

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.38306 of 2014

Arising Out of PS.Case No. -161 Year- 2005 Thana -GOH District- AURANGABAD

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1. SADHU SHARAN YADAV SON OF SHEO CHANDER YADAV
2. DHARAMDEO YADAV SON OF BALI YADAV
BOTH RESIDENT OF VILLAGE- MALHARA, POLICE STATION-
HASPURA, DISTRICT- AURANGABAD (BIHAR).

.... PETITIONER/S

VERSUS

THE STATE OF BIHAR OPPOSITE PARTY/S

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Appearance:

For the Petitioner/s : Mr. Purushotam Sharma, Adv.

For the Opposite Party/s : Mr. Ajay Kumar No.2., APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
C.A.V. ORDER

3 01-05-2015 Petitioners Sadhu Sharan Yadav, Dharamdeo Yadav

have filed instant petition for anticipatory bail under the guise of

Section 438 Cr.P.C.

2. Goh P.S. Case No.161 of 2005 was registered under

Section 302, 201, 34 of the IPC against four accused persons,

namely, Krishna Bind, Jagdish Bind, Vijay Bind, and Rajesh Bind

on the basis of fardbeyan of Sakaldeo Yadav alleging inter alia

that his elder brother Jhalakdeo Yadav had gone to the house of

Krishna Bind on 04.12.2005 to receive due wages. He did not

return and on account thereof, he along with his cousin brother

Vijendra Yadav has gone to the house of Krishna Bind who

disclosed that his brother had already returned to his house,

yesterday itself. Then, thereafter, they began to search however,

could not traced out and on account thereof, they again gone to the



house of Krishna Bind where Krishna Bind and Jagdish Bind disclosed that they came to know regarding his brother, at village Uphara, Bela. Again, he made search but having no clue. On 10-12-2005 while he was going to the house of Krishna Bind he found dead body of his brother lying in the field of Ram Balak Kande and so, he apprehended hands of those accused persons in killing of his brother. Names of both the petitioners transpired during course of investigation on the statement of the wife of informant and on account thereof, both the petitioners moved anticipatory bail petition under Cr. Misc. No.32656 of 2006 (Annexure-1) by which, vide order dated 03.11.2006 both the petitioners were granted anticipatory bail for a fixed tenure till submission of charge sheet.

3. After submission of charge sheet followed with cognizance, petitioners have again approached this Court through instant petition asking for grant of anticipatory bail for rest of the period that means to say, conclusion of the trial.

4. Heard learned counsel for the petitioners as well as learned Additional Public Prosecutor.

5. Section 438 Cr.P.C., usually known as anticipatory bail, is a creation of amended Cr.P.C. whereunder an accused, being apprehensive of his arrest in connection with cognizable, non-bailable offence was given an opportunity to seek a protection

by way of grant of bail without surrendering before the court by way of asking for regular bail in case, succeeds to place justifiable grounds. For that, the proper courts have been identified as session courts as well as the High Court having concurrent jurisdiction, however under judicial hierarchy, the Sessions Judge has to be approached first.

6. Though there happens to be no barrier prescribed under Section 438 Cr.P.C. save and except identified under sub-section (1) relating to grant of anticipatory bail as well as renewal of the prayer on account of refusal at an earlier occasion and on account thereof, accused is at liberty to renew his prayer in case, having a new ground though rejected at an earlier occasion. Because of the fact that by having such provision, the legislature indile in favour of accused to seek pre-arrest privilege, and that being so, prayer in bunch been placed before the court asking for grant of the same. As no proper identifiable criteria has been found duly incorporated under Section 438 Cr.P.C. for the purpose of appropriate consideration and as the different judicial pronouncement spoke divergent parameters on account thereof, to settle the matter in its finality, the Hon'ble Apex Court decided the issue under the constitution Bench in ***Gurbaksh Singh Sibbia v. State of Punjab*** reported in (1980) 2 SCC 565 whereunder all aspects of Section 438 Cr.P.C. have been considered and

elaborately been explained in comprehensive manner and till today, it commands the sphere.

7. However, in due course of time in some of cases more particularly *Salauddin Abdulsamad Shaikh v. State of Maharashtra* reported in (1996) 1 SCC 667 as well as K.L. Verma Vs. State & Another (1998) 9 SCC 348 Nirmal Jeet Kaur Vs. State of M.P. (2004) 7 SCC 558 the grant of anticipatory bail was allowed for limited period more particularly till submission of the charge sheet with a further opportunity to the accused /petitioner to surrender before the court below with a prayer for regular bail. Though there also happen to be another set of judicial pronouncement by the Hon'ble Apex Court itself contrary to the aforesaid pronouncement.

8. In *Siddharam Satlingappa Mhetre v. State of Maharashtra* reported in (2011) 1 SCC 694 the aforesaid issue has been considered and explained in length.

”98. The court which grants the bail has the right to cancel the bail according to the provisions of the General Clauses Act but ordinarily after hearing the Public Prosecutor when the bail order is confirmed then the benefit of the grant of the bail should continue till the end of the trial of that case. The judgment in *Salauddin Abdulsamad Shaikh (1996) 1 SCC 667* is contrary to the legislative intent and the spirit of the very provisions of the anticipatory bail itself and has resulted in an artificial and unreasonable restriction on the scope of enactment contrary to the legislative intention.

99. The restriction on the provision of anticipatory bail under Section 438 CrPC limits the personal liberty of the accused granted under Article 21 of the Constitution. The added observation is

nowhere found in the enactment and bringing in restrictions which are not found in the enactment is again an unreasonable restriction. It would not stand the test of fairness and reasonableness which is implicit in Article 21 of the Constitution after the decision in *Maneka Gandhi case (1978) 1 SCC 248* ; in which the Court observed that: (*Sibbia case (1980) 2 SCC 565, SCC p. 586, para 26*)

“26. ... in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable.”

100. Section 438 CrPC does not mention anything about the duration to which a direction for release on bail in the event of arrest can be granted. The order granting anticipatory bail is a direction specifically to release the accused on bail in the event of his arrest. Once such a direction of anticipatory bail is executed by the accused and he is released on bail, the court concerned would be fully justified in imposing conditions including the direction of joining the investigation.

101. The court does not use the expression “anticipatory bail” but it provides for issuance of direction for the release on bail by the High Court or the Court of Session in the event of arrest. According to the aforesaid judgment of *Salauddin case (1996) 1 SCC 667*, the accused has to surrender before the trial court and only thereafter he/she can make prayer for grant of bail by the trial court. The trial court would release the accused only after he has surrendered.

102. In pursuance of the order of the Court of Session or the High Court, once the accused is released on bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

103. The court must bear in mind that at times the applicant would approach the court for grant of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. In fact, the investigating agency concerned may not otherwise arrest that applicant who has applied for anticipatory bail but just because he makes an application before the court and gets the relief from the court for a limited period and thereafter he has to surrender before the trial court and only thereafter his bail application can be considered and the life of anticipatory bail comes to an end. This may lead to disastrous and unfortunate consequences. The applicant who may not have otherwise lost his liberty loses it because he chose to file application of anticipatory bail on mere

apprehension of being arrested on accusation of having committed a non-bailable offence. No arrest should be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. This finding of the said judgment (*supra*) is contrary to the legislative intention and law which has been declared by a Constitution Bench of this Court in *Sibbia case (1980) 2 SCC 565*.

104. The validity of the restrictions imposed by the Apex Court, namely, that the accused released on anticipatory bail must submit himself to custody and only thereafter can apply for regular bail; this is contrary to the basic intention and spirit of Section 438 CrPC. It is also contrary to Article 21 of the Constitution. The test of fairness and reasonableness is implicit under Article 21 of the Constitution of India. Directing the accused to surrender to custody after the limited period amounts to deprivation of his personal liberty.

105. It is a settled legal position crystallised by the Constitution Bench of this Court in *Sibbia case (1980) 2 SCC 565* that the courts should not impose restrictions on the ambit and scope of Section 438 CrPC which are not envisaged by the legislature. The Court cannot rewrite the provision of the statute in the garb of interpreting it.

106. It is unreasonable to lay down strict, inflexible and rigid rules for exercise of such discretion by limiting the period of which an order under this section could be granted. We deem it appropriate to reproduce some observations of the judgment of the Constitution Bench of this Court in *Sibbia case (1980) 2 SCC 565*: (SCC pp. 576-77 & 580-81, paras 10, 12 & 14-15)

“10. ... The validity of that section must accordingly be examined by the test of fairness and reasonableness which is implicit in Article 21. If the legislature itself were to impose an unreasonable restriction on the grant of anticipatory bail, such a restriction could have been struck down as being violative of Article 21. Therefore, while determining the scope of Section 438, the court should not impose any unfair or unreasonable limitation on the individual's right to obtain an order of anticipatory bail. Imposition of an unfair or unreasonable limitation, according to the learned counsel, would be violative of Article 21, irrespective of whether it is imposed by

legislation or by judicial decision.

* * *

12. ... Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence.

* * *

14. ... '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 expressed 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.'*

15. ... 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."

107. The Apex Court in *Salauddin case*(1996) 1 SCC 667 held that anticipatory bail should be granted only for a limited period and on the expiry of that duration it should be left to the regular court to deal with the matter is not the correct view. The

reason quoted in the said judgment is that anticipatory bail is granted at a stage when an investigation is incomplete and the court is not informed about the nature of evidence against the alleged offender. The said reason would not be right as the restriction is not seen in the enactment and bail orders by the High Court and the Sessions Court are granted under Sections 437 and 439 also at such stages and they are granted till the trial.

108. The views expressed by this Court in all the abovereferred judgments have to be reviewed and once the anticipatory bail is granted then the protection should ordinarily be available till the end of the trial unless the interim protection by way of the grant of anticipatory bail is curtailed when the anticipatory bail granted by the court is cancelled by the court on finding fresh material or circumstances or on the ground of abuse of the indulgence by the accused.”

9. As culminate from different judicial pronouncement having influence of constitution Bench, Sibbia case (supra), on the issue of grant of anticipatory bail, is to survive till conclusion of trial and that being so, it cannot be constrained with time framing.

10. Now the second question arose with regard to fate of impact of earlier order passed allowing the prayer for particular period as well as maintainability of subsequent petition for anticipatory bail filed in the aforesaid event. That means to say whether successive petition for anticipatory bail in case having been allowed in earlier petition even for limited period, is permissible. The same issue has come up for consideration in *Bishundeo Sahu & Ors. Vs. State of Bihar* reported in **2011(1) PLJR 731** wherein the Division Bench, after considering all the relevant decisions on this very score has held that the successive

anticipatory bail petition would not be maintainable however, in case of surrender before learned lower court, the court has to consider that apart from grant of anticipatory bail during intervening period, whether there happens to be misuse at his end.

For better appreciation para-19, 20, 21 are quoted below.

“19. In case of non-bailable offences also, similar view can be taken, in case anticipatory bail was granted for a limited period till submission of the charge-sheet. Since the accused has already surrendered before the Court below for grant of anticipatory bail and has executed bail bond, as such at his instance another anticipatory bail application can not be maintainable. He will have to surrender and pray for regular bail under Section 439 of the Code of Criminal procedure. The Court concerned, instead of taking him into custody, considering the previous order of anticipatory bail passed in his favour and also that he has not misused the privilege or his conduct is such that despite submission of charge-sheet or order taking cognizance, he is capable of granting bail, will grant him bail. In case where the anticipatory bail granted for limited period has been misused, the concerned Court will have discretion, either to grant or refuse the bail. In case of non-bailable offence, Anticipatory bail, if granted for limited period, the Court concerned will pass order in similar manner as laid down in the case of Mahendra Pd. Singh (supra). In no case, second anticipatory bail application at the instance of such accused person is maintainable.

20. So far petitioners in these Criminal Miscellaneous applications are concerned, they are also directed to surrender before the concerned Court within four weeks from the date of this order. In case these petitioners will surrender and file their applications for bail under Section 439 of the Code of Criminal Procedure, the concerned Court will pass an order in the similar manner as has been decided in the case of Mahendra Prasad Singh vs. State of Bihar reported in 2004(3) PLJR 491.

21. These petitioners will be granted bail without taking them into custody as there is no allegation against them that during the limited period of anticipatory bail or the provisional bail order passed during pendency of these applications by the High Court, they have misused the privilege of bail.”

11. Thus, the issue now no more remains under controversy. At the first sight, while observing that no successive anticipatory bail petition is maintainable in case petitioner is availing the same, even for limited period, and for that, direction has been given to the petitioner to surrender before the learned lower court with a prayer of regular bail. Simultaneously, the court has been directed to adjudicate upon considering whether there happens to be misuse of privilege or not. In case, there happens to be no evidence regarding misuse, then the prayer has to be favourably considered in accordance with law.

12. Hence, instant petition is disposed of in terms thereof.

(Aditya Kumar Trivedi, J.)

Patna High Court
Dated, the 1st day of May, 2015
Prakash Narayan

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