

**CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
APPELLATE SIDE**

**26.08.2019
Court No.1
SM(PA)**

CRM 127/ 2019 **BIMAL GURUNG AND ANR
VS
STATE OF WEST BENGAL**

AND

CRM 128/ 2019 BIMAL GURUNG
VS
STATE OF WEST BENGAL

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VS
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divisions of the said district. In order to quell such popular demonstrations, police unleashed brute force on a large number of supporters of Gorkha Janmukti Morcha, the political outfit of the petitioners, resulting in deaths of a number of protesters in police firing. Instead of prosecuting the police officers for extra-judicial killings, a spate of criminal case were instituted against the leaders of Gorkha Janmukti Morcha including one Binoy Tamang. It is further submitted under pressure of political persecution Binoy Tamang changed sides and has been rewarded by exoneration from criminal investigation/prosecution and was made Chairman of Gorkhaland Territorial Administration, an autonomous body which was set up to administer sub-divisions of Darjeeling, Kurseong and Kalimpong in the then district of Darjeeling pursuant to a tripartite agreement between the aforesaid political outfit, Government of West Bengal and the Central Government. On the other hand, the petitioners who continued to resist the undemocratic stance of the State Government were made hapless victims of political persecution by abuse of police powers and illegal processes were issued against them although they were ready and willing to cooperate with an honest and bona fide investigation by an independent agency. With such end in view, the petitioners had approached the Apex Court under Article 32 of the Constitution in ***W.P.(Criminal) No.148 of 2017 (Roshan Giri vs. Union of India and Others)*** and ***W.P.(Criminal) No.182 of 2017 (Bimal Gurung vs. Union of India and Others)***, praying for transfer of investigation in criminal cases registered against them to an independent agency as

well as initiation of criminal case against police officers who had resorted to extra-judicial killing of their supporters by an independent investigating agency preferably N.I.A. While turning down the prayer for transfer of criminal cases registered against the petitioners to an independent investigating agency in ***Bimal Gurung vs. Union of India and Others, (2018) 15 SCC 480***, the Apex Court, *inter alia*, observed if an accused is a victim of faulty investigation he may approach the appropriate court of law for various reliefs including further investigation. The other writ petition at the behest of petitioner no.2 Roshan Giri is still pending before the Apex Court. Interim prayer was made in the said writ petition before the Apex Court seeking leave to prefer pre-arrest bail before this Court which was allowed by the Apex Court vide order dated 3rd April, 2019. Pursuant thereto, petitioners have approached this Court for pre-arrest bail. Delay in filing the applications were due to obstruction on the part of the State authorities and other unavoidable reasons including the cessation of work by members of the Bar in the State of West Bengal.

Per contra, learned Advocate General assisted by the learned Public Prosecutor and Additional Public Prosecutor submits that the prayer for pre-arrest bail is *per se* not maintainable in law. Similar relief was sought for in both the writ petitions and was not allowed by the Apex Court. Furthermore, order dated 3rd April, 2019, in ***W.P.(Criminal) No.148 of 2017, Roshan Giri vs. Union of India and Others***, is restricted to petitioner no.2 alone and not to petitioner no.1. That apart, petitioner no.2 also failed to approach this Court within

the time frame as stipulated in the said order. He strenuously argued that the petitioners were the leaders of a violent agitation which caused loss of innumerable lives and extensive damage of public property. In fact, this Court in **W.P. No.15306(W) of 2017 (Rama Prasad Sarkar vs. State of West Bengal)** had issued various directions with regard to maintenance of law and order and securing essential services in the area which stood jeopardised by the violent and criminal activities unleashed under the leadership of the petitioners. The petitioners absconded and showed scant regard for orders passed by this Court as well as the Apex Court. As a result, State was constrained to resort to coercive processes including proclamation, attachment against the petitioners in most of these cases. Petitioners have also been declared 'proclaimed offenders' in some of the cases. It is also argued notwithstanding issuance of 'red corner notices' petitioners have illegally left the country and have taken refuge in a neighbouring country. Hence, their prayers for pre-arrest bail are not maintainable in law.

It is one thing to argue that the prayer of an accused for pre-arrest bail ought not to be granted on merits, however, it is entirely different to contend that he cannot be heard at all in the matter of grant of such relief. Pre-arrest bail to an accused is a species of relief which falls within the genus of personal liberty enshrined under Article 21 of the Constitution of India. Though the provision for pre-arrest bail is statutory in nature and does not partake the character of a constitutional remedy, any issue of demurrer raised qua

maintainability of such relief, must be strictly construed bearing in mind the fact that a “procedure established by law” making inroad into personal liberty must be fair, just and reasonable and not an arbitrary and oppressive one. Sweeping and unreasonable fetters put on the right of an accused to access such relief, may render such restriction violative of the fundamental right to liberty under Article 21 of the Constitution of India. We have sought to adjudge the issue of maintainability of these petitions in the light of the objections raised by the learned Advocate General keeping in mind the aforesaid proposition of law.

Firstly, learned Advocate General has argued as all the prayers in the writ petition preferred by the petitioner no.1 in ***Bimal Gurung vs. Union of India and Others, (2018) 15 SCC 480***, were turned down, petitioner cannot maintain an application for similar relief, that is, pre-arrest bail before this Court. In support of his contention he drew our attention to prayers ‘D’ and ‘E’ to the writ petition which read as follows:-

***“D. Grant anticipatory bail and protection against any coercive steps to the present petitioner in the FIRs registered by West Bengal Police, details of which are provided in Annexure P-4, during the course of such investigation by the said independent investigating agency; and
E. Grant anticipatory bail and protection against any coercive steps to the present petitioner in the FIRs registered by West Bengal Police, during the course of such investigation by the said independent investigating agency; and”***

We are unable to accede to such contention of the Advocate General. Principal prayers in the writ petition are adumbrated in

prayers 'A', 'B' and 'C' of the petition wherein it was prayed that all first information reports lodged against the petitioner and other members of Gorkha Janmukti Morcha be transferred to an independent investigating agency not under the control of State of West Bengal. Prayers 'D' and 'E' were interim reliefs sought for in aid of the aforesaid principal relief and were not substantive prayers in the said petition. Our opinion is fortified by the observation of the Apex Court at paragraph 38 of the report wherein the Court held as follows:-

“38. Before any further discussion we record a note of caution. In the present case, we are not called upon to express any opinion as to whether allegations made in FIRs which have been ledged against the petitioner and other supporters of GJM are true or false. The issue is as to whether, as prayed by the petitioner, investigation in such cases are required to be transferred to a Central investigating agency. Thus, our observations are only in reference to answer the prayer made in the writ petition. Our observation is not to be treated as any expression of pinion on the allegations made in FIRs. We do not express any opinion either in favour or against the petitioner with regard to the allegations made in various FIRs. Our observations shall not influence any investigating agency or any court which happen to deal with the criminal cases which are referred to in the writ petition.”
(Emphasis added)

From the observation made in the aforesaid paragraph it is clear that the Apex Court had restricted its adjudication to the prayer for transfer of investigation to a central agency and nothing more. Hence, it cannot be said that the Apex Court had applied its mind to the merits of the case in the perspective of prayers for grant of anticipatory bail to the petitioner no.1 with regard to FIRs registered against him. Furthermore, in paragraph 53 of the said report the Apex Court

clarified that the issue of faulty investigation prejudicing an accused may be remedied by seeking all remedies before a court of law including further investigation. Hence, we are unable to accept the initial objection on behalf of the State that in view of the dismissal of the writ petition preferred by petitioner no.1 under Article 32 of the Constitution of India he is precluded from seeking pre-arrest bail in the FIRs registered against him which, however, need to be considered on the merits of each case.

With regard to petitioner no.2 Roshan Giri it appears that the Apex Court had permitted him to pray for pre-arrest bail vide order dated 3rd April, 2019 in ***W.P.(Cri) No.148 of 2017 (Roshan Giri vs. Union of India and Others)***, which is still pending before the said Court. Argument has been advanced that the applications were not filed within the stipulated period of four days. We are of the opinion that the time frame stipulated in the aforesaid order was not mandatory as no consequence in the event of failure to institute proceedings with that time frame has been provided in the said order. Furthermore, we are convinced that genuine efforts were made by the petitioners to file the applications within the stipulated time frame but keeping in mind the large number of applications which were sought to be filed on behalf of the petitioners and other attending circumstances beyond their control, there was some, though not inordinate, delay in approaching this Court for pre-arrest bail. In this factual matrix, we are of the opinion that petitioners ought not to be denied their right to

seek pre-arrest bail in these cases on the sole plea that they had failed to adhere to the time frame as stated in the aforesaid order.

Secondly, issues relating to abscondence of the petitioners including issuance of processes against them and/or their being declared as 'proclaimed offenders', have been raised as grounds for non-maintainability of these petitioners. We are of the opinion that such objections are to be assessed in the light of validity of the said processes and may be judged on a case to case basis. Hence, the petitioners ought not to be non-suited in limine on such score.

Last submission raised by the learned Advocate General is that the petitioners have illegally crossed the borders of the country notwithstanding issuance of 'red corner notice' against them and have secreted themselves in a foreign country. Hence, the applications for pre-arrest bail are not maintainable. He relied on intelligence reports in support of this contention. He argued that a person seeking pre-arrest bail must be within the country at the time of institution and consideration of such relief particularly in view of Clause (iii) to Section 438(2) of the Code of Criminal Procedure which reads as follows:-

"438(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including -

.....

(iii) a condition that the person shall not leave India without the previous permission of the Court;"

We have given anxious consideration to such submission on behalf of the State. Analysis of the aforesaid provision indicates that

the imposition of a condition on an accused not to leave the country without the permission of the Court upon being granted the relief of pre-arrest bail is a discretionary one depending on the facts of the case. Although the aforesaid condition gives rise to an inference that an accused ordinarily ought to be within the country while seeking the relief of pre-arrest bail, it cannot be read to understand that in all cases an accused seeking pre-arrest bail must definitely be within the country. There may be cases where an accused lawfully residing in a foreign country apprehends arrest due to the imminent threat of execution of a coercive process in a contracting State in the course of investigation pursuant to order passed by an appropriate court under section 105-B of the Code of Criminal Procedure or by way of extradition proceedings. However, the situation in the present case is much more sinister and requires deeper scrutiny as it is alleged that the petitioners seeking anticipatory bail have illegally fled the country without valid permission and have secreted themselves in a neighboring country. Court would necessarily require to factor in such daring and dangerous conduct of an accused while considering the prayer for pre-arrest bail.

Mr. Dastoor, learned Senior Counsel strongly denies and disputes such allegations made against his clients and submits that these allegations have been made for the first time in Court and were not levelled in the affidavit filed on behalf of the State. He submits, on instruction, that his clients are in the country and have been actively pursuing their legal remedies therein and have executed power of

attorney before a notary public in India to institute the present proceedings.

No doubt, allegation that the petitioners have illegally left the country and have secreted themselves in a foreign State is a serious matter and assumes paramount importance while considering their prayers for pre-arrest bail. However, as such allegation has been raised for the first time in Court today in the course of arguments and do not form a part of the affidavit filed on behalf of the State, we consider it prudent to direct a responsible officer of the State to file an affidavit disclosing relevant facts relating to the abscondence of the petitioners beyond the territory of India so that they may respond to such allegations in an effective manner.

Affidavit in this regard shall be filed on behalf of the State within two weeks.

Reply, if any, be filed two weeks thereafter in this matter.

Let the matter for further hearing five weeks hence.

During the course of hearing, parties expressed their desire that in view of the nature of the proceedings it may be convenient for both of them to have the matter heard before the Principal Bench of this Court. Parties are at liberty to take appropriate steps in this regard.

(MANOJIT MANDAL, J.)

(JOYMALYA BAGCHI, J.)