

Court No. - 16

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION
U/S 438 CR.P.C. No. - 2759 of 2023

Applicant :- Vishal Singh

Opposite Party :- State Of U.P. Thru. Prin. Secy. Deptt. Of Home
Civil Sectt. Lko And Another

Counsel for Applicant :- Krishan Kumar

Counsel for Opposite Party :- G.A.

Hon'ble Subhash Vidyarthi,J.

1. Heard Sri Krishna Kumar, the learned counsel for the applicant as well as Sri Rakesh Kumar Singh, the learned Additional Government Advocate appearing on behalf of the State and perused the records.

2. The instant application has been filed by the applicant seeking anticipatory bail in F.I.R. bearing Case Crime No.0326 of 2023, under Sections 323, 506, 149, 308, 302, 34 IPC and Section 3 (2) V of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, registered at Police Station Ramkot, District Sitapur.

3. The learned A.G.A. has raised a preliminary objection that the applicant has sought anticipatory bail *inter alia* for the offence under Section 302 IPC, in which death sentence can be awarded. Therefore, the provisions of Section 438 Cr.P.C. will not be applicable in the present case in view of the provision contained in Section 438 (6) Cr.P.C. as it applies to the State of U.P.

4. Replying to the aforesaid preliminary objection, the learned counsel for the applicant has submitted that in the present case, the allegation of commission of offence under Section 302 IPC is *prima facie* not made out against the applicant.

5. Section 438 was omitted from the Code of Criminal Procedure, as it applies to the State of Uttar Pradesh, Section 438 by means of U. P. Act No. 16 of 1976. After remaining away from the code for as long as forty three years, Section 438 has been reinserted by the following

provision inserted by U. P. Act No. 4 of 2019, which is different from the provisions of Section 438 as applicable to the rest of India:-

“438. Direction for grant bail to person apprehending arrest.— (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 sub-section 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.

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely—

- (i) that the applicant shall make himself available for interrogation by a police officer as and when required;*
- (ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer,*
- (iii) that the applicant shall not leave India without the previous permission of the Court; and*
- (iv) such other conditions as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.*

Explanation.—The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application;

(6) Provisions of this section shall not be applicable,—

(a) to the offences arising out of,—

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session.”

6. Learned counsel for the applicant has relied upon a judgment of Hon'ble Supreme Court in the case of **Hitesh Verma vs. State of Uttarakhand and another**, decided on 05.11.2020 in Criminal Appeal No.707 of 2020, wherein Hon'ble Supreme Court held that if there is a false and unsubstantiated FIR, the proceedings under Section 482 Cr.P.C. can be invoked. Hitesh Verma (supra) was an appeal against an order passed by the Nainital High Court dismissing an application under Section 482 Cr.P.C and the question of scope of Section 438 Cr.P.C. was not involved in that case and therefore, the case of Hitesh Verma is not at all relevant for deciding the issue of maintainability of present application.

7. The other judgement relied upon by learned counsel for applicant is the judgment dated 30.07.2021 passed by a Bench of this Court in Criminal Misc Anticipatory Bail Application No.8032 of 2021; **Musafir vs. State of U.P. and others**, wherein this Court relied upon a decision of Hon'ble Supreme Court in the cases of **Prathvi Raj Chauhan vs. Union of India and others**, reported in (2020) 4 SCC 727 and **Union of India vs. State of Maharashtra and others**, reported in (2020) 4 SCC 761 in which Hon'ble Supreme Court held that in case offences under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act are not made out even *prima facie* the bar created under Section 18 of the said Act against grant of anticipatory bail would not be attracted.

8. In none of the aforesaid cases, the question of scope or interpretation of Section 438 Cr.P.C., as it applies in its modified form to the State of Uttar Pradesh, was under consideration.

9. It is settled law that a judgment is an authority on the point which it actually decides and not which can be deduced therefrom. Therefore, the aforesaid judgments cited by the learned counsel for the applicant would not be relevant for overcoming the statutory bar created by Section 438 (6) (b) Cr.P.C. applicable to the State of Uttar Pradesh.

10. In view of the aforesaid discretion, this Court is of the considered view that an application for grant of anticipatory bail in a case involving allegation of commission of offence under Section 302 IPC, in which death sentence can be awarded, is not maintainable.

11. The anticipatory bail application is **rejected** as not maintainable accordingly.

(Subhash Vidyarthi, J.)

Order Date :- 2.12.2023

Renu/-