A UNION OF INDIA AND ANR.

v.

STATE OF ASSAM

SEPTEMBER 10, 2004

B [ARIJIT PASAYAT AND PRAKASH PRABHAKAR NAOLEKAR, JJ.]

Railway Property (Unlawful Possession) Act, 1966—Sections 3 and 8—Offence under the Act—Bail—Held: Grant of bail is at the discretion statutorily provided to officer of the force and controlled by prescription C *regarding forming of opinion about sufficiency of material or otherwise—All offences under the Act are not bailable—More so, as offences under the Act carry imprisonment extending upto five years, by application of Part II of Schedule I of Criminal Procedure Code, 1973, they are non-bailable.*

D **Interpreting Section 8 of Railway Property (Unlawful Possession) Act, 1966, a Single Judge of High Court accepted the stand of respondent-state that all the offences under the Act have been specifically made bailable and only when accused was not in a position to provide security/ surety he could be sent to the Magistrate having jurisdiction. Review** E **against this judgment was dismissed by High Court.**

In appeal to this Court, appellant-Union of India contended that effect of proviso to sub-section (2) of Section 8 of the Act has been overlooked by High Court.

F **Allowing the appeal, the Court**

HELD : 1. Clause (a) of proviso to Section 8(2) of Railway Property (Unlawful Possession) Act, 1966 has given two options to the officer to form opinion i.e. whether there is sufficient evidence or reasonable ground G **of suspicion against the accused persons. It nowhere deals with the right of the accused to get bail. The third category is contemplated by clause (b) of the proviso. This category deals with a case where there is absence of sufficient evidence or reasonable ground of suspicion. In such case concerned officer has the power to release accused person on his executing bonds. Therefore, the High Court was not justified in holding that all** H **the offences under the Act are bailable. Such a view is contrary to the**

provisions contained in Section 8 of the Act. [327-H; 328-A, B, C] A

2. In Schedule I of the Code of Criminal Procedure, 1973, offences are classified. Part I deals with offences under the Indian Penal Code and Part II deals with 'Classification of offences against other laws'. Undisputedly the present case is covered by Part II. While classifying offences on the basis of punishments prescribed for offences punishable with imprisonment for 3 years and upwards but not more than 7 years, it is provided that the offences shall be cognizable and non-bailable. [327-E, F] B

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 608 of 1999. C

From the Judgment and Order dated 27.6.96 of the Guwahati High Court at Assam in Crl. Misc. C. No. 219/95 in Crl. O. Application No. 620 of 1995.

Mrs. Kiran Bhardwaj, S.N. Terdol and Ms. Sushma Suri for the Appellants. D

Ms. Krishna Sharma, V.K. Sidharthan and Niraj Kumar for the Respondent.

The Judgment of the Court was delivered by E

ARIJIT PASAYAT, J. : This is an interesting litigation where Union of India has questioned the stand taken by the State of Assam. State's appeal was accepted by learned Single Judge of the Guwahati High Court. The controversy lies in a very narrow compass. The issue is whether an F application under Section 438 of the Code of Criminal Procedure, 1973 (in short the 'Code') could be filed in respect of offences contemplated under the provisions of Railway Property (Unlawful Possession) Act, 1966 (in short the 'Act'). A learned Single Judge held that the offences were bailable after referring to Section 8 of the Act. A review application was filed for suitable G modification on the ground that Section 8 of the Act has not been properly analysed. Reliance was placed on a decision of learned Single Judge of the Madras High Court which was reported in brief in *State* v. *Sundara Pandian,* (1979) Crl. Law Journal NOC 194. The review application was rejected on the ground that a case for review was not made out and the view originally expressed was correct. H

A In support of the appeal learned counsel for the Union of India submitted that the learned Single Judge has not kept in view the provisions contained in Section 8 in the proper perspective. The High Court has erroneously come to hold that the accused had a right to get bail provided he was willing to offer surety/security. It was held that only when B the accused is not in a position to provide security or surety then only he can be sent to the Magistrate having jurisdiction. It was submitted that effect of the proviso to sub-section (2) of Section 8 has not been kept in view.

Learned counsel for the State of Assam supported the judgment of the learned Single Judge in Crl. Original application No.620/1995 and in Crl. C Misc. case no. 219/95.

The controversy revolves round the provisions contained in Section 8 of the Act and the same reads as under :

D "8. *Inquiry how to be made against arrested persons* — (1) When any person is arrested by an officer of the Force for an offence punishable under this Act or is forwarded to him under Section 7, he shall proceed to inquire into the charge against such person.

E (2) For this purpose the officer of the Force may exercise the same powers and shall be subject to the same provisions as the officer in charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case:

F Provided that -

(a) if the officer of the Force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in G the case, or forward him in custody to such Magistrate;

(b) if it appears to the officer of the Force that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused H person on his executing a bond, with or without sureties

as the officer of the Force may direct, to appear, if and when so required before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior.

A bailable offence is defined under Section 2(d) of the Criminal Procedure Code, 1973 (in short the 'Code'). A bare reading of the proviso to sub-section (2) of Section 8 makes the position clear that three situations are envisaged. Two of the three situations are relatable to clause (a) of the proviso. If the officer of the Force is of the opinion that there is sufficient evidence or reasonable ground of suspicion against the accused persons he shall (a) either admit him to bail to appear before a Magistrate having jurisdiction in the case or (b) forward him in custody to such Magistrate.

Learned Single Judge appears to have taken the view that the direction that can be given by the officer having jurisdiction of the case is as a corollary of accused's right to get bail. The interpretation is clearly erroneous. It has been observed that the discretion to decide whether it is bailable or not cannot be left to the discretion of the officer. The view overlooks the clear language of the proviso and the jurisdiction to exercise the discretion is statutorily provided. The exercise of such discretion is also controlled by the prescription regarding forming of opinion as regards sufficiency of material or otherwise.

The controversy can be looked at from another angle. In Schedule I of the Code, offences are classified. Part I deals with offences under the Indian Penal Code and Part II deals with "Classification of offences against other laws". Undisputedly the present case is covered by Part II. While classifying offences on the basis of punishments prescribed for offences punishable with imprisonment for 3 years and upwards but not more than 7 years, it is provided that the offences shall be cognizable and non-bailable. However, an exception has been made by Section 5 of the Act, making the offence non-cognizable. Except that exception, Schedule I of the Code applies under Section 3 of the Act for the first offence the imprisonment may extend upto five years and for subsequent offences also similar term is fixed. Only for special and adequate reasons to be recorded the minimum can be one year and two years respectively.

There are two options given to the officer to form opinion i.e. whether there is sufficient evidence or reasonable ground of suspicion against the

A accused persons. It nowhere deals with the right of the accused to get bail. The third category is contemplated by clause (b) of the proviso. It *inter alia*, provides that when it appears to the officer that there is no sufficient evidence or reasonable suspicion, he shall release the accused person on his executing a bond with or without surety as the officer of the Force may direct to appear B if and when so required before the Magistrate having jurisdiction and shall make a full report of all the particulars of the case to his superior officer. This category deals with a case where there is absence of sufficient evidence or reasonable ground of suspicion. In such case concerned officer has the power to release accused person on his executing bonds. Therefore, the High Court was not justified in holding that all the offences under the Act are C bailable. Such view is contrary to the provisions contained in Section 8 of the Act.

Learned Single Judge was, therefore, not justified in holding that since the offences have been specifically made bailable under the Act, they are D bailable. The conclusion is indefensible. That being so, we set aside the judgment of the Single Judge in Crl. Original Application no.620/1995 and Crl. Misc. case no.219/95 dated 27.6.96.

Appeal is allowed.

E V.S.S. Appeal allowed.