

Court No. - 72

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S
438 CR.P.C. No. - 10582 of 2023

Applicant :- Rakesh Kumar

Opposite Party :- State Of U.P. And 2 Others

Counsel for Applicant :- Chandra Prakash Awasthi, Saurabh Srivastava

Counsel for Opposite Party :- G.A.

Hon'ble Krishan Pahal, J.

1. List has been revised.
2. Third supplementary affidavit filed by learned counsel for the applicant is taken on record.
3. Heard Sri V.P. Srivastava, learned Senior Advocate assisted by Sri Saurabh Srivastava, learned counsel for the applicant, Sri V.K.S. Parmar, learned A.G.A. for the State and perused the material on record.
4. The present anticipatory bail application has been filed on behalf of the applicant in Case Crime No.29 of 2021, registered under Sections 409, 420, 467, 468, 471 I.P.C. at Police Station- Kotwali, District- Ballia with a prayer to enlarge him on anticipatory bail.
5. The first information report was instituted at Police Station Kotwali, District Ballia on 15.01.2001 stating therein that the informant is the Manager of Shri Murli Manohar Town Snakottar Mahavidyalaya, Ballia. The Ex-Manager (Shri Rakesh Kumar) in collusion with member of the institution has embezzled an amount of Rs. 21,70,000/- of the institution and had taken it in personal use.
6. Learned Senior Counsel for the applicant has stated that the applicant is a *bona fide* person and has not misused the liberty granted to him at all. The applicant was Manager with the institution at the time of alleged offence as is evident from Annexure no.8 filed with the

anticipatory bail application. The applicant was authorized signatory and all his acts were *bona fide* in pursuance of his official duty. Learned Senior Counsel has further stated that the police had filed the final report (charge-sheet) with respect to applicant under the influence of the informant, but subsequently, further investigation was taken up by the police after seeking permission from the Court and the closure report was filed with respect to the applicant. Both the documents are on the file.

7. Learned Senior Counsel for the applicant has further stated that the applicant had preferred a Criminal Revision No.1007 of 2004 before this Court against the order for taking cognizance dated 04.02.2004 of C.J.M., Ballia, and as such, the proceedings were stayed by this Court vide order dated 11.03.2004, the said order is filed as Annexure No.13 to the anticipatory bail application. Learned Senior Counsel has stated that in the light of judgment of the Apex Court passed in the case of ***Asian Resurfacing of Road Agency Private Limited and Another vs. Central Bureau of Investigation, (2018) 16 SCC 299***, the said stay order stood vacated. The matter was argued finally in this Court and was reserved on 27.05.2022 and the judgment was delivered on 29.07.2022 dismissing the said criminal revision. Learned Senior Counsel has stated that in the meantime, the proceedings under Section 82 Cr.P.C. were initiated against the applicant but at the time of reserving the judgment, the Hon'ble Court has passed the order as follows:-

“Heard Mr. Ravi Shankar Prasad, the learned Senior counsel assisted by Mr. Pradeep Kumar Sinha, the learned counsel for revisionist, the learned A.G.A. for State and Mr. Girish Kumar Singh, the learned counsel for complainant.

Arguments concluded.

Order reserved.

Till the delivery of order, no coercive action shall be taken against revisionist.”

8. In the light of aforesaid judgment of this Court, the order dated 13.6.2022 was withdrawn as such, no proceedings under Section 82

Cr.P.C. are pending against the applicant. The applicant was summoned vide order dated 5.6.2023 in Case No. 2474 of 2001 in the present case crime, as such, the applicant had challenged the said summoning order and the final report (charge-sheet) dated 12.08.2021 by filing Application U/S 482 Cr.P.C. No.22987 of 2023, which was disposed of by this Court vide order dated 10.7.2023 and the applicant was granted 45 days' time to apply for bail. Learned Senior Counsel has stated that the word "*Bail*" includes the anticipatory bail as has been opined by the Apex Court in the case of *Vinod Kumar Sharma and Another vs. State of U.P. and Another*, **LL 2021 SC 663**.

9. Learned Senior Counsel has further stated that the applicant is a *bona fide* person and is entitled for anticipatory bail as already the closure report has been filed by the same investigating agency subsequent to the final report (charge-sheet). Learned Senior Counsel has stated that criminal history of three cases assigned to the applicant stands explained as under:-

(i) In Case Crime No.484 of 2022, under Sections 419, 420, 467, 468, and 471 I.P.C., Police Station Kotwali, District Ballia, the investigation is going on and the final report has not yet been submitted.

(ii) In Case Crime No.248 of 2022, under Sections 419, 420, 409 I.P.C., Police Station Kotwali, District Ballia. the police after thorough investigation was pleased to file closure report and the Magistrate concerned has issued notice to the informant for disposal of the said closure report.

(iii) So far as Case Crime No.202 of 2005, under Sections 420, 471, 201, 120-B I.P.C., Police Station Kotwali, District Ballia is concerned, the final report (charge-sheet) was submitted in it and the applicant had challenged it by filing Application U/S 482 Cr.P.C. No.9277 of 2005 and this Court was pleased to grant interim protection vide order dated 21.07.2005, but the said petition has been dismissed by this Court vide order dated 2.11.2021 for want of prosecution. The

restoration application No.4 of 2022 has been filed, which is still pending.

10. Learned Senior Counsel has further stated that the judgment of this Court passed in the case of ***Shivam vs. State of U.P. and Another*** reported in ***AirOnline 2021 All 484*** is per-in-curium as it is against the judgment passed by the Apex Court in the case of ***Sushila Aggarwal Vs. State (NCT of Delhi), (2020) 5 SCC 1***" and has placed much reliance on the paragraph 7.5 of the aforesaid judgment, which reads as under:-

7.5. However, in *Siddharam Satlingappa Mhetre* [*Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] , despite the specific observations by the Constitution Bench of this Court in *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] that the normal rule should be not to limit the operation of the order in relation to a period of time, in other words in an appropriate case and looking to the facts and circumstances of the case and the stage at which the pre-arrest bail application was made, the court concerned can limit the operation of the order in relation to a period of time, on absolute misreading of the judgment in *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] and just contrary to the observations made in paras 42 and 43 of *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , an absolute proposition of law is laid down that the life of the order under Section 438 CrPC granting bail cannot be curtailed. Despite the clear-cut observations made by the Constitution Bench in *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] made in paras 42 and 43, in *Salauddin Abdulsamad Shaikh* [*Salauddin Abdulsamad Shaikh v. State of Maharashtra*, (1996) 1 SCC 667 : 1996 SCC (Cri) 198] , a three-Judge Bench of this Court has observed and held that the order of “anticipatory bail” has to be necessarily limited in time-frame. In

many cases, subsequently the decision in *Salauddin Abdulsamad Shaikh* [*Salauddin Abdulsamad Shaikh v. State of Maharashtra*, (1996) 1 SCC 667 : 1996 SCC (Cri) 198] has been followed, despite the specific observations made by the Constitution Bench in *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] made in paras 42 and 43 which, as such, are just contrary to the view taken in subsequent decisions in *Siddharam Satlingappa Mhetre* [*Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] and *Salauddin Abdulsamad Shaikh* [*Salauddin Abdulsamad Shaikh v. State of Maharashtra*, (1996) 1 SCC 667 : 1996 SCC (Cri) 198] . At this stage, it is required to be noted that in *Salauddin Abdulsamad Shaikh* [*Salauddin Abdulsamad Shaikh v. State of Maharashtra*, (1996) 1 SCC 667 : 1996 SCC (Cri) 198] , this Court had not at all considered the decision of the Constitution Bench in *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] . It cannot be disputed that the decision of this Court in *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] is a Constitution Bench decision which is binding unless it is upset by a larger Bench than the Constitution Bench. Therefore, considering the decision of the Constitution Bench of this Court in *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] and the relevant observations reproduced hereinabove, the decision of this Court in *Siddharam Satlingappa Mhetre* [*Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] to the extent it takes the view that the life of the order under Section 438 CrPC cannot be curtailed is not a correct law in light of the observations made by the Constitution Bench in paras 42 and 43 in *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] . The decision of this Court in *Salauddin Abdulsamad Shaikh* [*Salauddin*

Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667 : 1996 SCC (Cri) 198] which takes an extreme view that the order of “anticipatory bail” has to be necessarily limited in time-frame is also not a good law and is against and just contrary to the decision of this Court in *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465], which is a Constitution Bench judgment.

11. Learned Senior Counsel has stated that anticipatory bail application cannot be confined to a certain period as opined above, as such, the present anticipatory bail application is liable to be allowed.

12. Per contra, learned A.G.A. has vehemently opposed the anticipatory bail application on the ground that the case of the applicant is squarely covered by the judgment of this Court passed in the case of ***Shivam (supra)***, whereby the applicant had failed in the Application U/S 482 Cr.P.C. while challenging the charge-sheet. Learned A.G.A. has stated that the applicant had even filed criminal revision before this Court and had failed, and then again against the same order, the applicant preferred a petition under Section 482 Cr.P.C. which was also dismissed by this Court. The said act of the applicant tantamount to forum shopping as has been opined in the judgment of the Apex Court passed in ***K. Jayaram vs. BDA, (2022) 12 SCC 815***.

13. In the light of aforesaid, as far as the judgement of the Apex Court referred by learned Senior Counsel passed in ***Vinod Kumar Sharma (supra)***, the same was passed in the matter of dowry death and it was not an omnibus order. It only states that regular bail includes anticipatory bail. This Court also finds it proper that the word “Bail” includes anticipatory bail also. The criminal history of the applicant has not been properly explained as already the charge-sheet has been filed in Case Crime No.202 of 2005 and the applicant is absconding in it. He has not sought bail in it. Even the investigation is pending against the applicant in Case Crime No.484 of 2022 and he has not annexed any bail order in the said

case also. As far as Case Crime No.248 of 2022 is concerned, filing of closure report does not mean the closure of case once for all as a protest petition may be filed by the informant or the cognizance might be taken by the C.J.M. in the said subject-matter under Section 190 Cr.P.C.

14. In the light of aforesaid facts and circumstances of the case, taking into consideration the fact that the criminal history of the applicant has not been properly explained and also in the light of paragraph-43 of the judgment of this Court in *Shivam (supra)*, I do not find it a fit case for grant of anticipatory bail to the applicant.

15. The present anticipatory bail application is hereby found devoid of merits and is, accordingly, *rejected*.

16. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of anticipatory bail application and the said observations shall have no bearing on the merits of the case during trial.

Order Date :- 18.10.2023

Vikas

[Krishan Pahal, J.]