

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

SUO MOTU CRIMINAL PIL (ST) NO. 4 OF 2015

Ms. Purnima Upadhyay .. Petitioner
vs
State of Maharashtra & Ors. .. Respondents

Mr. Vijay Hiremath for the petitioner.
Mr. S.K. Shinde, Public Prosecutor, with Mr. J.P. Yagnik, A.G.P for the
respondent – State.

**CORAM: MOHIT S. SHAH, C.J. &
S.B. SHUKRE, J.**

DATE : 30 JUNE 2015

ORAL ORDER (Per Chief Justice):

This Suo Motu PIL was initiated on the basis of an email from Ms. Purnima Upadhyay, a social worker working in the tribal area of Melghat in Amravati District. Ms. Upadhyay relied upon a comment dated 8 June 2015 of Mr. Pavan Dahat in “the Hindu” regarding the physical condition of Prof. G.N. Saibaba, Professor in English of Delhi University, who is suffering from 90% disability and moving in a wheel chair due to post polio paralysis.

2. Prof. Saibaba came to be arrested in relation to Crime No. 3017 of 2013 of Aheri Police Station on 9 May 2015 on the allegation that he is an active member of Republic Democratic Front (RDF) which is a front of Communist Party of India (Maoist) and is

helping them in their cause. Prof. Saibaba is charged with offences punishable under sections 13, 18, 20, 38 and 39 of the Unlawful Activities (Prevention) Act, 1967.

3. Prof. Saibaba is in jail for the last about 14 months and was kept in jail for over 6 months in the secluded cell of Nagpur Central Prison known as “Anda Cell”. Mr. Pavan Dahat in the above newspaper report mentioned that the professor has developed several ailments crippling his entire body and that he faints every single day due to heat in the secluded cell (Anda Cell) which has no ventilation from outside. The above newspaper report also referred to the health status report given by Chief Medical Officer, Nagpur Central Prison that Prof. Saibaba is a known case of systemic hypertension with ischemic heart disease with cervical radiculopathy left side with bilateral kidney stone (left kidney 0.6 cm and right kidney 0.7 cm in size) with gallbladder stone (0.5 cm in size) with kyphoscoliosis.

4. The aforesaid letter of Ms. Purnima Upadhyay was, therefore, by an order dated 10 June 2015 of this Court, treated as *Suo Motu* Criminal Writ Petition and the report was called for from the Chief Medical Officer of the Nagpur Central Prison. After considering the said report and after noting the submissions of learned counsel for the petitioner that Prof. Saibaba is suffering from multiple ailments and that when his bail applications were coming up for hearing, he was provided all facilities but after the

disposal of the bail applications, the medical facilities were withdrawn, that Prof. Saibaba was suffering from excruciating pain and gradual degeneration of spine, vertebrae and nerve system from spine to shoulder, this Court directed the respondents to take Prof. Saibaba to Neuron Hospital at Nagpur in the presence of his wife Vasantha and brother Prof. Dr. Ramadevudu and also in the presence of Dr. Sanjay Ramteke, who is a Neurophysician of the choice of Prof. Saibaba.

5. On 22 June 2015, this Court referred to the grievances voiced in the affidavit of Prof. Saibaba's brother Dr. Ramadevudu and in the affidavit of Dr. Sanjay Ramteke that Dr. Ramteke was not allowed to have access to Prof. Saibaba and that the brother and wife of Prof. Saibaba were allowed to meet him only for 3 minutes and that the presence of armed guards around Prof. Saibaba all the time frustrated the object of the order dated 17 June 2015. On 26 June 2015, this Court also noted that though Prof. Saibaba's bail applications were earlier rejected by the Sessions Court and by this Court at Nagpur, subsequent change in circumstances, i.e. the deterioration in the health condition of the undertrial prisoner, made it necessary to re-examine the plea made by the learned counsel for the petitioner for releasing the undertrial prisoner on bail on such conditions and safeguards as may be suggested. Accordingly the matter has been heard today.

6. Mr. Shinde, learned Public Prosecutor, has now placed before us the report dated 26 June 2015 of Dr. Nitin Chandak of Central India Institute of Medical Sciences at Nagpur indicating the following diagnosis:

“His diagnosis is anterior horn cells disease most likely post polio syndrome. However, he will require further evaluation to rule out other causes of anterior horn cell disease.

He will also need re-evaluation by Chest physician and Cardiologist for his chest and cardiac ailments.

Patient requires physiotherapy, pain management and supportive care, regular clinical follow up with Neurophysician.”

(emphasis supplied)

7. Mr. Vijay Hiremath, learned counsel for the petitioner has placed before us the material to explain what is “anterior horn cell disease”.

“The anterior horn cells are somatotopically organized in the spinal cord. That is, medially located anterior horn cells innervate the proximal muscles, while laterally located ventral horn cells innervate more distal muscles.

Common causes of anterior horn cell diseases are poliomyelitis, motor neuron disease and spinal muscular atrophy. Only spinal muscular atrophy will be discussed further. This is usually an autosomal recessively inherited disease with onset at any time from infancy to adulthood. The primary pathology is the progressive loss of anterior horn cells until the patients become so weak that they die usually from an associated lung

infection. *The reason for the progressive loss of anterior horn cells is not clear, but the disease is associated with an abnormality on chromosome 4.”*

(emphasis supplied)

Learned counsel for the petitioner has also placed before us further material indicating the following treatment for the said disease.

“As with many genetic disorders, there is no known cure to any disorder of the spinal muscular atrophies group. Supportive therapies are widely employed for patients who often also require comprehensive medical care involving multiple disciplines, including pulmonology, neurology, orthopedic surgery, critical care and clinical nutrition. Various forms of physiotherapy and occupational therapy are frequently able to slow down the pace of nerve degeneration and muscle wasting. Patients also benefit greatly from the use of assistive technology.”

(emphasis supplied)

8. Learned counsel for the petitioner further submits that Prof. G.N. Saibaba is a professor in English in a college affiliated to Delhi University and that the patient needed specialized physiotherapy treatment even before his arrest. The patient was regularly taking treatment in All India Institute of Medical Sciences (AIIMS), St. Stephen's Hospital and Arya Vaidhya Shala at New Delhi. As all these hospitals are on the panel of Delhi University, the expenses for the treatment are born by Delhi University. Prof. Saibaba is 90% disabled as he suffered Polio at the age of 4 years and two persons are required to look after him even for his routine

physical movements. His family consisting of old mother, wife and daughter are residing at Delhi and therefore he can take such extensive treatment only in Delhi where his wife and daughter can give him the necessary care and supportive treatment.

9. Learned counsel for the petitioner further submits that Prof. Saibaba is accused of being a member of a terrorist organization called Communist Party of India (Maoist), but he has not been accused of being in possession of, carrying or providing fire arms, ammunitions, explosives or other instruments or substance capable of causing disruption nor has he been accused of committing any act causing death or grievous injury to any person or causing damage to any property nor is there any accusation of Prof. Saibaba providing or raising funds for the banned organization. It is submitted that merely because Prof. Saibaba was alleged to be found in possession of writings sympathetic to the cause of tribals and their struggles in the Naxalite areas, the authorities are taking harsh action against Prof. Saibaba.

10. Learned counsel for the petitioner has also relied upon the order dated 11 July 2014 of the Supreme Court in **Abdul Nazir Maudany vs. State of Karnataka**¹, wherein the Supreme Court granted temporary bail to the undertrial prisoner on medical ground in a case where the prisoner was facing trial for various offences like sections 120-B, 121A, 153A, 302, 307 of IPC and sections 3, 4, 5 and

¹ Criminal MP Nos.1966-1974/2014 in SLP (Cri) Nos. 8084-8092/2013

6 of the Explosive Substances Act, which offences were registered in connection with the case known as Bangaluru Blast case wherein number of persons died and many were injured.

11. Mr. Vijay Hiremath, learned counsel for the petitioner, therefore, submits that Prof. Saibaba is required to be released on bail during pendency of the trial against him and, in any case, he is required to be released on temporary bail on medical ground.

12. Mr. Sandip K. Shinde, learned Public Prosecutor, has opposed the prayer for bail as well as prayer for temporary bail and submitted that since the bail application of Prof. Saibaba was rejected by one of us (S.B. Shukre, J.) at Nagpur Bench of this Court on 25 August 2014 being Criminal Application (BA) No. 485 of 2014 and also subsequently by the learned Sessions Judge, Gadchiroli on 4 March 2015, this Court would not grant bail in exercise of jurisdiction under Article 226 of the Constitution of India. Learned P.P. Further submits that by an order dated 17 November 2014, the learned Sessions Judge, Gadchiroli had also rejected the application of Prof. Saibaba to send him to AIIMS, New Delhi for medical treatment on the ground that he can get all the facilities for proper medical treatment at Jail Hospital at Nagpur.

13. Learned P.P. Further submits that Prof. Saibaba is arraigned as an accused in Crime No. 3017 of 2014 of Aheri Police Station for offences punishable under sections 13, 18, 20, 38 and 39

of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as the “Act”) and that in view of rejection of the previous bail applications, this Court may not grant him any bail or temporary bail.

14. Having heard the learned counsel for the parties, we find that the order dated 4 March 2015 of the learned Sessions Judge at Gadchiroli rejecting bail application of Prof. Saibaba was based on the order dated 25 August 2014 of a learned Single Judge of this Court at Nagpur (Coram: S.B. Shukre, J.) rejecting the bail application on the ground that the letters received from the hard disk of the computer of Prof. Saibaba indicated that he was a member of a banned organization called Revolutionary Democratic Front, which is a front for CPI (Maoist). That order also referred to further material which shows that RDF was protesting against the arrest of some Maoist leaders and demanding their immediate release and also sharing same ideology as CPI (Maoist). We also note that the aforesaid order referred to the letters written by Prof. Saibaba complaining about his being discriminated against as he was not being given any opportunity of interaction with the underground activists of the banned organization.

There is no dispute about the fact that Prof. Saibaba is suffering from 90% disability and can only move in a wheel chair with the support of two persons for his ordinary day to day activities.

It is, therefore, clear that the organization of which Prof. Saibaba is accused of being a member has not assigned him any role which could implicate him with any violent activities. The accusations against Prof. Saibaba are regarding writing letters.

15. We make it clear that we are not examining the question whether the ingredients of the offences with which Prof. Saibaba is charged are made out or not. We are only examining the material on record for the limited purpose of considering whether allowing Prof. Saibaba to go to Delhi for the purpose of taking medical treatment at the hospitals on the panel of Delhi University such as AIIMS at New Delhi and under the care and support of his wife and daughter, would pose any security threat to the country. As indicated above, the material relied upon by the learned counsel for the petitioner shows that anterior horn cell disease is a progressive disease and can also prove to be fatal, if not properly treated. Even according to Dr. Nitin Chandak, Neurophysician at the Central India Institute of Medical Sciences, Nagpur, the patient requires not only physiotherapy but also pain management and supportive care apart from regular clinical follow up with Neurophysician and re-evaluation by Chest Physician and Cardiologist for his chest and cardiac ailments.

16. In the facts and circumstances of the case, therefore, it is clear that Prof. Saibaba badly requires pain management, supportive care and medical treatment at New Delhi where his family members

being aged mother, wife and daughter are residing. We are satisfied that if Prof. Saibaba is not released on temporary bail for medical treatment and supportive care, as indicated above, there could be a risk to his life and health. On the other hand, releasing Prof. Saibaba on bail for a period of 3 months for medical treatment would not cause any threat or risk to the security of the Nation.

17. We may now refer to sub-sections (5) and (6) of section 43D of Unlawful Activities (Prevention) Act, 1967 (“the Act” for short) heavily relied upon by the learned Public Prosecutor.

“43-D. Modified application of certain provisions of the Code (Code of Criminal Procedure, 1973).-

(1)

(2)

(3)

(4)

(5) *Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act, shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release.*

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) *The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.”*

Relying on the aforesaid provisions, the learned Public Prosecutor has submitted that in the order dated 25 August 2014 of this Court at Nagpur Bench, a finding has been given that there are reasonable grounds for believing that the accusation against Prof. Saibaba is prima facie true. Learned Public Prosecutor has, therefore, submitted that in view of the embargo placed by sub-sections (5) of section 43-D of the Act, there is a complete ban on granting not only regular bail pending trial but even temporary bail.

18. In response to the above submissions, learned counsel for the petitioner has submitted that even if the proviso to sub-section (5) is construed as placing a complete embargo on the power of the Court to release the accused on bail, once the prima facie finding is given, the Court is not denuded of its constitutional power to issue writs under Article 226 of the Constitution. It is submitted that the Legislature cannot take away the constitutional remedy and further that the constitutional remedy of a writ would extend to granting bail including temporary bail.

19. Learned counsel for the petitioner has further submitted that the prima facie finding given by a learned Single Judge of this Court at Nagpur Bench in the order dated 25 August 2014 is only in respect of accusation against Prof. Saibaba that he is a member of a banned organization and, therefore, it is only in respect of the offence punishable under section 38 of the Act that there is a prima

facie finding, but in respect of other offences being offences punishable under sections 13, 18, 20 and 39 of the Act, there is no such prima facie finding. It is submitted that no accusation has been made against Prof. Saibaba of committing or threatening to commit any of the acts included in the definition of “terrorist act” under section 15 of the Act. It is also submitted that as indicated above, the case of the prosecution itself is that the material recovered from Prof. Saibaba indicated that the organization in question was not giving him any opportunity of interaction with the underground activists of the organization.

20. Having carefully considered the rival submissions, we are of the view that the proviso to sub-section (5) of section 43-D of the Act does not and cannot take away the constitutional remedy of an accused under Article 226 of the Constitution. Of course, it is only in exceptional cases that the Court would consider exercising its extraordinary, prerogative and discretionary writ jurisdiction under Article 226 of the Constitution for the purpose of granting bail or temporary bail in extremely rare and exceptional cases. In the facts and circumstances indicated above, the present case is one such rare and exceptional case.

21. In the circumstances, if this Court does not exercise extraordinary jurisdiction under Article 226 of the Constitution this Court would be failing in its duty of protecting the fundamental

rights of Prof. Saibaba under Articles 14 and 21 of the Constitution, who was confined to a secluded cell and was not in a position to move this Court on his own. Hence we are inclined to direct the respondents to release the undertrial prisoner Prof. G.N. Saibaba on temporary bail for a period of 3 months for his medical treatment and supportive care by his family and medical personnel at New Delhi.

22. Hence, we pass the following order:-

ORDER

The respondents are directed to release the undertrial prisoner Prof. G.N. Saibaba, Professor in English at Delhi University, on temporary bail for a period of 3 months on furnishing a P.R. Bond of Rs.50,000/- with one solvent surety in the like amount, subject to the following conditions:

- (1) Undertrial prisoner Prof. G.N. Saibaba shall not contact/communicate with any of the witnesses in Sessions Case No. 13 of 2014.
- (2) The undertrial prisoner will provide his residential address in New Delhi as well as the address of the hospital/s where he will be undergoing treatment.

- (3) The certificate issued by the Medical Officer in charge of the hospital at New Delhi shall be produced on the next date of hearing.

The undertrial prisoner will be at liberty to apply to the Trial Court for exemption from personal appearance during the trial.

The prayer for regular bail will be considered on the next date of hearing.

Stand over to 28 September 2015.

Parties to act on a copy of this order duly authenticated by the Associate of this Court.

CHIEF JUSTICE

(S.B. SHUKRE, J.)