

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.50915 of 2014

Arising Out of PS.Case No. -184 Year- 2014 Thana -COMPLAINT CASE District- SUPAUL

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1. Md. Iliyas Ansari S/o Late Samid Ansari,
 2. Md.Safik Ansari S/O Ibrahim Ansari,
 3. Md. Sabir Ansari S/O Late Rahim Hazi,
- All are resident of Village -Bauraha, P.S-Birpur District-Supaul.

.... Petitioner/s

Versus

1. The State of Bihar,
2. Md.Zainuddin Ansari S/O Late Oswal Ansari, resident of Village - Bauraha, P.S-Birpur District-Supaul.

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Arun, Advocate.

For the Opposite Party/s : Mr. Madan Kumar(APP)

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI
ORAL ORDER

4 21-05-2015 This is an application, made under Section 438 of the Code of Criminal Procedure, seeking pre-arrest bail by the petitioners, namely, Md. Iliyas Ansari, Md. Safik Ansari and Md. Sabir Ansari, in connection with Complaint Case No. 184C of 2014 under Sections 420/467/468/471/120B of the Indian Penal Code.

Perused the above application, materials available on record including a copy of the order, dated 31.10.2014, passed, in A.B.P. No. 39 of 2014(B), by the learned Sessions Judge, Saharsa, rejecting the said application for pre-arrest bail.

Heard Mr. Arun, learned counsel for the petitioners, and Mr. Madan Kumar, learned Additional Public

Prosecutor, appearing on behalf of the State.

This case reveals a very disturbing state of practice prevailing in the subordinate judiciary on the subject of granting of bail in a *complaint case* involving non-bailable offence inasmuch as when an accused appears in such a case, pursuant to even *summon* issued against him, his prayer for bail is routinely rejected and he is invariably taken into custody and kept detained.

The present application seeking pre-arrest bail has arisen in a *complaint case*, wherein the prosecution of the accused-petitioners has been sought for under Sections 420/467/468/471/120B of the Indian Penal Code.

On a query made by this Court, Mr. Arun, learned Counsel, agrees that subsequent to the filing of the complaint aforementioned and taking of cognizance of offences under Sections 420/467/468/471/120B of the Indian Penal Code, *summon* has been issued against the petitioners, but the petitioners, according to learned Counsel for the petitioners, have not appeared in the *complaint case* aforementioned, because a Magistrate, in a *complaint case*, does not grant, as a matter of practice, bail if the complaint alleges commission of a non-bailable offence and, hence, ordinarily, an accused, placed in the position, as the present petitioners are placed, applies for

anticipatory bail by taking recourse to Section 438 of the Code of Criminal Procedure.

From a bare reading of the provisions embodied in Section 438 of the Code of Criminal Procedure, it becomes abundantly clear that Section 438 of the Code of Criminal Procedure empowers the High Court as well as the Sessions Judge to issue directions granting bail to person(s) apprehending arrest and lays down that where any person has reason to believe that he may be arrested on accusation of having committed a non- bailable offence(s), he may apply to the High Court or the Court of Session for a direction, under Section 438 of the Code of Criminal Procedure, that in the event of such arrest, he shall be released on bail and that Court may, after taking into consideration, *inter alia*, the nature and gravity of the accusation, the antecedents of the applicant including the fact as to whether they have previously undergone imprisonment on conviction by a Court in respect of any cognizable offence, the possibility of the applicant to flee from justice, and where the accusation has been made with the object of injuring or humiliating the applicant by having them so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail and where the High Court or, as the case may be, the Court of

Sessions, has not passed any interim order under Section 438 of the Code of Criminal Procedure 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 accusations made against the applicant.

Sub-section (2) of Section 438 of the Code of Criminal Procedure clarifies that when the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including that the person shall make himself available for interrogation by a police officer as and when required, a condition that the person 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, a condition that the person shall not leave India without the previous permission of the Court and such other condition as may be imposed under sub-section (3) of Section 437 of the Code of Criminal Procedure, as if the bail were granted under that section.

Sub-Section (3) of Section 438 of the Code of Criminal Procedure further clarifies that if such person is



thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under subsection (1) of Section 438 of the Code of Criminal Procedure.

Because of the fact that Section 438 of the Code of Criminal Procedure applies to a situation, wherein a person, apprehending arrest in connection with non-bailable offence, may seek bail, it logically follows that when an accused is *summoned* to appear in a *complaint case* involving commission of a non-bailable offence, he cannot contend, in the face of the provisions of Section 438 of the Code of Criminal Procedure, that he is likely to be arrested in connection with non-bailable offence inasmuch as the obligation of such an accused person is to appear in the *complaint case* pursuant to the *summon* issued to him and he may, on such appearance, apply for bail.

Necessarily, therefore, a person, who is *summoned* to appear in a *complaint case* involving non-

bailable offence, cannot claim to be apprehending arrest and cannot, therefore, seek that he be granted pre-arrest bail before he appears in the *complaint case*, though merely *summon* has been issued to him. Obviously, in such a case, his application for pre-arrest bail will not be sustainable.

The fact of the matter, however, remains, as agreed at the Bar, that an accused, such as, the present petitioners, would be sent to jail, as a matter of practice, when the offences alleged — in the *complaint case* — is a non-bailable offence even if the accused appears, in the *complaint case*, pursuant to a *summon*.

It needs to be, therefore, clarified that ordinarily and unless it is otherwise warranted in the given set of facts and circumstances of a case and the law relevant thereto, an accused shall not be remanded to custody merely because the case involves commission of non-bailable offences if the accused appears, in a *complaint case*, pursuant to issuance of *summon*.

Coupled with the above, I may also pause here to point out that in a *complaint case*, when cognizance has been taken, no investigation is, ordinarily, required and it is the complainant, who has to prove his or her case on the basis of the evidence, which he or she may adduce by examining witnesses and such witnesses may be cross-

examined by the defence.

No fruitful purpose would, thus, be served by detaining an accused in a *complaint case*, even if the case involves commission of non-bailable offences, unless there is credible material on record to show that accused may unduly influence the witnesses and/or desist them from giving evidence or may not be available for trial.

Unless such an extreme case is made out, as stand indicated above, a Magistrate shall, ordinarily, allow the accused to go on bail unless the offence falls within the exceptions as have been provided under Section 437 of the Code of Criminal Procedure itself, such as, a case of murder, where the case requires an order of commitment to the Court of Session.

Reverting to the case at hand, it may be pointed out that the petitioners, apprehending that they would be taken into custody and detained if they appeared in obedience to the *summon* issued to them, have made this application seeking pre-arrest bail.

Upon taking cognizance of non-bailable offence, a Magistrate does not lose the jurisdiction to grant bail to such an accused provided that the offence does not fall within those categories, where Sections 437 of the Code of Criminal Procedure prohibits granting of regular bail by a

Magistrate or the peculiarity of the facts of the case does not legally permit granting of bail or when the case is required to be committed to the Court of Session.

Considering, therefore, the matter in its entirety and in the interest of justice, while prayer for anticipatory bail is declined, it is hereby directed that the petitioners above-named shall appear in the learned Court below and if, on their appearance in the learned Court below, they apply for bail, learned Court below shall do the needful in accordance with law bearing in mind the position of law as has been discussed above.

This application for pre-arrest bail shall stand disposed of in terms of the above observations and directions.

(I. A. Ansari, J.)

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