

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.13464 of 2015

Arising Out of PS.Case No. -24 Year- 2013 Thana -PHENHARA District- EAST CHAMPARAN
(MOTIHARI)

=====

Md. Amarul Haque, Son of Late Md. Badruddin, resident of village - Phenhara Tola
Pokharia P.S.- Phenhara District- East Champaran.

.... Petitioner

Versus

The State of Bihar

.... Opposite Party

=====

Appearance :

For the Petitioner/s : Md. Anis Akhtar, Advocate

For the Opposite Party/s : Mr. Ajit Kumar, Advocate

=====

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 21-08-2015

By way of filing the present application under Section 482 of the Code of Criminal Procedure, 1973 (For short 'the Code'), the petitioner Amarul Haque has assailed the condition imposed vide order dated 16.02.2015 passed by the learned Sessions Judge, Motihari, East Champaran in Phenhara P.S. Case No. 24 of 2013, whereby the learned Sessions Judge has allowed the petitioner to be released on bail in the event of arrest or surrender on amongst other condition to deposit Rs. 7,00,000/- (seven lakhs) in the department concerned.

2. The prosecution case is based on a written report



submitted by the District Programme Officer (Primary Education & Sarva Siksha Abhiyan), East Champaran, Motihari to the Officer-in-charge Phenara police station. The District Programme Officer has stated that Technical Examination Cell of Vigilance made an inquiry regarding irregularities caused in construction of building in Kasturba Balika Vidyalaya, Phenara, East Champaran. In this regard Rs. 56,000/- was paid to the co-accused Kamaluddin Ahmad though cheque and Rs. 19,31,600/- was paid to co-accused Amjad Kamal, Block Pramukh, Phenara through 12 cheques and the said building was constructed by them. It is further stated that the then Headmaster of the school, the Block Education Officer, Phenara, the Junior Engineer, the Assistant Engineer and the Executive Engineer concerned with the aforesaid construction work were responsible for the irregularities committed in execution of the work.

3. On the basis of the said written report, Phenara P.S .Case No. 24 of 2013 was registered under Sections 406, 409, 420, 467, 468 and 120-B of the Indian Penal Code and investigation was taken up.

4. It is stated by learned counsel for the petitioner that the alleged scheme for construction of school building was sanctioned in the year 2007-08 and same was passed during tenure of one Kameshwar Singh, the then Headmaster of the said school in the



year 2008. In the year 2008 itself, the contract for construction of building was given to Amjad Kamal, a co-accused and on the basis of same construction had commenced. He has submitted that the alleged scheme for construction of the school was not passed during the period when the petitioner was posted as Headmaster in school. The entire construction work had been completed during the time when his predecessor Sri Kameshwar Singh was posted as Headmaster in the school.

5. It is further contended that apprehending arrest at the hands of police, the petitioner filed an application under Section 438 of the Code before the learned Sessions Judge, East Champaran, Motihari seeking bail. The learned Sessions Judge, Motihari allowed the aforesaid application vide order dated 16.02.2015 passed in Anticipatory Bail Petition No. 0493/2014/1116/2014 subject to certain conditions. The operative part of the impugned order dated 16.02.2015 reads as under:-

“It is, therefore, ordered that after depositing Rs. 7,00,000/- before the Department concerned, in the event of arrest/surrender within twelve weeks from today the petitioner-accused Md. Amarul Haque be released on anticipatory bail on furnishing his bail bond of Rs. 10,000/- (Rs. Ten thousand) with two sureties of the like amount each to the satisfaction of the learned court below in connection with Phenara

P.S. Case No. 24 of 2013, Subject to the conditions as laid down U/S 438(2) Cr. P.C. with additional condition to remain physically present before the court below on each and every date at least for two years or till disposal of the case, whichever is earlier and in case of failure on two consecutive dates without giving any reasonable explanation, the liberty granted shall be deemed to be cancelled.”

6. It is contended that the condition imposed for grant of anticipatory bail by the impugned order is onerous one and the petitioner being a retired Headmaster of the school is not in a position to deposit Rs. 7,00,000/- as directed by the learned Sessions Judge, East Chmaparan, Motihari.

7. On the other hand, learned counsel for the State has submitted that there is no error in the order passed by the court below. The petitioner and other accused persons have defalcated government money. One of the co-accused of the case, namely, Amjad Kamal, son of Md. Kamaluddin Ahmad had moved for grant of anticipatory bail before this Court in Cr. Misc. No. 4565 of 2014 wherein a submission was made on his behalf that in order to avoid future complications, he is ready to deposit the amount so received subject to the result of the case. On the aforesaid submission made by co-accused Amjad Kamal, a Bench of this Court vide order dated



19.06.2014 passed in Cr. Misc. No. 4565 of 2014 allowed his application for anticipatory bail in the event of filing duly verified petition supported with personal affidavit stating intention and deposit of the amount either before the competent authority or before the court below. He, thus, submits that while passing the impugned order, the learned Sessions Judge has simply followed the order passed by a Bench of this Court.

8. I have heard respective counsel for the parties and considered the rival contentions made by them.

9. In the present application, the only point for consideration is whether the condition imposed by the learned Sessions Judge directing the petitioner to deposit a sum of Rs. 7,00,000/- before the department concerned is onerous, unwarranted and is liable to be set aside.

10. At this juncture, it is useful to refer Section 438 of the Code, so far as it is relevant for the present, which reads as under:-

“438. Direction for grant of 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 incharge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(1-A) 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.

(1-B) The present of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) 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 thinks fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) 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;
(iii) a condition that the person shall not leave India without the previous permission of the Court;
(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.**

(3) If such person is thereafter arrested without warrant by an officer incharge 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 sub-section (1)”

(Emphasis supplied)

11. It would be evident that the first part of section 438 of the Code sets out the conditions under which a person can make an application for anticipatory bail. The second part of section 438 of the Code confers jurisdiction on the High Court or the Court of Sessions to grant anticipatory bail subject to certain exceptions. Sub-section (2) of Section 438 of the Code gives power to the court to impose conditions while granting anticipatory bail. The court may impose the conditions as enumerated in Section 438(2) of the Code. Clause (iv) of sub-section (2) of Section 438 of the Code confers jurisdiction to the court to impose such other conditions as may be imposed under sub-section (3) of Section 437 of the Code.

12. Section 437 of the Code gives the court or a police officer power to release an accused on bail in a non-bailable case,

unless there appears reasonable ground that the accused has been guilty of an offence punishable with death or imprisonment for life.

13. Sub-section (3) of Section 437 of the Code, inter alia, envisages that when a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII or the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court shall impose the conditions:- (a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter, (b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and (c) that such 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 or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.

14. On careful scrutiny of the provisions of sub-section (2) of section 438 and sub-section (3) of Section 437 of the Code, it is clear that the court having regard to the facts and circumstances of



the case can impose necessary, just and efficacious conditions while enlarging an accused on bail under Section 438 of the Code. Any other conditions not specified in the provisions of Section 438 of the Code can also be imposed inasmuch as the conditions specified are inclusive, but the other conditions which could be imposed must be *ejusdem generis* as the condition specified in Section 438. The discretion of the court while putting condition should be a judicial discretion.

15. A similar question came up for consideration before the Supreme Court in **Munish Bhasin and others Vs. State (Government of NCT of Delhi) and Anr. [(2009) 4 SCC 45]**. In the said case, the Supreme Court has observed as under:-

“10. It is well settled that while exercising discretion to release an accused under Section 438 of the Code neither the High Court nor the Sessions Court would be justified in imposing freakish conditions. There is no manner of doubt that the court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while enlarging an accused on bail under Section 438 of the Code. However, the accused cannot be subjected to any irrelevant condition at all.

11. The conditions which can be imposed by the court while granting anticipatory bail are enumerated in sub-section (2) of the Section 438 and sub-section (3) of Section 438 of the Code. Normally, conditions can be imposed (i) to secure the presence of the accused before the investigating officer or before the court, (ii) to prevent him from fleeing the course of justice, (iii) to prevent him



from tampering with the evidence or to prevent him from inducing or intimidating the witnesses so as to dissuade them from disclosing the facts before the police or court, or (iv) restricting the movements of the accused in a particular area or locality or to maintain law and order, etc. To subject an accused to any other condition would be beyond jurisdiction of the power conferred on court under Section 438 of the Code.

12. While imposing conditions on an accused who approaches the court under Section 438 of the Code, the court should be extremely chary in imposing conditions and should not transgress its jurisdiction or power by imposing the conditions which are not called for at all. There is no manner of doubt that the conditions to be imposed under Section 438 of the Code cannot be harsh, onerous or excessive so as to frustrate the very object of grant of anticipatory bail under Section 438 of the Code.

13. In the instant case, the question before the Court was whether having regard to the averments made by Ms Renuka in her complaint, the appellant and his parents were entitled to bail under Section 438 of the Code. When the High Court had found that a case for grant of bail under Section 438 was made out, it was not open to the Court to direct the appellant to pay Rs 3,00,000 for past maintenance and a sum of Rs 12,500/- per month as future maintenance to his wife and child. In a proceeding under Section 438 of the Code, the Court would not be justified in awarding maintenance to the wife and child.

14. The case of the appellant is that his wife Renuka is employed and receiving a handsome salary and therefore is not entitled to maintenance. Normally, the question of grant of maintenance should be left to be decided by the competent court in an appropriate proceedings where the parties can adduce evidence in support of their respective case, after which liability of husband to pay maintenance could be determined and appropriate order would be passed directing the husband to pay amount of



maintenance to his wife. The record of the instant case indicates that the wife of the appellant has already approached the appropriate court for grant of maintenance and therefore the High Court should have refrained from granting maintenance to the wife and child of the appellant while exercising powers under Section 438 of the Code. The condition imposed by the High Court directing the appellant to pay a sum of Rs 12,500 per month as maintenance to his wife and child is onerous, unwarranted and is liable to be set aside."

16. A Bench of five Judges of the Supreme Court in **Gurbaksh Singh Sibbia etc. Vs. State of Punjab [(1980) 2 SCC 565]**, while dealing mainly that the question for consideration that can validly weigh the court while granting bail under Section 438 examined various facets of the issue and ruled as under:-

"26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of S. 438 specially when no such restrictions have been imposed by the legislature in the terms of that section. S. 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. **An over-generous infusion of constraints and conditions which are not to be found in S. 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in S. 438 must be saved, not jettisoned.** No doubt can linger after the decision in Maneka Gandhi, (1978) 1 SCC 248 :

(AIR 1978 SC 597) that in order to meet the challenge of Art. 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. S. 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein.”

(Emphasis mine)

17. In **Sandeep Jain Vs. National Capital Territory of Delhi [(2000) 2 SCC 66]**, in para 4, the Supreme Court held as under:-

“4. We are unable to appreciate even the first order passed by the Metropolitan Magistrate imposing the onerous condition that an accused at the FIR stage should pay a huge sum of Rs 2 lakhs to be set at liberty. If he had paid it is a different matter. But the fact that he was not able to pay that amount and in default thereof he is to languish in jail for more than 10 months now, is sufficient indication that he was unable to make up the amount. Can he be detained in custody endlessly for his inability to pay the amount in the range of Rs 2 lakhs? If the cheques issued by his surety were dishonoured, the Court could perhaps have taken it as a ground to suggest to the payee of the cheques to resort to the legal remedies provided by law. Similarly if the Court was dissatisfied with the conduct of the surety as for his failure to raise funds for honouring the cheques issued by him, the Court could have directed the appellant to substitute him with another surety. But to keep him in prison for such a long period, that too in a case where bail would normally be granted for the offences alleged, is not only hard but improper. It must be remembered that the Court has not even come to the conclusion that the allegations made in the FIR are true. That can be decided only when the trial concludes, if the case is charge-sheeted by the

police.”

18. In **Sheikh Ayub Vs. State of M.P. [(2004) 13 SCC 457]**, the Supreme Court held that a direction to pay a portion of the amount misappropriated by the accused to the complainant as a condition of bail is unwarranted.

19. In **U. Palaniappan & Another vs. Sub-Inspector of Police [(2005) 10 SCC 464]** in para 3, a three Judge Bench of the Supreme Court ruled as under:-

“3. On the facts and circumstances of this case, the condition imposed by the High Court while granting anticipatory bail that the first appellant should deposit Rs 10 lakhs and the second appellant should deposit Rs 5 lakhs before getting the benefit of anticipatory bail in our opinion is onerous. Hence, in modification of the said order while affirming the grant of anticipatory bail, we direct the appellants to furnish a self-bond of Rs 50,000 each and one surety for the like sum each to the satisfaction of the Court or the arresting authority as the case may be.”

20. In **Ramathal & Others vs. Inspector of Police and Another [(2009) 12 SCC 721]**, the Supreme Court was considering a case in which the High Court had passed an order granting anticipatory bail on condition that in the event of arrest, the accused persons shall be enlarged on bail on their depositing Rs. 32,00,000/- before the Judicial Magistrate and also on their executing their personal bond of Rs. 1,00,000/- with two sureties each for the like sum to the satisfaction of the Magistrate. In that case after hearing

the parties, the Supreme Court ruled as under:-

“13. It appears that in the aforesaid facts and circumstances, the High Court passed the impugned order with the intention of protecting the interest of the complainant in the matter. In our considered opinion, the approach of the High Court was incorrect as under the impugned order a very unreasonable and onerous condition has been laid down by the Court as a condition precedent for grant of anticipatory bail.”

21. In **Amarjeet Singh vs. State of NCT of Delhi**

[(2009) 13 SCC 769], the Supreme Court held as under:-

“7. Having regard to the facts and circumstances of the present case, we have no hesitation in coming to the conclusion that the imposition of condition to deposit the sum of Rs 15 lakhs in the form of FDR in the trial court is an unreasonable condition and, therefore, we set aside the said condition as a condition precedent for granting anticipatory bail to the appellant-accused.”

22. Similarly, in **Sumit Mehta vs. State (NCT of Delhi)**

[(2013) 15 SCC 570], the Supreme Court in paras 14 and 15 ruled as under:-

“14. Thus, in the case on hand, fixed deposit of Rs 1,00,00,000 for a period of six months in the name of the complainant and to keep the FDR with the investigating officer as a condition precedent for grant of anticipatory bail is evidently onerous and unreasonable. It must be remembered that the court has not even come to the conclusion whether the allegations made are true or not which can only be ascertained after completion of trial. Certainly, in no words are we suggesting that the power to impose a condition of this nature is totally excluded, even in cases of cheating, electricity pilferage, white-collar crimes or chit fund scams, etc.

15. The words “any condition” used in the provision should not be regarded as conferring absolute power on a court of law to impose any condition that it chooses to impose. Any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance and effective in the pragmatic sense and should not defeat the order of grant of bail. We are of the view that the present facts and circumstances of the case do not warrant such extreme condition to be imposed.”

(Emphasis supplied)

23. The aforesaid decisions of the Supreme Court give an abundant clarity as to the ambit and scope of sub-section (2) of Section 438 of the Code. The Supreme Court has always frowned on onerous condition being imposed as a condition precedent for granting anticipatory bail. In my opinion, any condition which has no reference to the fairness and propriety of investigation and trial cannot be imposed while exercising power conferred under Section 438 of the Code.

24. Thus, in my view, in the case on hand, the condition imposed by the learned Sessions Judge, East Champaran, Motihari for grant of anticipatory bail to the petitioner cannot be upheld. The learned Sessions Judge should have considered the entire facts of the case including the nature of the offence alleged and in the light thereof, should have considered the prayer for grant of anticipatory bail.

25. In view of the aforesaid discussions, I am of the opinion that the entire order passed by the learned Sessions Judge, East Champaran, Motihari is fit to be set aside. I, accordingly, set aside the impugned order dated 16.02.2015 passed in Anticipatory Bail Petition No. 0493/2014/1116/2014 arising out of Phenhara P.S. Case No. 24 of 2013 and remit the matter back to the learned Sessions Judge, Motihari to consider the prayer for anticipatory bail of the petitioner afresh in accordance with law taking into consideration the facts and circumstances of the case including the nature of the offence alleged. The learned Sessions Judge, East Champaran, Motihari is requested to dispose of the aforesaid Anticipatory Bail Petition No. 0493/2014/1116/2014, giving reason for his decision as expeditiously as possible, preferably within a period of three weeks from the date of receipt/communication of the order.

26. The petition is, accordingly, allowed.

(Ashwani Kumar Singh, J.)

Sanjeet/-

U		T	
---	--	---	--