

HIGH COURT OF CHHATTISGARH, BILASPUR

M.CR.C.(A) No. 92 of 2016

1. Lav Mishra S/o Shri Avani Kumar Mishra Aged About 29 Years Posted & Serving As Junior Scientist at Accelerator & Pules Power Division -3, BARC, Bhabha Atomic Research Centre, Near Vikram Sarabhai Bhawan, Barc Road, Trompay, Mumbai (M.H.)

--- Applicant

Versus

1. State of Chhattisgarh through Collector Raipur, District Raipur, Chhattisgarh
2. Smt. Alpa Bhargava Pandey W/o Gourav Pandey Aged About 32 Years R/o 203, Sunder Nagar Raipur, District Raipur, Chhattisgarh

--- Respondents

For the applicant	:	Mr. P.P. Sahu, Advocate.
For the State/R-1	:	Mr Anant Bajpai, Panel Lawyer.
For Respondent No.2	:	Mr. Vikram singh & Shrikant Mishra, Advocates

Hon'ble Shri Justice Goutam Bhaduri

O R D E R

30.03.2016

1. Apprehending arrest in connection with Complaint Case (Criminal) No.2288 of 2015 filed by Non-applicant No.2 for non-bailable offence wherein an arrest warrant has been issued, the instant application u/s 438 of the Code of Criminal Procedure for grant of anticipatory bail has been preferred by the applicant.

2. The brief facts of the case are that a complaint case was filed by Respondent No.2 Smt. Alpa Bhargava Pandey wife of Gaurav Pandey before the Court of Judicial Magistrate, Raipur, for the offence u/s 354-A, 392 323, 294, 506-B read with section 34 of IPC and the said complaint was filed against six persons namely Lavi Mishra, Lav Mishra, Manisha Mishra, Smt. Babita, Avani Kumar Mishra and Kush Mishra. The background of the case is that one Lavi Mishra was married to Ashish Pandey who is stated to be brother-in-law of Alpa Bhargava, the complainant. Reading of the complaint which is filed as Annexure A-2 would show that the marriage of Ashish Pandey, brother-in-law of complainant was fixed with accused Lavi Mishra who is sister-in-law of applicant. It is alleged that while the engagement was going on on 07.10.2013 at the residence, applicant Lav Mishra entered into the room and tried to outrage the modesty of the complainant. Subsequently, the complaint further purports that when the marriage was being performed on 13.11.2013 at the residence of complainant which is situated at Sundar Nagar, Raipur, at that time, applicant Lav Mishra along-with other co-accused who have been named in the complaint as accused forcibly had taken away the cash of Rs.60,000/- from complainant and thereafter further took the complainant to a room and assaulted her with a slap and further abused. On these allegations, the complaint was registered.

3. Learned counsel for the applicant would submit that the instant complaint is a counter blast to a report which was lodged by Lavi Mishra, wife of Ashish Pandey when she was subjected to matrimonial dispute and torture and the offence was registered u/s 120-B, 323, 328, 354, 307, 377 & 506 of IPC. He would submit that after such report was made, the jurisdiction was challenged before Allahabad High Court and the criminal proceedings having been stayed, the subsequent complaint was filed on 04.06.2015. He would submit that the allegation on the face of it itself would demonstrate that all the facts have been exaggerated to suppress the report which was earlier made by Lavi Mishra on 20.02.2015. He would submit that the alleged incident of outraging modesty of complainant is stated to have taken place on 07.10.2013 at the time of engagement, however, no report was made and subsequently when the marriage was solemnized on 13.11.2013 another offence wherein Rs.60,000/- is said to have been snatched with physical force was complained. He further submits that the allegation(s) itself would show the falsity on the face of it and is a result of counter blast.
4. He further submit that the applicant is working as Junior Scientist in Bhabha Atomic Research Center at Mumbai and on the basis of complaint so registered he was served with summon on 25.11.2015 with a date of appearance on 27.11.2015, as such, a request was made for extension of time and the matter was fixed for 23.12.2015. When the complaint was taken up on

23.12.2015, an application u/s 317(1) Cr.P.C., was filed on behalf of applicant on medical ground stating that he was suffering from acute back pain and prayer was made for exemption of personal appearance and another date was prayed for. However, the trial Court rejected such application u/s 317 Cr.P.C., and issued non-bailable warrant against the applicant. Therefore, against issuance of such warrant, an application for anticipatory bail was filed which was rejected by the Sessions Judge, Raipur. Hence, the instant petition. Learned counsel for the applicant prays that that in the facts of the present case, the applicant may be enlarged on bail.

5. Per contra, learned State counsel as also counsel for the objector opposes the bail application and submits that since the warrant has been issued, the application under section 438 Cr.P.C. is not maintainable.
6. Learned counsel for the objector relied on a judgment rendered by Bombay High Court in case of ***Himanshu @ Hemant Rajendra Bhatt Vs. The State of Maharashtra (2014) ALLMR (Cri) : (2014) 3 BomCR (Cri) 526*** and would submit that since the warrant has been issued, the Court in exercise of power u/s 438 CrPC cannot grant anticipatory bail and the only course is left for the petitioner is to approach the trial Court for cancellation of warrant which was issued.
7. Since the objection has been raised about the maintainability, it is appropriate to refer to Section 438

of the Code, which reads as under:

“438. Direction for grant of bail to person apprehending arrest.-(1) When 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 Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(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 facts of the particular case, as it may think 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 conditions 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-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 besides 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)."

8. The scope and ambit of provisions of section 438 came up for consideration in case of **Nirbhay Singh Vs. State of M.P.** in **1995 JLJ 21** wherein the Full Bench of M.P. High Court has held that "section 438 speaks of a person having reason to believe that he may be arrested on an 'accusation'. Therefore after registration of the case, filing of the charge sheet or filing of complaint or taking cognizance or issuance of warrant, the accusation will not cease to be an accusation. Nevertheless, the accusation survives or continues. Section 438 speaks of apprehension and belief that he may be 'arrested'.
9. There is no limitation in the language employed by the legislature indicating that the arrest contemplated is an arrest by the police of their own accord or that arrest by the police on a warrant issued by the Court will not attract section 438. The language used is clear and unambiguous, namely, apprehension of 'arrest on an accusation". Further it has been settled that the conflict between an order of anticipatory bail and non-bailable warrant has to be met in a pragmatic manner striking a balance between individual's right to personal freedom and the invocation of right of the police and the procedure required to be followed by a Magistrate. Where an order of anticipatory bail is passed after issue of non-bailable warrant of arrest by a Magistrate, the duty of the police officer entrusted with execution of the

warrant would be to arrest the person and produce him before the Magistrate who thereupon shall deal with the accused as required by the order of anticipatory bail.”

10. Similar view was taken by the Full Bench of the Calcutta High Court reported in **2003 CRI.L.J 2815 (Shamim Ahmed Vs. State and others)** wherein it was held that no bar is created in filing an application u/s 438 after filing of the charge sheet or after issuance of a process under Section 204 of the Code or after the issue of warrant of arrest in a complaint case. It was further held that section 70(2) of the Code is also sufficient to indicate that as soon as the person against whom a warrant of arrest has been issued is arrested, it comes to an end, meaning that the warrant of arrest has been executed. So after arresting a person if it is detected that there is an order under Section 438, the arresting officer can proceed in accordance with sub-section (3) of Section 438 immediately after the execution of the warrant of arrest. So reading of the provisions do not indicate that the provisions of Section 70 or the other provisions of Chapter VI or Section 209 of the Code prohibit entertainment of an application u/s 438 of the Code after the charge sheet is filed or the process is issued u/s 204 or u/s 209.
11. Further in a decision reported in **1986 CRI.L.J. 1303 – Smt. Sheik Khasim Bi Vs. The State**, the Full Bench of Andhra Pradesh High Court held that filing of a charge sheet by the police and issuing of a warrant by the Magistrate do not put an end to the power to grant

bail under Section 438(1) and on the other hand, the High Court or the Court of Session has power to grant anticipatory bail u/s 438(1) to a person after the criminal court has taken cognizance of the case and has issued process viz., the warrant of arrest of that accused persons.

12. Similar view has been adopted in case of ***Arun Kumar Vs. state of M.P. 2001 (4) M.P.L.J. 449*** wherein it has been held that on reading of Section 438(1), it is luminously clear that it stipulates that a person concerned should have reasonable apprehension to be arrested in respect of a non-bailable offence and therefore when the Magistrate takes cognizance in respect of non-bailable offences even if he issues summons, the accused would be entitled to move the competent court for grant of anticipatory bail and the said application would be maintainable.
13. The reliance placed by the objector in case of ***Himanshu @ Hemant Rajendra Bhatt Vs. The State of Maharashtra (2014) 3 BomCR(Cri) 526*** would go to show that the law laid down in such case supports the case of the applicant. In the said case, the Magistrate had issued non-bailable warrant in the case filed u/s 138 of the N.I.Act. The Court held that u/s 438 of Cr.P.C., the Sessions Court and High Court has power to grant bail to a person apprehending arrest in non-bailable offence. It was further held that section 438 Cr.P.C., provides a special provision to protect liberty against the arrest in non-bailable offence and get pre-

arrest bail. Consequently it was held that since the warrant of arrest was issued for a bailable offence i.e., u/s 138 of N.I. Act, therefore, the power to cancel such arrest warrant u/s 438 Cr.P.C., would not lie. Therefore, the law relied on by the counsel for the objector also supports the contention of the applicant that in non-bailable offence, the petition u/s 438 Cr.P.C., would lie.

14. Further the Supreme Court in case law reported in ***AIR 2011 SC 312 - Siddharam Satlingappa Mhetre Vs. State of Maharashtra*** has reiterated the law laid down in case of ***Gurbaksh Singh Sibbia and others V. State of Punjab (1980) 2 SCC 565***. The principles of scope and ambit of anticipatory bail have been reiterated in case of Siddharam Satlingappa Mhetre (supra) in paras 118, 119, 121 & 122 which reads as under:

“SCOPE AND AMBIT OF ANTICIPATORY BAIL:

118. A good deal of misunderstanding with regard to the ambit and scope of section 438 Cr.P.C. could have been avoided in case the Constitution Bench decision of this court in Sibbia’s case (supra) was correctly understood, appreciated and applied.

119. This Court in the Sibbia’s case (supra) laid down the following principles with regard to anticipatory bail:

- a)** Section 438(1) is to be interpreted in light of Article 21 of the Constitution of India.
- b)** Filing of FIR is not a condition precedent to exercise of power under section 438.
- c)** Order under section 438 would not affect the right of police to conduct investigation.
- d)** Conditions mentioned in section 437 cannot be read into section 438.
- e)** Although the power to release on anticipatory bail can be described as of an “extraordinary” character this would “not justify the conclusion that the power must be exercised in exceptional

cases only. "Powers are discretionary to be exercised in light of the circumstances of each case.

- f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be reexamined after hearing. Such ad-interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant.

121. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in *Sibbia's case* (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

- i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
- ii. The antecedents of the applicant including the fact as to whether the accused 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. The possibility of the accused's likelihood to repeat similar or the other offences.
- v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.
- vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.
- vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of

sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

15. Therefore, applying the aforesaid principles to the facts and circumstances of the present case, I have no hesitation to hold that the objection raised by the counsel for the State as also counsel for the objector cannot be sustained in view of the settled principles laid down with respect to the maintainability of the application u/s 438 Cr.P.C., and in the facts of this case, since the arrest warrant has been issued for an offence of non-bailable in nature, therefore, the apprehension of arrest cannot be ruled out and the application u/s 438 Cr.P.C., would lie before the Court of session or the High Court.

16. Now reading of the complaint in this case would show that after filing of the complaint, FIR was registered. The applicant who is said to be working as Junior Assistant in Bhabha Atomic Research Center at Mumbai has filed an application u/s 317 (1) of Cr.P.C., stating

that he has received summons on 25.11.2015 and the date of hearing was fixed for 27.11.2015 at Raipur Court. Subsequently, the date was fixed for 23.12.2015 on which date the applicant could not appear for some medical reason and another application was filed u/s 317 of the Cr.P.C., however, the same was rejected and arrest warrant was issued.

17. Complainant Alpa Bhargava had filed a petition u/ss 354-A, 392, 323, 294, 506-B/34 IPC alleging that on 07.10.2013 while the engagement ceremony was going on, the applicant tried to sexually molest her and it was the occasion of engagement of her brother-in-law Ashish Pandey (*Jeth*) with one of the accused Lavi Mishra. Though the incident was of 07.10.2013 it was not reported but again the allegation has been made that when the marriage was being performed on 13.11.2013 at her residence, the applicant along-with other co-accused has looted Rs.60,000/- from the complainant. The incident is said to have happened first at the time of engagement and secondly at the time of marriage. Therefore, the facts as narrated by complainant though to be tested at evidence but prima facie it do not inspire confidence. Therefore, taking into facts as has been discussed in the foregoing paragraphs that the bail petition is maintainable and considering the prima facie allegations as levelled against the applicant, without any observations on merit, I am inclined to extend the benefit of Section 438 Cr.P.C., to the applicant.

18. Accordingly, the application is allowed and it is directed

that in the event of arrest of the applicant in connection with the aforesaid offence, he shall be released on bail on his executing a personal bond in sum of Rs.25,000/- with one surety to the satisfaction of the trial Court. The applicant shall also abide by the following conditions :

- (i) that he 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/her from disclosing such facts to the Court or any police officer;
- (ii) that he shall not act in any manner which will be prejudicial to fair and expeditious trial; and
- (iii) that he shall appear before the trial Court on each and every date given to them by the said Court till disposal of the trial.

C.c. as per rules.

Sd/-
GOUTAM BHADURI
JUDGE

Rao