

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.51644 of 2015

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Saurav Kumar, S/o Late Birendra Kumar, R/o Village + P.O. - Ghejan, P.S.
- Sakurabad, District - Jehanabad.

.... Petitioner

Versus

1. The State of Bihar.

2. Khushbu Kumari @ Priyanka Kumari, D/o Vijay Sharma.

3. Anand Kumar @ Sanjay Kumar, S/o Vijay Sharma, Opposite Parties
Nos. 2 & 3 are residents of Village + P.O. - Ghejan, P.S. - Sakurabad,
District - Jehanabad.

.... Opposite Parties.

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Appearance :

For the Petitioner : Mr. Jitendra Kumar Roy, Advocate.

For the State : Mr. Iftekhar Mahmood, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL ORDER

2 20-01-2016

Heard learned counsel for the petitioner and learned

counsel for the State.

This application has been filed by the petitioner under
Section 439(2) of the Code of Criminal Procedure, seeking
cancellation of anticipatory bail granted by this Court to the
opposite party nos. 2 and 3, vide order dated 28.09.2015, passed in
Cr. Misc. No. 39422 of 2015, in connection with Jehanabad Rail
P.S. Case No. 39/2014.

The brief facts leading to this application are as under:-

The petitioner is the informant of Jehanabad P.S. Case
No. 39/2014. The opposite party no. 2, namely, Khushbu Kumari
@ Priyanka Kumari and opposite party no. 3, namely, Anand
Kumar @ Sanjay Kumar made application under Section 438(1)
of the code, before this Court, for grant of anticipatory bail in

connection with Jehanabad Rail P.S. Case No. 39/2014, instituted for the offences under Sections 302, 201 and 34 of the Indian Penal Code and Section 27 of the Arms Act and they have been granted anticipatory bail vide order dated 28.09.2015 passed in Cr. Misc. No. 39422 of 2015.

The contention of the petitioner is that the First Information Report of Jehanabad Rail P.S. Case No. 39/2014 was lodged against unknown, but in course of investigation, the police found involvement of the opposite party nos. 2 and 3, besides others, out of them charge sheet has been submitted by the police against the accused Bipul Kumar @ Bipul Sharma and Geeta Devi. The deceased was uncle of opposite party nos. 2 and 3 and he objected the illicit relation of opposite party no. 2 developed with accused Bipul Sharma, who happens to be the brother-in-law of opposite party no. 3. At the relevant time of the occurrence, the opposite party no. 2, who is a married lady, has already left her matrimonial house and had been living at parental house. The further contention of the petitioner is that since the deceased had been making protest and was an impediment in the illicit relationship of opposite party no. 2 and accused Bipul Sharma, thus, all the accused persons hatched-up a conspiracy and killed the deceased.

Admittedly, there being no eye witness to the

occurrence of the alleged murder and further there is no such complete chain of circumstances, which may exclude every hypothesis other than guilt of the opposite party nos. 2 and 3 in the alleged occurrence. Considering the facts and circumstances of the case including the motive, which appears to be weak, this Court vide order dated 28.09.2015 passed in Cr. Misc. No. 39422 of 2015 granted anticipatory bail to the opposite party nos. 2 and 3.

The petitioner by filing supplementary affidavit has raised a mixed question of law and facts that after rejection of anticipatory bail, by the court of Sessions, opposite party nos. 2 and 3, filed application again in terms of Section 438(1) of the Code of Criminal Procedure before this Court, without pointing any change in circumstances, therefore, anticipatory bail granted to the opposite party nos. 2 and 3 by this Court is fit to be cancelled, on the ground of maintainability as the Code of Criminal Procedure, nowhere prescribes any appeal or revision against the order of the court of Sessions passed in terms of Section 438(1) of the Code of Criminal Procedure.

Firstly, it would be appropriate to consider the issue raised by the petitioner as referred above regarding maintainability of anticipatory bail application before this Court after rejection of the prayer for grant of anticipatory bail by the court of Sessions. The power to grant anticipatory bail was not available under the

old code and has been introduced for the first time in the new code of 1973, in view of 41st report of Law Commission of India, which reads as under:

“The suggestion for directing the release of a person on bail prior to his arrest (commonly known as ‘anticipatory bail’) was carefully considered by us. Though there is conflict of judicial opinion about the power of a court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the code. The necessity for granting anticipatorily bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times with the accentuation of political rivalry, this tendency showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail”.

Now for the purpose of the issue raised in the application the relevant portion of Section 438 of the Code of Criminal Procedure may be quoted, as under:

“Section 438. Direction for grant of bail to person apprehending arrest:-

(1) Where any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the court of Sessions for a

direction under this Section; and the court may, if it thinks fit, direct that in the event of such arrest he shall be released on bail.”

Thus from the aforesaid provision, it is clear that if any person apprehends his arrest for having committed a non-bailable offence he may apply to the High Court or the court of Sessions who are competent to give necessary direction in the matter, as both the Courts having concurrent power of granting anticipatory bail.

The Division Bench of this Court had occasion to decide the issue referred above, in the case of **Kameshwar Prasad Singh-Vs- State of Bihar reported in 1985 PLJR 247**. In the said case the short point, which had to be answered, was:

“ If any person moves initially to the court of Sessions for anticipatory bail under Section 438(1) of the Code of Criminal Procedure, 1973, and the court of Sessions rejects that application on merit, is the second application by the same person for anticipatory bail under Section 438(1) of the Code of Criminal Procedure maintainable in the High Court”

In paragraph no. 7 of the judgment, the Division Bench of this Court relying upon the decision of Gurbaksh Singh Sibbia – Vs- State of Punjab (AIR 1980 SC 1632), held thus:

“7. In the case of Gurbaksh Singh Sibbia(Supra) it has been observed that there is no risk involved in entrusting a wide discretion to the court of Sessions and the High Court in granting



anticipatory bail, because firstly, these are higher court manned by experienced person, secondly, their orders are not final but are open to appeal or revisional scrutiny and above all because, discretion is always to be exercised by the courts judicially and not according to whim, caprice or fancy. In absence of any provision in Section 438 of the Code debarring a person from moving the High Court when he has moved the Sessions Judge, it will be adding something in the statute, which is not there. 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 improve. This is especially true where 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 presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence. It is duty of the court to determine in what particular meaning and particular shape of meaning, the word or expression are used by the law maker and in discharging the duty the court has to take into account the context in which it occurs, the object to serve which it used, and to give harmonious construction to the various provisions of the code in order to achieve the object. In may considered opinion, therefore, for the reasons mentioned above, my answer to the question which has been referred to the Bench, is that a person whose application for anticipatory bail has been rejected by the court of Sessions has the liberty to move the High Court for the same relief.”

In view of the ratio of the above referred decision of

the Division Bench of this Court, in my considered opinion, second application for grant of anticipatory bail in terms of Section 438(1) of the Code of Criminal Procedure, by the same person after rejection of the application on merit, by the court of Sessions, is maintainable.

The main relief, for which this application has been filed, is cancellation of anticipatory bail of the opposite party nos. 2 and 3 referred above.

In my view, rejection of bail, when bail is applied for is one thing; cancellation of bail already granted is quite different. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such case. Cancellation of bail necessarily involves the review of decision already made and can by and large be permitted only if, by reasons of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial.

In my opinion, deprivation of liberty of a person had serious impact on the mind of a person. Incarceration restricts liberty of a person. If liberty of individual is restricted in larger social interest then such deprivation of liberty must have due sanction of law. Needless to emphasize that the liberty of individual is not absolute, but is a restricted one, therefore, it is known as “regulated freedom”. No one in the society can act in a

manner, which may jeopardize the life or liberty of others. In my view, bail is a regulated freedom to the accused and release of accused on bail would still retain constructive control of the court over him through the sureties. The literal meaning of the word bail is surety.

In the case of **Daulat Ram & Ors. –Vs- State of Haryana, (1995) (1) SCC 349**, the Apex Court has already considered the issue of cancellation of anticipatory bail and held thus:

“4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. These principles, it appears, were lost sight of by the High Court when it

decided to cancel the bail, already granted. The High Court it appears to us overlooked the distinction of the factors relevant for rejecting bail already granted.”

The learned counsel for the petitioner has placed reliance upon the order of this Court, rejecting the prayer for grant of anticipatory bail, dated 16.07.2015 passed in Cr. Misc. No. 50487 of 2014, which has no application in the facts and circumstances of the case, for the simple reason that “cancellation of bail” was not an issue before His Lordship.

The counsel for the petitioner also submits that there are materials against the accused persons including opposite party nos. 2 and 3 in the case diary, in my view, those materials have hardly any relevance for the purpose of cancellation of bail inasmuch as they have been given a detail consideration, while granting anticipatory bail to the opposite party nos. 2 and 3.

In my considered opinion, unless the petitioner(informant) makes out a case that the opposite party nos. 2 and 3(accused) after grant of anticipatory bail, have interfered or attempted to interfere with the due course of administration of justice or tampered the evidences and witnesses or evaded or attempted to evade the due course of justice or abused the concession granted to them or such overwhelming or supervening circumstances have arisen, which have rendered it no longer

conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial, there is no occasion for this Court to cancel anticipatory bail already granted to the opposite party nos. 2 and 3 as referred above. In the present case, nothing as such has been brought on record, which may be material consideration for cancellation of anticipatory bail.

Therefore, this application is, accordingly, rejected being devoid of merits.

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(Sudhir Singh, J)