Namboothiri, learned Standing Counsel for the CBI. He received the copy on 13.04.2009 itself. When the matter taken today for consideration, the learned counsel for the petitioner submitted that while this application is pending, the respondent/CBI effected arrest of the petitioner and the said fact is not disputed by the learned Standing Counsel for the CBI. Propriety demand that when an application for anticipatory bail pending and when such pendency is aware of the investigating agency,

no arrest need be made unless the same is expedient in the interest of justice. Here no such expediency is brought to my notice.

2. Considering the particular facts and circumstances involved in the case especially the circumstances indicated above, I am of the view that till passing a final order in this petition, no further steps shall be taken by the CBI towards the investigation including approaching the court below for custody of the petitioner. Learned Standing Counsel for the CBI also agreeable for the same and it is recorded. There will be a direction to the CBI Court-II to defer the application for custody if any, filed by the CBI in RC 1 (a)/09/CBI/Ker/Cochin till the disposal of this petition.”

5. Strictly speaking, with the arrest of the petitioner, the petition for anticipatory bail stands aborted.

6. Learned counsel appearing for the petitioner pointed out that the conduct of CBI acting in the manner as it did without atleast informing the court about the need for arrest may not be lightly viewed. If such a conduct is permitted, it would be very easy for anybody to defeat an anticipatory bail application. Since the conduct of the respondent is reprehensible, counsel prayed that in the light of the peculiar facts and circumstances of this case, the petition for anticipatory bail may be treated

as an application for regular bail.

7. Learned counsel for the CBI has filed a verified petition as well as a detailed statement. The main grievance voiced by the CBI is that due to the order dated 21.4.2009 the investigation has come to a stand still and it has to be vacated. It was also pointed out that the CBI has approached the Court of Special Judge-II, CBI, Ernakulam seeking police custody of the petitioner for interrogation. That is pending consideration and it could not be taken up due to the order passed by this court.

8. CBI thus finds fault with this court for having passed the order dated 21.4.2009 and wants that order to be vacated.

9. In the statement filed by the CBI, they have stated the details about the merits of the case, highlighting the misdeeds of the petitioner and his role in the issue involved in the case. It was pointed out that Crime No. RC 1(a)/09/CBI/Ker/Cochin has been registered under Sections 120B and 420 of Indian Penal Code and Sections 13(2) and 13(1)(d) of the Prevention of Corruption Act.

10. The main accusation of the CBI is that with the connivance of certain officials of Lakshadweep Administration petitioner diverted diesel and petrol to be supplied to Lakshadweep and sold it for illegal gains.

It is stated that a report seeking to implicate three other accused persons has also been filed. It is revealed that a raid was conducted in the houses of certain officers and incriminating documents have been seized. CBI seeks to justify its conduct of arrest of the petitioner on 20.4.2009 saying that the arrest was absolutely essential in order to prevent the petitioner from destroying the relevant documents.

11. Before going into the merits of the case, certain aspects need to be noticed. Nowhere in the verified petition or in the statement CBI expressed their repentance for the high handed action in arresting the petitioner while his application for anticipatory bail is pending consideration before this court. It may be recollected that when the case initially came up on 15.4.2009, it was adjourned to 21.4.2009 for the learned counsel appearing for CBI to get instructions in the matter. As is revealed, the arrest was made on 20.4.2009. Assuming that there was some urgent need in arresting the petitioner, proper course would have been to bring to the notice of the court the necessary facts and seek appropriate orders. Without taking any such steps, CBI arrested the petitioner and thus has interfered with the proceedings in court.

12. When the matter was taken up on 21.4.2009 and it was brought to the notice of the court that petitioner had been arrested on 20.4.2009 that the interim order was passed. It is significant to note that the order says that the CBI had not pointed out any expediency for the arrest. Equally important that portion of the order stating “that no further steps shall be taken by the CBI till this petition is disposed of on merits” was made with the consent of the counsel for CBI.

13. However, it may be noticed that at the time of hearing of the petition on 28.4.2009, learned counsel appearing for the CBI does not press the contention that since the petitioner has been arrested, the petition has become infructuous and it should fail. But it was prayed that the interim order be vacated so that the CBI could proceed with the investigation including custodial interrogation of the petitioner, for which a petition has already been laid before the court below.

14. True, once an arrest is made, petition for anticipatory bail may not lie. However, in the case on hand, in the peculiar circumstances of the case, namely that the CBI had arrested the petitioner during the pendency of anticipatory bail application in this court and also in the light of the fact that CBI was unable to justify its conduct, it is felt that in the

interests of justice, the prayer of the petitioner to treat this petition as one for bail be allowed.

15. There is no reason as to why the CBI could not inform this court about the need for immediate arrest and sought appropriate orders. No party can be allowed to defeat the proceedings in court by resorting to such objectionable conduct. It needs to be stated here that the conduct of CBI is far from satisfactory. Equally reprehensible is the stand of the CBI that due to the interim order passed by the court their hands are tied and investigation cannot go on. It is unfortunate that CBI should take untenable contentions to cover up their ill motivated conduct. Judicial propriety prohibits this court from stating more in this regard.

16. It needs to be remembered that the scope of an anticipatory bail application and a regular bail application are entirely different. While anticipatory bail is pre-arrest remedy, the remedy available under Section 439 is only after the arrest is made and the person concerned is in custody. However, in the case on hand due to the imprudent act on the part of CBI, this court feels that it is only just and proper to treat this petition as one for regular bail and it may be noted that no objection in this regard is made by the counsel appearing for the respondent. It is also felt that it is unnecessary



to drive the petitioner to file another petition in this regard for the purpose of seeking bail. Therefore, the prayer of the petitioner, already made mention of, is allowed, though it may not be strictly in accordance with law.

17. One must remember that the court is not denuded of power in passing an interim order when an application for anticipatory bail is filed. But by the self imposed restrictions, the court do not normally pass interim orders because it is felt that the said course would hamper or impede investigation. It may be that custodial interrogation is necessary. It may be that under certain circumstances the accused will provide valuable information dealing with the discovery of material facts. It may be necessary to curtail his freedom in order to extract information. It may also be necessary to curtail the freedom of the alleged person to prevent his disappearance and interference with the investigation. Of course, it may also be necessary to do so to collect valuable information regarding other persons involved in the incident. Normally, any court will be reluctant to interfere with the investigation process. But that does not mean that the conduct such as the one displayed by the CBI in this case can be appreciated and allowed.

18. The Case Diary was made available for perusal. The allegations are that the petitioner during the period from January, 2005 to 2009 with the connivance and assistance of several unknown persons and also the officers of Lakshdweep Administration, had been diverting diesel and petrol, which he was bound to supply in Lakshadweep. The possible involvement of certain officials of Bharat Petroleum is also indicated. CBI claims that it has seized several incriminating documents from various persons in this regard. It is pointed out that in the nature of the allegations in this case it is absolutely necessary to have custodial interrogation of the petitioner.

19. Learned counsel appearing for the petitioner pointed out that the petitioner is being continuously harassed by the officers of the respondent under one pretext or another without any basis. The apprehension expressed by the CBI is that he is likely to flee, destroy evidence etc., are without any basis or foundation. Even going by the statement filed by the CBI, it could be seen that several records from his office have already been seized. Learned counsel stressed that at no point of time petitioner had refused or shown diffidence to co-operate with the investigation conducted by the CBI and he is willing to do so in future also.

It was pointed out that any stringent condition may be imposed and bail may be granted to the petitioner ensuring smooth investigation.

20. The courts have often been cautioned against in going into the details of the case at the time of consideration of an application for bail. It will be highly improper to go into the details of the case in such a stage or to reveal the informations that could be gathered by perusing the Case Diary.

21. By no stretch of imagination the act of CBI in arresting the petitioner while the petition for anticipatory bail was pending and without getting orders from this court can be justified. If the CBI had felt that immediate arrest of the petitioner was necessary for the purpose of investigation, they should have approached this court, made this court aware of the true state of affairs and also impressed upon this court the need for immediate arrest. After having resorted to improper methods, it comes with little grace from the CBI to state that the investigation is being held up due to the order passed by this court. Such a stand, to say the least, is unfortunate and uncalled for.

22. However reprehensible may be the conduct on the part of the respondent, that may not have much bearing on the issue involved in

this case. On going through the records, it is felt that the offences involved in this case have considerable impact and importance. The question as to whether the allegations against the petitioner are prima facie true and whether they have any basis are not matters that can be gone into in this proceeding. The investigation is at a very infant stage. However, going by the records, the allegation of the petitioner that he has been unnecessarily harassed cannot altogether be ignored.

23. The courts have recognised the need for custodial interrogation in some cases. This court is given to understand that the CBI has filed a petition before the Special Judge-II, CBI Court, Ernakulam seeking the custody of the petitioner for a period of ten days.

24. It is necessary to mention here that the learned counsel appearing for the petitioner has pointed out that his client is willing to co-operate to any extent with the investigation in the case and that he will make himself available for interrogation at any time required by the CBI. Counsel also expressed the view that his client is prepared to surrender his passport and to undertake that he will not go abroad without obtaining prior sanction of the court concerned.

25. On going through the records and hearing counsel on both sides, it is felt that it may be necessary to interrogate the petitioner especially in the light of the issue involved. However, the conduct of the CBI is of such that it may not be proper to grant a free hand to the CBI. Considering the various aspects, records and on hearing the counsel on both sides, an order is passed as follows:

- i) In relation to the petition for custodial interrogation filed by the CBI before the Special Judge-II, CBI, Ernakulam, it is made clear that the CBI is allowed to question the petitioner in the presence of the Superintendent of Jail, where he is lodged, from 9 a.m. till 5 p.m. on 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> of May, 2009 without torturing or causing any physical harassment to him.
- ii) The Superintendent of Jail concerned shall ensure the physical safety of the petitioner during interrogation by the CBI.
- iii) On 8.5.2009, the petitioner shall be released on bail subject to the condition that he executes a bond for Rs.1,00,000/- (Rupees One Lakh only) with two solvent sureties for the like sum each to the satisfaction of Special Judge-II, CBI, Ernakulam.
- iv) If the CBI feels that further questioning of the petitioner is necessary, they may make an application to that effect before the Special Judge-II, CBI, Ernakulam and seek appropriate

orders in accordance with law.

v) Petitioner shall surrender his passport before the Special Judge-II, CBI, Ernakulam.

vi) Petitioner shall not leave the jurisdiction of the Special Court-II, CBI, Ernakulam without the prior permission of that court.

vii) Petitioner shall not tamper or attempt to tamper with the evidence or influence or try to influence the witnesses.

viii) If any of the above condition is violated by the petitioner, bail, that is to be granted to him on 8.5.2009, shall stand cancelled and appropriate action may be taken by the Special Court-II, CBI, Ernakulam.

ix) Both the parties are at liberty to approach the Special Court-II, CBI, Ernakulam, before which the proceedings are pending, for such orders as they deem necessary by filing necessary petitions during investigation, which the Special Court may dispose of in accordance with law.

x) All further proceedings shall be before the Special Court-II, CBI, Ernakulam.

P. BHAVADASAN,  
JUDGE

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