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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision : 25th July, 2014*

+ BAIL APPLN. 35/2014

AVINASH

..... Petitioner

Through: Mr.Satish Tamta, Advocate.

versus

STATE

..... Respondent

Through: Ms.Rajdipa Behura, APP for State
with SI Manish Kumar, CAW Cell,
East Delhi.
Mr.S.Tripathi and Ms.Yogita Bansal,
Advocates for the Complainant with
Complainant in person.

PRATIBHA RANI, J. (ORAL)

1. The Petitioner is husband of the Complainant and seeking anticipatory bail in case FIR No.554/2013 under Sections 498-A/406/34 IPC, PS New Ashok Nagar.
2. The Petitioner got married to the Complainant on 13.02.2012. A baby girl was born on 09.01.2013 out of this wedlock who is now under care and custody of the Complainant. Within 2-3 months of the marriage, rude and arrogant attitude of the Complainant towards the Petitioner and his family as well the Complainant insisting the Petitioner to get his share in the family property, led to problem in their matrimonial life. The father of the Petitioner made them to live separately but the problem persisted. The Complainant filed a false complaint before CAW Cell on 06.08.2013 but a

compromise was arrived at before CAW Cell on 04.10.2013. The Petitioner left for her parent's home on 16.10.2013. Thereafter notice was received by the Petitioner and his family from CAW Cell and ultimately the complaint culminated into registration of case FIR No.554/2013 under Sections 498-A/406/34 IPC at PS New Ashok Nagar.

3. The Petitioner is seeking bail on the following grounds :-

(i) All the allegations in the FIR even if taken to be true, do not disclose the commission of offence under Section 406/498-A IPC and there is no legal evidence to connect the Petitioner with the alleged offence.

(ii) The Complaint has been filed with ulterior motives on failure of the Petitioner to agree to her (complainant's) terms. The Petitioner is ready and willing to keep the Complainant and the child with him.

(iii) A bare reading of the complaint would reveal that it has been drafted and vetted by a legal person.

(iv) The Petitioner is ready and willing to join the investigation and no purpose will be served if the Petitioner is sent to Jail and face humiliation.

4. Prayer for grant of anticipatory bail has been rejected by learned Addl. Session Judge on 20.12.2013 for the reason that the marriage between the parties took place on 13.02.2012 and a daughter had also been born out of the said wedlock. There are clear and specific allegations of harassment and demand of Rs.10 lacs from the Complainant and jewellery articles of the Complainant are also stated to be lying with the Applicant and his family. Learned Addl. Session Judge was of the opinion that in view of the gravity of the allegations, Applicant was not entitled to be released on anticipatory bail.

5. When the Present bail application came up for hearing before this

Court, noticing the Complainant to be with a child in her lap, the Petitioner was asked to make some provision for the infant child at least for her food. This was felt desirable by the Court for the reason that mediation had failed. The Complainant and her daughter were not getting any maintenance from the Petitioner either voluntarily or under any order of the Court. Since it is a matrimonial dispute, learned Counsel for the Petitioner Mr.Satish Tamta, Advocate was requested to explore the possibility as to what the Petitioner could do for the child during this matrimonial litigation so that at least the child does not suffer because of warring parents and being father he is able to perform at least some obligation towards the child. Since in matrimonial disputes, possibility of the parties reuniting is always there, even after filing of divorce petition, an effort was made by the Court to convince the Petitioner to make some provision for the child so that child can be looked after properly by the Complainant.

6. Unfortunately, instead of making some offer for the child, learned counsel for the Petitioner submitted that there is an increasing tendency now-a-days wherein under such directions, the Petitioner is made to pay which has the effect of buying the bail. Mr.Satish Tamta, Advocate for the Petitioner has submitted that the Petitioner is ready and willing to take back the Complainant and child, if she so desires but not willing to buy bail by making payment to the Complainant.

7. Learned counsel for the Petitioner has submitted that in a proceeding under Section 438 CrPC, the Court cannot award maintenance to the wife and child or subject the accused to such conditions which would be beyond the jurisdiction of the Court. Mr.Satish Tamta, Advocate further submitted that the conditions to which the accused can be subjected while granting

anticipatory bail are enumerated in Section 438 CrPC and any order by the Court by putting condition on him to pay the money would be beyond the powers conferred on the Court under Section 438 CrPC.

8. Learned counsel for the Petitioner has relied upon ***Jagmohan Singh Kataria & Anr. v. State of NCT of Delhi 2002 (3) JCC 1721***, ***Munish Bhasin & Ors. v. State (Government of NCT of Delhi) & Anr. (2009) 4 SCC 45*** and ***M.R.Narayanan v. State 2002 (3) JCC 1674*** submitting that this Court cannot impose any condition on the Petitioner by directing him to make some deposit as a pre-condition to seek anticipatory bail. The Petitioner has applied for anticipatory bail and the Court is required to consider the provisions under Section 438 CrPC while dealing with the prayer of the Petitioner and grant or reject the prayer in accordance with the above provisions.

9. The basic question that arises for consideration now is whether a gesture which should have been volunteered by the Petitioner, but suggested by the Court, can be termed as unreasonable condition which can have the effect of terming such condition as buying the bail.

10. On behalf of State and Complainant, it has been submitted that Complainant had not been awarded any maintenance till date though she has filed a petition claiming maintenance. It is further submitted that the Complainant and her child is dependent on the family of the Complainant. The Complainant is not even employed.

11. In the case ***Jagmohan Singh Kataria & Anr. v. State of NCT of Delhi*** (Supra) relied upon by learned Counsel for the Petitioner, in a matrimonial dispute while granting anticipatory bail, vide order dated 19.10.2001 the learned ASJ directed the Accused/Petitioner to file an FDR

for a sum of Rs.5 lacs in the name of District & Sessions Judge, Delhi within two days. Subsequently, the anticipatory bail was confirmed vide order dated 01.11.2001 subject to the condition that the Petitioner will further deposit Rs.5 lacs within seven days. Both the orders were challenged by filing separate Criminal Miscellaneous Petitions and the conditions imposed in the bail order were set aside by the Court observing as under :

‘Under Section 437 (3) and 438 (2) Criminal Procedure Code shows that conditions which can be imposed are primarily with a view to ensure availability of the accused during investigation, enquiry or trial and his non-interference with the course of justice. Other conditions which Court may think fit can also be imposed but idea should be to ensure his presence as and when required and his non-interference with the investigation, enquiry or trial. It is obvious that other conditions should be ‘ejusdem generis’ to the conditions which are already enumerated under Sections 437(3) or 438(2) Criminal Procedure Code.’

12. In the case ***Munish Bhasin & Ors. v. State (Government of NCT of Delhi) & Anr.*** (supra) the Appellant (A-1) assailed the conditions imposed by the High Court while granting anticipatory bail to the Appellant/A-1 and his parents in a case under Section 406/498-A read with Section 34 IPC **requiring him to pay Rs.12500/- per month as maintenance to his wife and child.** In the facts and circumstances that the wife of the Appellant (A-1) was employed and receiving a handsome salary and not entitled to maintenance and further the question of maintenance should be left to be decided by the Court in appropriate proceedings, the Apex Court held that in proceeding under Section 438 CrPC, the Court would not be justified in awarding maintenance to the wife and child.

13. In another case ***M.R.Narayanan v. State*** (Supra) relied upon by

learned counsel for the Petitioner, a reference was made to the Division Bench pursuant to the conflicting views in judgments dated 26.11.2001 in ***Cr.R. 638/2001 titled as Mrs.Rajeshwari Verma & Anr. vs. State, Sarkar Saheb vs. State 93 (2001) DLT 585 and Vansh Bahadur Singh vs. State 1998 (2) JCC (Delhi) 39.***

14. It may be noted here that in ***Sarkar Saheb's*** case (Supra), while considering an application for grant of anticipatory bail in a case under Section 498-A/406 IPC, a condition was imposed on the accused to deposit Rs.50,000/- in lieu of non-return of jewellery articles. Feeling aggrieved, the accused/Petitioner filed CrI.R.156/2001 & CrI.M.301/2001 contending that imposing a condition to deposit Rs.50,000/- was beyond the powers of the Court under Section 438 CrPC and under Section 438 (2)(iv) CrPC, the Court could have imposed only such condition that may be imposed under Section 437(3)(c) CrPC while granting bail under Section 438 CrPC. While rejecting the contention of the Petitioner, it was held as under :-

'4. Section 437(3) of the Code, which deals with bails in non-bailable offences, stipulates that when a person accused or suspected of commission of offence punishable with imprisonment, which may extend to seven years or more or an offence under Chapter VI, Chapter XVI or Chapter XVII of Indian Penal Code or abetment or conspiracy thereof is released on bail, the Court may impose any condition, which it considers necessary in the interests of justice. The offence under Section 406 IPC falls in Chapter xviii of the Indian Penal Code and as such, conditions as envisaged in sub-clause (3) of Section 437 of the Code can be attached thereto. In the judgment, referred to by learned counsel for the petitioner in Ashok Malhotra's case (supra), a learned Single Judge of this Court had also clearly held that attaching of a condition to an order of anticipatory bail is permissible. However, Hon'ble Judge was of the view that the discretion must not be exercised arbitrarily. It was held that an unreasonable condition frustrates the very purpose of the bail. In the

Supreme Court judgment, referred to by learned counsel for the petitioner, Their Lordships had emphasised the need for liberal approach in the matter of orders relating to bail.

5. Coming to the facts of the case in hand, it is found that the petitioner is being proceeded against under Section 498-A/406 IPC on the complaint of his wife, who had alleged that soon after her marriage, the petitioner and his family had started harassing and torturing her in regard to the dowry demands. She had also alleged that her jewellery as well as Istri Dhan was taken and retained by her husband and his brother's wife on the assurance that it would be returned as and when required. However, when the complainant demanded her jewellery and other articles back, they flatly refused and threw her out of the matrimonial home. In matrimonial disputes, a tendency appears to be emerging to return only those articles of dowry, which become worthless after use and retain the jewellery which has a higher value. Therefore, under such circumstances the condition attached by learned Additional Sessions Judge to merely deposit a sum of Rs.50,00/- with the Trial Court in F.D.R. to be dealt with at the final stage of the trial, was not an unreasonable, unjust or arbitrary condition. It appears that this condition was imposed to protect and safeguard the interests of the complainant and also make the petitioner feel that law does not countenance harassment of newly wed girls and deprivation of their jewellery and other valuables with impunity.'

15. In **Sarkar Saheb's** case, the condition of depositing the amount, equivalent to the amount of istridhan was held to be a reasonable and just condition for grant of bail by the Division Bench of this Court.

16. After considering the decision of Supreme Court in **M.Sreenivasulu Reddy vs. State of Tamil Nadu 2001(2) Crimes 230**, the reference was answered in following terms :

18. In the light of the decision of Supreme Court in M. Srinivasulu Reddy the question posed before us has to be answered holding that the purpose of imposing conditions, which are envisaged in Sub-section (3) of Section 437 or Sub-section (2) of Section 438 or Sub-

section (1) of Section 439 cannot be such the object of which should be to recover the alleged amount. In that sense neither it is permissible nor appropriate either to buy bail by accused by offering to pay the alleged amount or sell bail by the Additional Sessions Judge in calling upon the accused to pay the amount. The conditions imposed must be reasonable and just which may be considered by the Court in the facts and circumstances of the case in order to secure the presence of the accused for interrogation by the police officers, as and when required; to ensure that the accused does not misuse liberty by directly to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to the police officer; to ensure that the accused does not leave territorial limits of the country without previous permission of the court; or that the accused does not commit an offence similar to the offence for which he is accused or suspected, during the period when he is on bail. The court while imposing conditions has to exercise its discretion considering the facts and circumstances of the case. Discretion has to be exercised judicially and not arbitrarily and certainly the object of imposing conditions should not be to recover the amount.

19. In the light of the position in law aforementioned, a view expressed by the learned Single Judge in Sarkar Saheb's case (supra) is not in conflict with the decisions rendered in Rajeshwari Varma's case (supra) since in Sarkar Saheb's case the court considered the condition to be just, fair and reasonable, in the facts and circumstances of the case and not a harsh condition. However, in Sarkar Saheb's case the court did not examine the question as to whether the object of imposing condition was the one which is provided in Sub-section (2) of Section 438 of Cr.P.C. The learned Single Judge in Rajeshwari Varma's case found the condition imposed to be in consonance with the purposes laid down in Sub-section (2) of Section 438 or Sub-section (3) of Section 437 of Cr.P.C. In Vansh Bahadur Singh's case (supra) learned Single Judge adopted the same approach as was adopted by the Supreme Court in M. Sreenivasulu Reddy's case that when an accused has undertaken to deposit the amount and acting on that undertaking an interim order of bail was granted, the order did not require any interference thereafter since the accused was bound to pay and since the balance amount which he

had undertaken to pay and since the balance amount was not paid, rightly the court had declined to grant indulgence to the accused.

20. There is a valid reason for taking this view of the matter and the reason being the doctrine of estoppel, which was duly approved by the Supreme Court in Sajan K. Varghese and Ors. v. State of Kerala and Ors. 1989 SCC (Cri) 339. In nutshell it was held that when a court in persuaded to accept the terms and conditions for grant of indulgence, it will not be permissible for the party later on to resile from those terms and conditions. It is permissible, when an undertaking is given on behalf of the accused to deposit the amount, that indulgence can be granted to him, if considered reasonable and proper. Reference may be made in this regard to the decisions of Supreme Court in Chakrawarti Prasad v. State of Bihar 1(2001) CCR 249 and Amarjit Singh v. State (NCT) of Delhi 2002 (61) DRJ 670 . In the later decision, the Supreme Court observed that imposition of a condition to deposit a sum of Rs. fifteen lakhs in the form of FDR was unreasonable since as per Sub-section (2) of Section 438 Cr.P.C. conditions which can be imposed should not be unreasonable. A condition, which would be difficult to comply with would amount to imposition of an unreasonable condition and would tantamount to refusal; of invoking the discretion under Sub-section (1) of Section 438 Cr.P.C. In Sandeep Jain v. State of Delhi JT 2000 (1) SC 166 : 2000 (2) JCC 639 condition of deposit of amount of Rs. two lakhs apart from furnishing a bond of Rs. 50,000/- with two solvent sureties, while granting bail was held by the Supreme Court to be unreasonable one.

17. Even at the cost of repetition, it may be noted here that in the case ***M.R.Narayanan v. State*** (Supra) relied upon by learned counsel for the Petitioner, the condition of depositing the amount, equivalent to the amount of istridhan was held to be a reasonable and just condition for grant of bail by the Division Bench of this Court.

18. The provisions of Section 437, 438 and 439 CrPC and the power of Court to impose conditions came up for consideration before the

Constitution Bench of Hon'ble Supreme Court ***Shri Gurbaksh Singh Sibbia & Ors. vs. State of Punjab AIR 1980 SC 1632***. For purpose of dealing with this bail application and the contentions of learned counsel for the Petitioner, it would be appropriate to refer to paras 1, 14 to 17 of the report, which are extracted as under :

'1. These appeals by Special Leave involve a question of great public importance bearing, at once, on personal liberty and the investigational powers of the police. The society has a vital stake in both of these interests, though their relative importance at any given time depends upon the complexion and restraints of political conditions. Our task in these appeals is how best to balance these interests while determining the scope of Section 438 of the CrPC, 1973 (Act No. 2 of 1974).

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14. The provisions of Section 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully : Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in paragraph 29.9 that it had "considered" carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion of the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the 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. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provided that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in Clauses (i) to (iv) of Sub-section (2). The proof of legislative intent can best be found in the language which the legislature uses. Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non-bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail is generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the Court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437.

15. This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of Section 438. Though Sub-section (1) of that section says that the Court "may, if it thinks fit" issue the necessary direction for bail, sub-section (2) confers on the Court the

power to include such conditions in the direction as, it may think fit in the light of the facts of the particular case, including the conditions mentioned in Clauses (i) to (iv) of that sub-section. The controversy therefore is not whether the Court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant Under Section 439 of the Code.

16. Generalisations 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. While dealing with the necessity for preserving judicial discretion unhampered by rules of general

application, Earl Loreburn L.C. said in *Hyman and Anr. v. Rose* [1912] A. C 623 :

I desire in the first instance to point out that the discretion given by the section is very wide.... Now it seems to me that when the Act is so express to provide a wide discretion... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would, regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the Court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the Court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the Court wish it had kept a free hand.

17. 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 the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-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 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 guide-lines and cannot compel blind adhere'nce. 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.

19. In view of the above decision of Constitutional Bench of Hon'ble Supreme Court, I have no hesitation in coming to the conclusion that the suggestion by the Court to make some provisions for the immediate need of the child cannot be described as buying the bail or awarding maintenance.

20. The Petitioner is entangled in a matrimonial dispute with his wife/Complainant. Even before the CAW Cell , the Parties entered into a settlement on 04.10.2013 to give their marriage another trial which unfortunately remained unsuccessful. The Complainant, who is a lady, involved in a litigation with husband is unemployed and dependent on her parents for her every need as well as of her child. In such type of disputes, possibility of living together is never ruled out especially when even during course of arguments, the Petitioner has expressed his desire to take back the Complainant and child but due to her own apprehensions presently she is not willing to live with her husband.

21. In the given facts and circumstances, the Petitioner is granted anticipatory bail subject to the condition that he shall pay Rs.50,000/- in cash or through pay order to the Complainant for meeting day to day requirements of the child within 15 days from the date of this order and for two weeks, no coercive steps shall be taken against the Petitioner to enable him to comply with the above condition. Thereafter, subject to the fulfilment of above condition, in the event of arrest, the Petitioner be

released on bail on his furnishing personal bond in the sum of Rs.20,000/- with one surety in the like amount to the satisfaction of IO/SHO concerned.

22. Application stands disposed of in above terms.

23. Any observations made hereinabove for the purpose of dealing with the contentions of counsel for the petitioner shall not be deemed to be an expression on merits of the case.

24. As prayed, copy of the order be given dasti to learned counsel for the parties.

PRATIBHA RANI, J

July 25, 2014

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