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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Bail Appl.No.1618/2008.

Vikas Mendiratta Petitioner
Through : Mr. K.K. Sud, Sr. Adv. with
Mr. Alok Rai and Mr. Atul Shah, Adv.

Versus

State of Delhi Respondent
Through : Mr. Lovkesh Sawhney, Adv.
Inspr Om Prakash Singh, SHO, Pahar
Ganj.

ORDER
24.02.2009

CORAM:
HON'BLE MR. JUSTICE G.S. SISTANI

1. Whether reporters of local papers may be allowed to see the Judgment ?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

G.S. SISTANI, J. (ORAL):

Bail Appl.No.1618/2008.

1. The present bail application has been filed under Section 438 of the Code of Criminal Procedure, for grant of anticipatory bail to the petitioner in the event of his arrest.
2. The necessary facts, as set out in the present application, are that an FIR was lodged on 14.5.2008 by one Sh. Harvinder Singh Sodhi, who stated himself to be working as a Supervisor in the Oxford Management Agency (hereinafter referred to as, "agency"), C-52, Flatted Factory Complex, Jhandewalan, Delhi. Sh. Vikas Mendiratta, petitioner herein, was stated to be the owner of the agency. Sh. Mahender Singh, Sh. Tarun Bhalla, Sh. Ajay Kumar, were also stated to be working at the said agency

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and that a team was being headed by Sh. Surinder Saini under whom one Mr. Sajauddin (since deceased) was working. As per the said FIR, on 14.05.2008, an information was received from the HSBC Bank that a sum of Rs.22,000/- was not received by them although a receipt had been issued. On enquiry, it was learnt that the receipt was issued by Sh. Sajauddin. The said information was conveyed to the petitioner, who instructed Harvinder Singh Sodhi to call Sajauddin to the office. The deceased reached the office and was questioned with regard to the issuance of the said receipt and the payment received by him. As per the FIR, the petitioner herein, was not present at the time of the questioning of the deceased, however, it is stated that the questioning was being done at his instructions. Further, as per the FIR, during the course of questioning of the deceased, he is stated to have gone to the toilet from where he jumped from the third floor and sustained grievous injuries. He was thereafter taken to Ganga Ram Hospital.

3. Initially FIR No.132/08 was registered under Sections 323/330/342/109/34, IPC, however, after the demise of Sajauddin, on 18.05.2008, Sections 302/364-A, IPC, were added.
4. Learned senior counsel for the petitioner submits that when the present bail application came up for hearing, this Court had granted interim protection to the petitioner on 04.08.2008 and which protection, continues till date.

Learned senior counsel submits that the matter was adjourned from time to time as the counsel for the State had sought adjournments on the ground that the recording files of the CCTV Camera, which was installed at the agency, had been sent to the Central Forensic Science Laboratory (CFSL), Chandigarh, for examination, and the examination report was awaited. A V.C.D. interviewing the deceased, recorded by a star news correspondent, was also sent to the CFSL, the examination report of which has since been received.

5. Learned senior counsel contends that the CCTV camera recording shows that the petitioner was not present at the premises and also as per the video clipping of the V.C.D., which is sought to be relied upon as a dying declaration by the State, the date of its creation is 20.05.2008, which is admittedly after the date, the deceased had succumbed to injuries.
6. Learned senior counsel has very vehemently argued that the petitioner has in fact been falsely implicated in the present case. He submits that the post-mortem report does not show that the deceased had been pushed from the third floor and except for the fact that the petitioner herein was the employer of the deceased, the petitioner has no other role to play in the entire incident whatsoever. Learned senior counsel submits that the investigation is complete and the petitioner has throughout the investigation co-operated with authorities and in fact had

approached this Court for protection at the very first opportunity available.

7. It is next submitted by the learned senior counsel that there is no apprehension in the mind of the State that the petitioner would not make himself available at the stage of trial. Moreover the petitioner has strong roots in the society; he is carrying out an established business; and is not likely to escape bail. Senior counsel also contends that there is no possibility of the petitioner tampering with the evidence.

8. On the contrary, learned counsel for the State has vehemently opposed the present application for grant of anticipatory bail to the petitioner, primarily on three grounds – (i) a plain reading of the FIR would show that the deceased was questioned at the instance and with the knowledge and connivance of the petitioner herein; (ii) it is the petitioner only who had asked Surender Saini to call Sajauddin (deceased) to the factory; and (iii) in the concluding portion of the FIR it has been mentioned that *“thus Supervisor Surender, Mahender and Tarun Bhalla on the instructions of owner Vikas, forcefully stopped Sajauddin in the office, obtained writing on papers about receiving the money. Legal action be taken against them”*.

9. Learned counsel for the State further submits that a correspondent of the Star News Channel had also interviewed the deceased Sajauddin in the Safdarjung Hospital. In the transcripts of the conversation in the Video

clipping (VCD), the deceased has also named the petitioner as the culprit behind his fall from the third floor of the agency. It is contended that the statements of the deceased were recorded by the cameraman at the behest of the correspondent of the Star News Network.

10. The last submission of learned counsel for the State is that as per the information received from the Cell Phone Tower, the presence of the petitioner was located in and around the area of the factory premises, and which goes on to show that, the petitioner was very much present at the factory at the time of the incident. However, learned senior counsel for the petitioner submits that one tower ordinarily covers a large area and, at this stage, there is no conclusive proof to show that the petitioner was in fact present in the room or in the area where the deceased had been kept.
11. The petitioner herein has prayed for grant of Anticipatory Bail. Section 438 of the Cr.P.C., deals with the same and is reproduced hereunder:

"438. (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia the following factors, namely:-

- (i) the nature and gravity of the accusation;
- (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice; and

(iv) Where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this subsection or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application..... "

12. I have heard learned counsel for the parties, who have taken me through the records of this case. To elaborate upon the law with regard to 'anticipatory bail', reliance is placed upon the case of **Union of India Vs. Padam Narain Aggarwal, etc.**, reported at **2008 (4) JCC 2733**, relevant portions of which are reproduced below:

"26. Section 438 of the Code makes special provision for granting 'anticipatory bail' which was introduced in the present Code of 1973. The expression ('anticipatory bail') has not been defined in the Code. But as observed in **Balchand Jain v. State of M.P., (1976) 4 SCC 572**, anticipatory bail means a bail in anticipation of arrest. The expression 'anticipatory bail' is a misnomer inasmuch as it is not as if bail presently granted in anticipation of arrest. Where a competent court grants 'anticipatory bail', it makes an order that in the event of arrest, a person shall be released on bail. There is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting anticipatory bail becomes operative.

27. It was also observed that the power of granting 'anticipatory bail' is extraordinary in

character and only in exceptional cases where it appears that a person is falsely implicated or a frivolous case is launched against him or "there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail" that such power may be exercised. Thus, the power is 'unusual in nature' and is entrusted only to the higher echelons of judicial service, i.e. a Court of Session and a High Court.

(emphasis supplied)

34. In the leading case of **Gurbaksh Singh Sibbia & Ors. v. State of Punjab, (1980) 2 SCC 565**, the Constitution Bench of this Court was called upon to consider correctness or otherwise of principles laid down by the Full Bench of High Court of Punjab & Haryana in **Gurbaksh Singh Sibbia v. State of Punjab, AIR 1978 P & H 1 : 1978 CrL LJ 20 (FB)**. The Full Bench of the High Court summarized the law relating to anticipatory bail as reflected in Section 438 of the Code and laid down certain principles as to when discretionary power to grant anticipatory bail may be exercised by a Court.

35. This Court partly disagreeing with the judgment of the High Court held that the Legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail since it felt, *firstly*, that it would be difficult to enumerate the 2 conditions under which anticipatory bail should or should not be granted and *secondly*, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail.

36. The Court stated;

"Generalizations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound

to differ from case to case*frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, Courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher Courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by Courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. *Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges".*

(emphasis in original)

37. According to this Court, therefore, discretionary power conferred by the Legislature on higher judiciary cannot be put in a straight-jacket formula. Such power must be exercised by the Court keeping in view facts and circumstances of an individual case.

38. Speaking for the Court, Chandrachud, C.J. stated;

"Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by

employing judicial artifices and techniques, we cut down upon the Courts, by devising a formula which will confine the power to grant jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed ² in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the Legislature, it can at best furnish broad guidelines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail "if it thinks fit". The concern of the Courts generally is to preserve their discretion without meaning to abuse it. *It will be strange if we exhibit concern to stultify the discretion conferred upon the Courts by law*".

(emphasis in original)

49. In **Adri Dharan Das v. State of West Bengal**, (2005) 4 SCC 303, referring to Gurbaksh Singh, this Court observed that normally, no direction should be issued to the effect that the applicant should be released on ³ bail "whenever arrested for whichever offence whatsoever". Such order should not be

passed as it would serve as a blanket to cover or protect any and every kind allegedly unlawful activity. An order under Section 438 is a device to secure the individual's liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely.

50. The Court proceeded to state;

"Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance to maintain law and order in the locality. For these or other reasons, arrest may become inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in 3 an application under Section 438 of the Code. The role of the investigator is well-defined and the jurisdictional scope of interference by the Court in the process of investigation is limited. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of accused in a cognizable offence. *An interim order restraining arrest, if passed while*

dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code".

(emphasis in original)

13. Thus, it can be seen that anticipatory bail is to be granted on a careful scrutiny of the case and a power which is to be exercised sparingly. While exercising this power, the court must consider whether the investigation and the case would be affected or hampered by the grant of bail. The power is extraordinary in character and is to be used only in exceptional cases, for example, where it appears to the court that a person may be falsely implicated in a matter. Courts must also consider the nature and gravity of the circumstances in which the offence has been committed as also the likelihood of the person tampering with the evidence and causing hindrance in the investigation of the matter.
14. Keeping in mind the aforesaid principles and having regard to the submissions made by learned counsel for the parties and in view of the fact that the charge sheet has not been filed, I do not consider it to be a fit case for grant of anticipatory bail. It has specifically been pointed out in the status report dated 30.09.2008 (filed and placed on record), by the SHO, Police Station, Pahar Ganj, that the petitioner had joined the investigation on 20.09.2008 and 22.09.2008 and was found to conceal facts. According to

the status report dated 29.01.2009, there is very likelihood of the petitioner tampering with the evidence and causing hindrance in the investigation process if bail is granted to the petitioner. The FIR expressly states that it was only at the instance of the petitioner, that certain employees of his agency questioned the deceased, and after some time it was informed that a person has fallen down, who was later identified as the deceased and who had sustained grievous injuries. In the transcripts (placed on record) provided by the Star News Channel, who had interviewed the deceased immediately before his death, the deceased has stated that in the office Mahender Sodhi, Rajesh, Vikas and others were present, who beat him and then threw him from the third floor of the said agency. Looking into the gravity of the offence and the principles affirmed by the Apex Court that the discretion of granting anticipatory bail is to be exercised sparingly, and only in extraordinary cases and where *inter alia* there is a presumption that the accused is being falsely implicated. In view of the aforesaid reasons, accordingly, the present bail application is dismissed. Needless to say that any observations made in this order will have no bearing on the trial or while considering the regular bail application.

15. Dasti.


G.S. SISTANI, J.

February 24, 2009

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