

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.207 OF 2016

- 1) Rama s/o Manik Shinde (**withdrawn**)
- 2) Gopal s/o Manik Shinde
- 3) Manik s/o Sadashiv Shinde
- 4) Bhagvan s/o Ajinath Shinde
- 5) Vishnu s/o Ajinath Shinde
- 6) Anil s/o Ajinath Shinde
- 7) Ajinath s/o Sadashiv Shinde
- 8) Sunil s/o Rushiket Shinde
- 9) Achyut s/o Rushiket Shinde
- 10) Rushiket s/o Sadashiv Shinde ... APPLICANTS

VERSUS

- 1) The State of Maharashtra
- 2) Sau. Asha w/o Hanumant Harale ... RESPONDENTS

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Shri M.V. Salunke, Advocate for applicants
Shri A.S. Shinde, A.P.P. for respondent No.1/ State
assisted by Shri S.S. Bora, Advocate
Shri V.D. Sapkal, Advocate, holding for
Shri S.P. Harale, Advocate for respondent No.2

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CORAM: N.W. SAMBRE, J.

DATED: 27 th October, 2016.

Date of reserving order : 11th August 2016
Date of pronouncing order : 27th October, 2016

ORDER :

1. By way of present application, the accused - applicants are praying for their release in the event of their arrest in R.C.C. No.125/2010 pending on the file of learned Chief Judicial Magistrate, Osmanabad. The facts of the present case for the purpose of deciding the issue are as under :

2. On March 3, 2010, the applicant No.1 Rama who was already arrested, filed F.I.R. resulting into registration of Crime No.28/2010 against one Advocate Sahdeo Harale and his brothers, who are family members of the respondent No.2 Complainant Asha Harale, for an offence punishable under Sections 395, 323, 452, 509, 504 of the Indian Penal Code.

3. As a counterblast to the above, on April 4, 2010, the respondent No.2 Asha Harale along with two other women, filed

complaint for an offence punishable under Sections 147, 148, 149, 452, 324, 354, 295, 504, 506 of the Indian Penal Code against the accused persons. The said complaint was enquired into and investigating officer submitted a report to the Police Inspector of the concerned Police Station that the material as is collected during enquiry depicts that the complaint at the behest of respondent No.2 against the present applicant is filed at the behest of Advocate Sahdeo Harale, accused in Crime No.28/2010.

4. Private complaint No.125/2010 was presented before the Chief Judicial Magistrate by the respondent No.2, ordered issuance of process, which was further modified by the Sessions Court in revision by adding offence under Section 395 also.

5. On October 15, 2015, the Chief Judicial Magistrate issued summons, which was served on the applicant No.1 Rama, which was made returnable on November 19, 2015 and matter was posted on November 19, 2015 and thereafter December 17, 2015.

6. Pursuant to an application by the complainant for

issuance of a non-bailable warrant, dated November 26, 2015, bailable warrants were issued returnable on December 17, 2015. As the bailable warrants were not executed, the Magistrate, based on report, formed an opinion that the applicants/ accused are avoiding service, issued non-bailable warrants.

7. Pursuant to the above referred developments, the accused moved the Sessions Court praying for pre-arrest bail, which came to be rejected on January 5, 2016.

8. This Court, in the present application, has protected the applicants by an order dated January 14, 2016. On January 19, 2016, all the applicants appeared before the Chief Judicial Magistrate and have furnished bail bonds.

9. In the above referred background, Shri Salunke, learned counsel for the applicants would urge that the applicants' prayer for grant of pre-arrest bail is rejected by the learned Sessions Judge on the erroneous ground, that it is not a fit case to release the applicants on pre-arrest bail. Learned Sessions Judge then observed that the applicants - accused should have gone before the Chief Judicial Magistrate and sought regular bail

in the matter. By inviting attention of this Court to the judgment of Principal Seat in the matter of **Himanshu @ Hemant Rajendra Bhatt Vs. The State of Maharashtra**, reported in **2014 ALL MR (Cri.) 3944**, the learned counsel for the applicants submits that, the provisions of Section 438 of the Criminal procedure Code are very much available to the applicants and the applicants' conduct prior to and subsequent to the registration of offence in no case could be termed as avoiding the proceedings before the Magistrate. He would then urge that, paras 16, 17 and 18 would speak of the availability of the right in favour of the present applicants to claim pre-arrest bail even if the Chief Judicial Magistrate has issued non-bailable warrants. Apart from above, the learned counsel would rely upon the judgment of Full Bench of Madhya Pradesh High Court in the matter of **Nirbhay Singh & anr. Vs. The State of Madhya Pradesh**, reported in **1995 Cri.L.J. 3317** so as to canvass that the Sessions Judge so also this Court did possess to order release even if the Chief Judicial Magistrate has ordered issuance of non-bailable warrants. He would rely upon paras 12, 14 of the said judgment.

10. Per contra, Shri Sapkal, learned counsel for the

respondent No.2 complainant and the learned A.P.P. would submit that, the provisions of Section 437 of the Criminal Procedure Code are not applicable in the present case as the learned Magistrate has ordered issuance of warrant. He would invite attention of this Court to the provisions of Section 438(1) proviso so as to substantiate his contention for rejection of the prayer. According to him, Section 41 contemplates arrest of an accused without warrant and the provisions of Sections 437, 438 and 439 can be exercised only in case if the arrest is without warrant. He would harp upon the scheme of Sections 70 to 82 of the Criminal Procedure Code and submits that, in the present case, the provisions of Sections 437 and 438 need to be read down to be excluded when the Magistrate issues the non-bailable warrants against the accused person. He would also invite attention of this Court to Sections 80 and 81 of the Criminal Procedure Code. In addition, the learned counsel would harp upon the judgment of this Court in the matter of **Ambalal Punamchand Rashamwala Vs. State of Maharashtra,** reported in **1992 Cri.L.J. 2373.**

11. What is required to be noted from the factual matrix of the above case is that, the overall perusal of the conduct of

the applicants- accused particularly the accused No.1 since already he is arrested, is, they are not avoiding the Court proceedings. All the accused persons are inter-related and some of them are senior citizens. They hold landed property and apart from the crime in question, there is no other crime pending against them.

12. The fact remains that the Magistrate, after issuance of bailable warrants, has issued non-bailable warrants and in the said background, the respondents have tried to put forth a case that the provisions of Section 438 of the Criminal Procedure Code are not available. However, in view of the law laid down by the judgment of this Court in the matter of Himanshu Vs. State (cited supra), particularly paras 16, 17 & 18, which read thus:

"16. Another crucial question required to be answered is whether powers under Section 438 can be invoked by a Court in all the instances of issuance of non-bailable warrant by the Magistrate when non-bailable offences are pending before the Magistrate or not? In *Nirbhay Singh* (supra) and *Akhlaq Ahmed F. Patel* (supra), non-bailable warrant was issued by the learned Magistrates while issuing process under Section 204 of Cr.P.C., i.e. immediately after taking the cognizance of the matter. In *Puran Singh* (supra) the Division Bench of Punjab and Haryana High Court held that the power to grant anticipatory bail cannot be restricted only till the time and order is passed by the Magistrate under Section 204 of Cr.P.C. against the

accused. Section 438 is to be used liberally as it vests wider power to the Court to achieve the object to protect the individuals' liberty. Relying on sub-section (1) and (3) of Section 438 in *Puran Singh (supra)* it was held that it was an intention of the legislature that the power conferred under Section 438 can be exercised till the order regarding bailable warrant had been issued by the Magistrate. However, in all the judgments referred above, the learned Judges of the respective High Courts have unanimously laid down the ratio that to grant a bail under Section 438(1) of Cr.P.C. depends on the merit of a particular case.

17. Section 70 empowers the Magistrate to issue warrant of arrest to procure the appearance of the person. This statutory power has deterrent force compelling a person to obey the orders of the Court. It is a very valuable provision in the Criminal Procedure Code. On number of occasions the Court is required to issue warrant of arrest, either bailable or non-bailable. The order of warrant of arrest while issuing process under Section 204 of the Code is one of such circumstances when a Court may issue warrant. Non-bailable warrant under Section 204 in non-bailable offences as per the settled position can be challenged under Section 438 Cr. P.C. and the person against whom such warrant is issued may seek a pre-arrest protection under Section 438 of the Code. However, considering the object and spirit of power of warrant conferred upon the Magistrate, I am of the view that in all the orders of non-bailable warrant even in non-bailable offences anticipatory bail under Section 438 of the Cr.P.C. cannot be granted. If a person once granted a regular bail in non-bailable offence and thereafter he fails to appear before the Court either on the specific dates or during the trial, then the Magistrate after considering his conduct may issue warrant of arrest, i.e., non-bailable warrant to procure his appearance. Under such circumstances, the only proper remedy available to the said person as contemplated under Section 70(2) of Cr.P.C. is to go before the same Court for cancellation of the said warrant.

18. A Magistrate who issues a warrant knows fully why the accused is avoiding to remain present before the Court an non-appearance causes obstruction in the smooth working of the Court. It is a hurdle in speedy disposal of the matter and therefore the Magistrate issues non-bailable warrant to compel a person to appear before the Court as the trial is at a standstill for want of appearance. To remove this stagnation, the appearance is a must. Though pre-arrest bail can be granted under Section 438, however, it cannot be granted in any or each and every impending arrest in non-bailable offence, which is pursuant to a warrant of arrest issued by the learned Magistrate for any other purpose but not under Section 204 of Cr.P.C. Thus, anticipatory bail cannot be sought when warrant is issued during the trial due to non-attendance of the accused. If all the sub-sections of Section 438 are taken into account, the very language of the statute compels this construction. While granting anticipatory bail, the Court has to consider the four factors including the antecedents of the applicant. There is a provision of interim bail, so also it is obligatory for the Court to give notice to the Public Prosecutor and hear the prosecutor. However, if the warrant of arrest is issued by the Judicial Magistrate for non-attendance of a particular person, then it is not obligatory on the said Magistrate to hear the prosecution. There is no such provision of interim bail available while cancelling the warrant issued under Section 70 of Cr.P.C. Moreover, while granting anticipatory bail, the Court has to see that the applicant shall be available for interrogation by the police officer as and when required. Thus, it is amply clear that the anticipatory bail, which is an extraordinary provision which protects the liberty of an individual can be used before he is taken into custody by the police first time after the registration of an offence against him. Once he is taken in custody, this power is not available to the Court and also cannot be invoked. Thus, within the purport of Section 438 of Cr.P.C. grant of pre-arrest bail is not available to the Sessions Court or the High Court when warrant of arrest issued is by the Magistrate except warrant of arrest issued under Section 204 of Cr.P.C. Under Section 204 of Cr.P.C. the Magistrate takes

cognizance and thereafter issues the warrant, so this is the first instance that the person is booked for some offence, which may be either by the police or by the Magistrate."

in my opinion, it cannot be laid down that the provisions of pre-arrest bail are not available to the applicants. The Section which confers right to claim such relief of pre-arrest bail does not quantify exercise of such rights. However, such powers are dependent on the merits of each case. The Court's power to issue both bailable and non-bailable warrant is to secure the presence of the person particularly in the background of conduct of such person. This does not mean that the accused in all the cases in which warrant is issued is as of right entitled for pre-arrest bail. However, the powers under Section 438 are very wide.

13. Once in the above referred judgment it is concluded that power under Section 438 are available to the accused in case of issuance of non-bailable warrant. While dealing with a complaint case under Section 204 of the Criminal Procedure Code, I am required to deal with the case of the applicant on its facts.

14. It is not the case from the record that accused are intentionally avoiding the Court proceedings. The bailable warrant and thereafter non-bailable warrant was ordered by the Magistrate after the accused though served with the summons including the one for offence punishable under Section 395 remained absent.

15. The process was ordered by Magistrate on 20.7.2010 and further modified as per order of Sessions Judge on 15.10.2015 i.e. after about five years.

16. Initially bailable warrant was ordered on 26.11.2015. The learned Magistrate, on December 12, 2015, has noted that accused are avoiding Court proceeding as they have applied for grant of pre-arrest bail and hence ordered non-bailable warrant.

17. In fact, what the accused were trying is exhausting their statutory remedy. Even otherwise, having regard to the fact that offence under Section 395 of the Indian Penal Code is registered after more than five years, the custodial interrogation for the said purpose is not required. The accused are very much available for trial.

18. Apart from the above, it is to be noted that, the applicants are enjoying the protection from this Court since January 2016.

19. In view thereof, in my opinion, the applicants are entitled to be released. The application is allowed in terms of the interim order dated 14th January 2016 and disposed of.

(N.W. SAMBRE, J.)

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