

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 905 OF 2014

Pramod s/o. Madhukar Kalpund

....Applicant.

Versus

Savita w/o. Rajendra Kalpund & Anr.

....Respondents.

WITH
CRIMINAL APPLICATION NO. 906 OF 2014

Pramod s/o. Madhukar Kalpund

....Applicant.

Versus

Kiran s/o. Devendra Gaikwad & Anr.

....Respondents.

Mr. V.D. Sapkal, Advocate for applicant.

Mr. R.S. Deshmukh, Advocate for respondent No. 1.

Mr. M.M. Nerlikar, APP for State.

CORAM : T.V. NALAWADE, J.

DATED : 02nd February, 2015.

ORDER :

1) Both the applications are filed under sections 439 (2) of Criminal Procedure Code ('Cr.P.C.' for short) for setting aside the orders made of interim nature and the final orders in Criminal Application Nos. 206/2013 and 203/2013 by learned Additional Sessions Judge, Sangamner, District Ahmednagar. The prayer is made for cancellation of temporary bail and bail

granted under section 439 of Cr.P.C. in favour of both the respondents No. 1 from the two proceedings. During argument, submission was made that after granting relief by Sessions Court, the chargesheet came to be filed against both the respondents No. 1 from both the proceedings for offence punishable under sections 306 r/w. 34 of Indian Penal Code ('I.P.C.' for short). Both the sides are heard. The learned APP supported the applications which are filed by the original complainant.

2) The deceased was brother of present applicant. There are allegations that respondent No. 1 of the second proceeding had illicit relations with the wife of the deceased, respondent No. 1 of the first proceeding. When the deceased and his relatives realized about unchaste behaviour of the wife of deceased, the deceased questioned his wife about it. There are allegations that respondent No. 1 from the second proceeding then gave threat of life to the deceased. The respondent No. 1 was thinking that deceased was coming in the way of respondent No. 1 in keeping relations with the wife of deceased. It is contended that the wife of the deceased had admitted that she had kept such relations. The deceased then committed suicide by hanging himself in a room from a lodge.

He has left behind a suicide note in which he has disclosed the aforesaid circumstances and he has contended that the respondents are responsible for his suicide. He has requested for taking action against them.

3) To both the wife of the deceased and other respondent, the learned Additional Sessions Judge had initially granted relief of anticipatory bail. The said orders were challenged in Criminal Application Nos. 4231/2013 and 4232/2013 by present applicant in the proceedings filed under section 439 (2) of Cr.P.C. By the order dated 25.11.2013, this Court had allowed those applications and the orders of anticipatory bail were set aside and the relief was cancelled. In the petition filed for Special Leave to file Appeal (Cri.) viz. 9925/2013 and 9931/2013, the Hon'ble Apex Court made the following order :-

"Taken on board.

Heard Ms. Bina Madhavan, learned counsel appearing for the petitioners and Mr. Shankar Chillarge, learned counsel along with Mr. Anirudh Mayee, learned Advocate-on-Record who accepted notice on our instructions.

These are not the cases where this court should interfere with for grant of anticipatory bail. However, in the facts and circumstances of the

case, as the petitioners in both these cases have been given protection for a particular period, we extend the same for two more weeks i.e. upto 23rd December 2013. In the meanwhile, petitioners may approach the concerned court for regular bail. Till then no coercive steps shall be taken against them.

With these observations, the special leave petitions stand disposed of."

The aforesaid order was made by the Hon'ble Apex Court on 5.12.2013.

4) When the time of 18 days i.e. up to 23.12.2013 was given by the Hon'ble Apex Court to respondents to move Sessions Court for getting regular bail, the applications were moved by both the respondents under sections 439 of Cr.P.C. on 17.12.2013. On 17.12.2013 itself these respondents prayed for interim regular bail. The learned APP requested for time. Prosecutor wanted to take instruction to file say. On the first day i.e. on 17.12.2013 itself, the learned Additional Sessions Judge passed order of interim nature. He has mentioned that no say was filed by APP, there was no possibility of abscondance of the accused and there was the direction of the Apex Court to surrender and to apply for regular bail. By making such

observations, interim relief was granted. Following is the operative order made on interim application by the learned Additional Sessions Judge.

- "1) Petition is allowed.
- 2) Petitioner be released on executing her P.B. of Rs. 20,000/- with one solvent surety of like amount.
- 3) Petitioner not to tamper prosecution evidence.
- 4) Petitioner to attend Sangamner City Police Station on every Sunday in between 9.00 a.m. To 2.00 p.m. till tiling of the charge-sheet.
- 5) This order will remain in force, till decision of main bail petition."

5) In the final order, the learned Additional Sessions Judge has observed that there was force in the submissions made by the learned counsel for both the accused before him and so, there was need to grant bail. Following submissions were made by the learned counsel representing the two accused.

- (i) Accused had attended the concerned police station after getting the relief of anticipatory bail as per the directions given by the Sessions Court.
- (ii) There is no allegation of misuse of liberty.
- (iii) Offence punishable under section 306 is not

punishable with life imprisonment or death.

(iv) Investigation was almost completed though the formality of filing chargesheet was not completed.

(v) The accused are denying that they had illicit relations and it is their case that the deceased had made the allegations only out of suspicion, and

(vi) No specific allegations are there against the accused that they had abetted suicide of the deceased.

6) The learned APP in Sessions Court submitted as follows :-

(i) The investigation was in progress.

(ii) There was material to make out strong prima facie case for the offence punishable under section 306 r/w. 34 of I.P.C. against both the accused.

(iii) Nature of offence is serious.

(iv) Release order of the accused will be the obstacle in the investigation and there was the possibility of tampering with the prosecution witnesses at the hands of accused.

7) The learned counsel for original complainant made submissions in this Court that learned Additional Sessions Judge

has committed grave error in granting relief in view of the facts and circumstances of the present case. He submitted that even the order made by the Hon'ble Apex Court is misread and misconstrued. He submitted that due to the orders passed in favour of the accused, in such a serious case, both the accused avoided their arrest and they were not kept behind bars even for a single day. He submitted that these orders have given wrong signal to the society. He submitted that a feeling is created in the mind of complainant also that he did not get justice and the accused avoided arrest even after committing immoral acts which led to the death of his brother.

8) The learned counsel for original complainant made other general submissions also and he submitted that there are misconceptions in the minds of many Judges of subordinate judiciary with regard to the right of the accused of personal liberty and the object behind the provision of section 438 of Cr.P.C. He submitted that the orders of interim nature made in such proceedings are misused by making wrong representation in the Courts and wrong submissions are made in respect of the orders made by this Court and Hon'ble Apex Court in Sessions Court and in the Court of Magistrate for getting some orders. He submitted that whenever there are orders of this Court or the

Hon'ble Apex Court, the Judges of subordinate judiciary accept whatever submissions are made with regard to the interpretation of such orders out of fear. He submitted that in the present matter also, it was not open to the learned Additional Sessions Judge to grant interim relief when the protection was given till 23rd December 2013 by Hon'ble Apex Court and only Apex Court could have modified that order. It was submitted that if the applications were rejected, police could have requested for police custody and they could have collected more material in respect of illicit relationship between the two accused and also on other circumstances due to which the deceased was compelled to commit suicide. He submitted that the learned Additional Sessions Judge has committed grave error in accepting the submission that there was no material to make out case of the abetment of suicide from the two accused when the law is made clear on this point in the case reported as **2009 CRI.L.J. 3728 Supreme Court [Damu Vs. State of A.P.]**. He submitted that in this case the Apex Court has laid down that illicit relationship may also amount to abetment.

9) The learned counsel for original complainant, present applicant submitted that due to misinterpretation of the orders made by this Court and Hon'ble Apex Court and due to misuse of

the interim orders, the interest of public at large is getting affected and the orders of the subordinate judiciary are creating bad image for it. He submitted that after getting interim anticipatory bail in a proceeding filed under section 438 of Cr.P.C., the accused is produced before the police, formal arrest is shown and bonds are given in the police station. He submitted that after doing this exercise, the main application filed for anticipatory bail is withdrawn. He submitted that as the bonds are given, representation is made that the accused is released on regular bail. He submitted that many times after getting interim relief or final relief in a proceeding filed under section 438 of Cr.P.C., application is moved before the Magistrate and the bonds are given. He submitted that in such cases, when the higher Court sets aside the orders of anticipatory bail, these orders are challenged in Apex Court and submissions are made that regular bail was already granted. He submitted that even in High Court, submissions are made by making use of aforesaid circumstances that cancellation of anticipatory bail has become meaningless as regular bail is granted by J.M.F.C. He submitted that when anticipatory bail is granted, in view of provisions of section 438 (3), the Magistrate does not grant regular bail, but it is only compliance of order made under section 438 (1) of Cr.P.C. He submitted that when anticipatory bail is granted, there is no

question of again applying for regular bail under sections 437 and 439 of Code, but submissions of aforesaid nature are made and the Courts are being misled. He submitted that provision of sections 438 (3) as introduced in the year 2005 needs to be considered in this regard. He submitted that when order on interim nature is made in a proceeding filed under section 438 of Cr.P.C. and it remains in existence for many months in Sessions Court or in this Court, the investigating agency becomes helpless and feels that with whatever material available with them chargesheet needs to be filed and they file chargesheet. He submitted that the circumstance of filing chargesheet is then used in proceeding filed under section 438 of Cr.P.C. and submissions are made that police should not need the custody of accused for interrogations as chargesheet is filed. He submitted that after getting interim relief, all kinds of tactics are played in all the Courts by the accused and the decisions of the matters filed for anticipatory bail are protracted. He submitted that due to these tactics, the investigation gets affected. He submitted that in the present matter also, the submissions made by the learned counsel for the accused in Sessions Court were accepted as they were and implications of the orders were not at all considered by the learned Additional Sessions Judge. He submitted that some observations need to be made in this

regard by this Court as such instances are increasing. On this point, the learned counsel for accused, placed reliance on some reported cases and submitted that the learned Additional Sessions Judge has not committed any error. The cases cited were as follows :-

(i) 2009 (7) SCC 559 [Sukhwant Singh and Ors. Vs. State of Punjab] and

(ii) AIR 1980 SC 785 [Niranjan Singh and Anr. Vs. Prabhakar Rajaram Kharote and Ors.].

10) It is a fact in the present matters that both the accused persons were practically not arrested and they were not detained in any kind of custody even for a single day. From the relevant provisions, which are being quoted at proper place, it can be said that if the applications were rejected by the learned Additional Sessions Judge, it was possible for police to take steps for obtaining police custody remand of both the accused and make investigation and the possibility of revealing more material after custodial interrogation is always there. It is a fact that the learned Additional Sessions Judge has not considered that possibility and also the allegation about the immoral acts of the accused.

11) To protect moral values is the object behind many

provisions of Criminal law. It is also the duty of the Courts to uphold the moral values which are incorporated in the law. When the accused is involved in immoral act and that immoral act has led to commission of an offence, the Court is not expected to use discretion given in section 438 of Cr.P.C. in favour of the accused. The circumstance which is peculiar to the accused is always relevant when the discretion is to be used by the Court in such matters. Though personal liberty is fundamental, it is circumscribed by process sanctioned by law. The discretion to grant or refuse the relief of bail or anticipatory bail is also circumscribed by many provisions of law. Using of discretionary power in favour of a person, who has no regard to moral values, amounts to passing of an order against larger interest of public. Such orders definitely give bad image to justice delivery system. Further, in such cases, while using discretion, the Court is always expected to keep in mind that statutory power is given to police, investigating agency to arrest a person, accused of cognizable offence to make investigation of the case. It becomes the duty of the Court, in view of such provisions to see that the use of discretionary power does not interfere in the statutory powers of police. It needs to be presumed that the statutory powers are there to protect the larger interest of the society.

12) This Court has seen that in most of the proceedings filed in Sessions Court, many learned Judges of Sessions Court grant interim anticipatory bail as a matter of course. The main proceeding remains pending in Sessions Court for months together. In most of the cases, the interim relief is given due to misconception that if no interim relief is given, it would become compulsory for them to reject the main application itself in view of the wording of section 438 of Cr.P.C. The immediate rejection is also avoided to avoid wrath of few elements. When for many months interim relief remains in existence, the accused starts making submission that he had visited the police station as per the conditions laid down, he had cooperated the investigating agency and so, interim relief needs to be confirmed. In many cases, only due to such submissions, the interim reliefs are confirmed. After many months of granting interim relief, when the Sessions Court rejects the application filed for anticipatory bail and the proceeding is filed in this Court, submission is made that for many months interim relief was in existence and so, the accused is entitled to interim relief in this Court also. By making such submission in many cases the accused gets interim relief and this relief remains in existence for many more months and in some cases even for the period of more than one year. The High Court has atleast advantage of having the order of rejection of

anticipatory bail application made by the Sessions Court on the first day of the hearing in this Court.

13) It is a fact that after getting the orders of interim nature either in Sessions Court or in this Court, tactics are played. Many times the accused are produced either before police or in the Court of J.M.F.C. and bonds are given as per the interim orders made in anticipatory application. When the Court expresses that the Court is not inclined to give final order in favour of the accused, the applications are withdrawn. After the withdrawal, due to aforesaid tactics already played, the accused becomes able to avoid the arrest and detention. In such cases, it is represented for the accused that he is released on regular bail. Thus, even when in law the accused is not given relief of anticipatory bail, by using aforesaid tactics, in many cases the accused have avoided arrest and detention for a single day in serious cases. It is needless to say that investigation must have been affected in all those cases. It is also noticed that in many cases after playing aforesaid tactics even after cancellation of the anticipatory bail, submissions are made in higher Court for the accused that the bail is already granted and so, the order of cancellation of anticipatory bail is meaningless. In fact, in many cases, after taking cognizance of the offence the Magistrate

takes steps as provided under section 438 (3) of Cr.P.C. and takes bond.

"(3) 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 sub-section (1)"

Such orders cannot be treated as orders made under section 437 or 439 of Cr.P.C., but such submissions are made. It is already observed that chargesheets are filed when police feel that they are helpless due to the orders made by the Courts. It is settled law that when anticipatory bail is granted, there is no question of giving application under sections 437 or 439 of Cr.P.C. for regular bail.

14) Due to misconception, many learned Judges of the Sessions Court grant interim relief in a proceeding filed under section 438 of Cr.P.C. as a matter of course. The provision of sections 438 (1) with proviso runs 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;
- (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."

The power of granting relief of bail and anticipatory bail are discretionary powers. In section 438 (1) of Cr.P.C. the word 'may' is used. As it is discretionary power, the Court may either reject the application forthwith or grant interim relief. Both granting interim relief or rejection of the application on the first day is not mandatory. Grant of interim anticipatory bail is enabling provision and that does not mean that in all the cases Court should grant interim relief. The power is given to reject the application forthwith. There is no reason to interpret the term 'forthwith' as 'immediately on the first day' and in view of the object behind the provision, the term 'forthwith' needs to be interpreted to mean as 'within reasonable period'. It is always desirable to issue notice to the Public Prosecutor as provided in section and then hear the main matter itself. This is because after getting interim relief, all kinds of tactics are played and the main matter remains pending. The proviso to section 438 (1) of Cr.P.C. also shows that if interim relief is not granted (the main proceeding is kept pending) and also when the main matter itself is dismissed, the officer incharge of police station can arrest the accused without warrant by exercising statutory powers given to

him. Thus, when the main matter itself is dismissed and the relief is refused, the investigating agency is at liberty to arrest the accused, though there was interim relief in the past for some time in favour of the accused and even in the cases when in view of the interim relief, bonds were taken from accused after arrest during pendency of main matter.

15) While considering the application filed for the relief of anticipatory bail, the Court is expected to keep in mind that there is statutory power given to police to investigate cognizable offence and arrest the accused involved in such cases without obtaining warrant. The provisions of sections 41, 57, 59, 156, 167, 169, 170 and 173 of Cr.P.C. need to be kept in mind by the Court as they speak about the powers of investigating agency. The Courts are also expected to keep in mind that even today the modern techniques of investigation are not available to collect the material in our country. They invariably use the provision of section 27 of Evidence Act which enables them to collect relevant information and even in some cases, the material. In view of this provisions the factors mentioned in section 438 (1) of Cr.P.C. (there may be many other factors peculiar to case of accused) the Court is not expected to grant relief of anticipatory bail and even the interim relief in such a

proceeding as a matter of course. The Court is expected to start with presumption that granting such relief is bound to affect the investigation and it will be interference in the power of police of making investigation. Ordinarily also, when accused is arrested and produced before the Court, in view of the provisions of sections 41, 57 and 167 of Cr.P.C., the Court is expected to pass reasoned order when police pray for police custody remand. This possibility is always required to be kept in mind while passing any order in any proceeding filed for anticipatory bail. If material is available and it points finger towards the applicant/accused, in ordinary course, it would not be proper to grant anticipatory bail in such cases. Even from the nature of allegations made in the F.I.R., the Court can anticipate material which can be available against the accused and thus the Court can restrain itself from passing order of interim nature. Thus, passing order of anticipatory bail or order of interim anticipatory bail is not possible as a matter of course. It is already observed that the powers are discretionary powers, but they are circumscribed by the provisions which prescribe the statutory powers of police. Such powers must be used in exceptional circumstances, when there are compelling circumstances for granting both interim and final relief. On this point following cases can be referred.

(i) (1997) 6 Supreme Court Cases 647

[Directorate of Enforcement and Another Vs. P.V. Prabhakar Rao],

(ii) 1987 (Supp) Supreme Court Cases 549 [Kiran Devi Vs. State of Rajasthan and Anr.],

(iii) 2005 ALL MR (Cri) 1097 (S.C.) [Adri Dharan Das Vs. State of West Bengal]

16) The aforesaid provisions and object behind the provision of section 438 of Cr.P.C. discussed by the Apex Court show that interim anticipatory bail cannot be granted as a matter of course. The law is clear that the Courts are expected to keep in mind that the power under section 438 of Cr.P.C. is extraordinary power and it can be used in only exceptional cases. Few factors are mentioned in section 438 of Cr.P.C. itself which can be referred when the application is under consideration for even interim relief. When there is material to make out prima facie case, then there is no possibility to say that accused is falsely implicated and the Court is not expected to grant interim relief. Arrest of accused from cognizable offence is a part of process of investigation. In Cr.P.C. itself classification of offences is done as serious offence (cognizable offence) and less serious offence. Though the amendment to section 41 of Cr.P.C. came to be made in the year 2009, the powers still remain with police to arrest. Only thing that is changed is the requirement of giving reasons in writing when the offence falls

under the first category of section 41 of Cr.P.C.

17) While considering the application filed for anticipatory bail or for that matter interim anticipatory bail, the Court is expected to keep in mind that custodial interrogation is more effective than questioning a person, who has protection of order made under section 438 of Cr.P.C. It needs to be kept in mind that interrogation while in custody can be more effective in a sense that there can be possibility of collection of more material against not only that accused, but against other accused persons. It needs to be kept in mind that while giving statutory powers to police, the legislature has considered the right of freedom of accused and that is curtailed to that extent. On this point following cases can also be referred.

**(i) (1997) 7 Supreme Court Cases 187
[State rep. by the C.B.I. Vs. Anil Sharma],'**

**(ii) AIR 2009 SUPREME COURT 502
[Parvinder Singh & Anr. Vs. State (U.T.
Chandigarh) and Anr.].**

18) The aforesaid discussions and observations are made with the hope that the learned Judges of Subordinate judiciary do not get mislead in view of the wording of section 438 of Cr.P.C. Even when there is the order of this Court to the effect that some protection is given to the accused and he can file

proceeding for bail in Sessions Court or before Magistrate during the period given by this Court, the learned Judges of Sessions Court and Courts of Magistrates are not expected to go with the presumption that the bail needs to be granted to such accused. In such cases also, it is necessary for them to consider aforesaid circumstances and position of law. If they form opinion that custodial interrogation is necessary, they can straight way reject the application. When such protection is given by higher Courts, it is not necessary or possible for them to grant temporary bail in view of sections 437 and 439 of Cr.P.C. and the law developed. Accused can be treated to be in deemed custody of the Court. The learned Judges of subordinate judiciary are expected to avoid granting of further protection, when protection is given for a particular period by this Court and within prescribed period, the application is expected to be disposed of on merits. Similarly when such application is rejected and also when anticipatory bail application is rejected by Sessions Court, further protection for approaching this Court cannot be given by Sessions Court as there is no such power to the Sessions Court. The aforesaid circumstances need to be kept in mind as by using aforesaid tactics, such accused persons are spoiling the image of judicial system. Investigation also gets hampered when such orders are made.

19) It can be said that on many occasions the investigating agency is also misled by making similar representation in respect of orders made by Courts. If order of interim nature is made in a proceeding filed under section 438 of Cr.P.C., it is not mandatory on the part of police to arrest the accused and to take the bonds of the amount mentioned in the order. They can wait for final decision of the matter and they can take steps by approaching prosecutor for getting expeditious disposal of the main matter itself. When there is the interim relief, it is not necessary for police to file chargesheet if they think that the investigation will not be effective unless there is custodial interrogation. The satisfaction of the Investigating Officer is important in this regard. In appropriate cases the orders of anticipatory bail made need to be challenged by the State as there is always possibility of commission of mistakes and those mistakes can be corrected by higher Courts.

20) From the position of law quoted above and in view of the facts and circumstances of the present case, this Court has no hesitation to observe that the present respondents were not entitled to the protection which they have got in the present matter from Sessions Court. Unfortunately, Sessions Court granted relief of anticipatory bail and the protection remained in existence for long time. Offence took place on 14.7.2013 and

charge sheet is filed. In view of the developments which took place in the present matter which are quoted already, this Court does not feel it proper to set aside the orders made by the learned Additional Sessions Judge. This Court has referred following cases also.

(i) A.I.R. (32) 1945 Privy Council 18 [Emperor Vs. Khwaja Nazir Ahmad],

(ii) A.I.R. 1963 Supreme Court 447 [State of West Bengal Vs. S.N. Basak],

(iii) AIR 1980 SUPREME COURT 1632 [Gurbaksh Singh Sibba etc. Vs. The State of Punjab],

(iv) (2003) 2 Supreme Court Cases 649 [M.C. Abraham and Another Vs. State of Maharashtra and Ors.],

(v) AIR 2009 SUPREME COURT 94 [Lokesh Singh Vs. State of U.P. and Anr.],

(vi) (2005) 1 Supreme Court Cases 608 [Sunita Devi Vs. State of Bihar and Anr.],

(vii) (1997) 6 Supreme Court Cases 647 [Directorate of Enforcement and Another Vs. P.V. Prabhakar Rao]

(vii) (2011) 1 SUPREME COURT CASES 694 [Siddharam Satlingappa Mehete Vs. State of Maharashtra and Ors.]

21) In the result, both the applications stand rejected.

[T.V. NALAWADE, J.]

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