

Anil Dond

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

ANTICIPATORY BAIL APPLICATION NO.1599 OF 2017

Dr.Augustine Francis Pinto & Anr	..Applicants.
Vs.	
The State of Maharashtra & Ors.	..Respondents.

**WITH
CRIMINAL APPLICATION NO. 845 OF 2017
IN
ANTICIPATORY BAIL APPLICATION NO.1599 OF 2017**

Budhbhushan Shamrao Kamble & Anr.	..Applicants
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**WITH
CRIMINAL APPLICATION NO. 847 OF 2017
IN
ANTICIPATORY BAIL APPLICATION NO.1599 OF 2017**

Barun Chandra Thakur	..Applicant
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ANTICIPATORY BAIL APPLICATION NO.1608 OF 2017

Ryan Augustine Pinto	..Applicant.
Vs.	
The State of Maharashtra & Ors.	..Respondents.

Mr. Nitin Pradhan with Ms. Ameeta Kuttikrishnan i/b Ms. Shubhada D. Khot for Applicants in ABA 1599 and ABA 1608 of 2017.
Mrs. A.S. Pai, APP for State.
Mr. Gunratna Sadavarte for Intervener in APPP No.845/2017.
Mr. Sushil Tekriwal i/b Mr. Pravin Gaikwad for Intervener in APPP No.847/2017.

CORAM: Shri A.S. GADKARI, J.

DATE : 14th September 2017.

P.C.

1] The abovementioned Anticipatory Bail Applications bearing Nos.1599 and 1608 of 2017 under Section 438 of Code of Criminal Procedure are filed for Transit Anticipatory Bail in order to enable the applicants to approach the appropriate Judicial Authority, in the State of Haryana praying that in the event of their arrest at the instance of Police attached to Bhondsi Police Station in connection with First Information Report No.0250 of 2017 dated 8th September 2017 for an offence punishable under Section 302 of the Indian Penal Code and under Section 25 of the Arms Act.

2] The first informant namely Shri Barun Chandra Thakur, father of the deceased Master Pradhyuman Thakur, has filed an intervention application being Criminal Application No.847 of 2017.

At the outset, Mr. Tekriwal, learned Counsel for the Intervener submitted that there is no concept of transit anticipatory bail under Section 438 of Cr. P.C and the present anticipatory bail applications are filed on frivolous and false grounds and therefore needs the same to be dismissed in

totality. He submitted that the jurisdiction to file anticipatory bail applications under Section 438 of Cr. P.C. lies within the territorial jurisdiction of State of Haryana, Gurugram or before the Punjab and Haryana High Court located at Chandigarh but not within the territorial jurisdiction of this Court. That the applicants seeking bail by approaching this Court are actually invoking wrong territorial jurisdiction and these transit anticipatory bail applications filed before this Court be dismissed on this ground alone. He further submitted that, in catena of judgments, the Hon'ble Supreme Court has categorically laid down the ratio that in cases of offences of diabolical, brutal or rarest in nature the accused should not be enlarged on anticipatory bail and therefore the present transit anticipatory bail applications be dismissed on this count also. He invited my attention to the Order passed by the Hon'ble Supreme Court dated 11th September 2017 in a Writ Petition filed by the intervener under Article 32 of the Constitution of India, wherein the Supreme Court has observed that, the issue involved in the said petition, which relates to ensure absolute safety and security of each and every child studying in all the schools across the country. The Supreme Court has further observed that, the petition is not restricted to the school concerned as it has a countrywide effect. He therefore prayed that the transit anticipatory bail applications be

dismissed summarily.

3] Mrs. Pai, the learned Additional Public Prosecutor appearing for the State of Maharashtra submitted that, there is no provision under the Code of Criminal Procedure for filing an application for transit anticipatory bail. She submitted that the offence in question has occurred beyond the territorial jurisdiction of this Court and this Court does not have jurisdiction over the locale where the crime is committed. She further submitted that Section 438 of Cr. P.C., does not permit to grant anticipatory bail by any High Court or the Court of Sessions within the country where the accused may apprehend arrest. She submitted that the applicants ought to have approach the Sessions Court at Gurugram or the High Court of Punjab and Haryana for appropriate reliefs and the present applications are not maintainable in the eyes of law.

In support of her contention, she relied on the following decisions of Apex Court and other High Courts:

(i) Sandeep Sunilkumar Lohariya Vs. Jawhar Chelaram Bijlani @ Suresh Bijlani & Ors.

[Order dated 14.6.2013 passed in Special Leave to Appeal (Criminal) No.4829 of 2013 by the Hon'ble Supreme Court]

(ii) Sayed Zafrul Hassan & Anr. Vs. State

[AIR 1986 Patna 194 : 1986 Cri. L.J. 605 (Full Bench of Patna High Court)]

(iii) Sailesh Jaiswal Vs. State of West Bengal

1998 Law Suit (Cal) 194 : 1998 Cal Cri L. R 342 (Larger Bench of Five Judges of Calcutta High Court).

She therefore prayed that the present transit anticipatory bail applications may be dismissed summarily.

4] Mr. Pradhan, the learned Counsel appearing for the applicants submitted that by the present applications, the applicants are seeking temporary anticipatory bail for a limited period to approach the competent Court having jurisdiction over the Bhondsi Police Station, Gurugram, State of Haryana, with a view to facilitate them to file appropriate proceedings before the said Court and to seek appropriate reliefs. He submitted that in view of the circumstances which are beyond the control of the applicants, there is no alternative than to approach this Court seeking transit anticipatory bail under Section 438 of Cr. P.C. He submitted that the concept of transit anticipatory bail is not new to this Court and there are precedents in that behalf, when this Court has exercised jurisdiction for granting anticipatory bail.

In support of his contention, Mr. Pradhan relied upon the

following decisions of this Court:

- (i) N.K. Nayar & Ors. Vs. State of Maharashtra & Ors.
(1985) Cri.L.J. 1887] (Division Bench of this Court).
- (ii) Teesta Setalvad & Anr. Vs. The State of Maharashtra & Ors.
[Criminal Application no.14 of 2014 dated 31.1.2014 passed
by the learned Single Judge of this Court.]
- (iii) Navinchandra N. Majitha Vs. State of Maharashtra & Ors.
[(2000) 7 SCC 640]

He submitted that, in view of the above decisions, it is clear that there are no in-built restrictions under the provisions of Section 438 of Cr. P.C. itself and Court has to consider the application for anticipatory bail and at the same time use the discretionary power by imposing conditions. He submitted that the learned Single Judge of this Court, in the case of Teesta Setalvad & Anr (Supra) has followed the ratio laid down by the Division Bench of this Court in the case of N.K. Nayar & Ors. Vs. State of Maharashtra (supra) and therefore the applications filed by the applicants for transit anticipatory bail are maintainable in the eyes of law. He lastly submitted that the applicants may be granted relief for certain duration in the nature of transit anticipatory bail with a view to facilitate them to approach the competent Court having jurisdiction over Bhondsi Police

Station, Gurugram, State of Haryana.

5] In the case of Sandeep S. Lohariya (*supra*), the respondent therein was an accused in a case registered with Vashi Police Station, Navi Mumbai, Maharashtra under Sections 302, 120(B) r/w 34 of the Indian Penal Code and under Section 3 and 25 of Arms Act. His anticipatory bail application was rejected by the High Court of Bombay and the said Order was upheld by the Supreme Court in S.L.P. (Cri.) No.2790 of 2013 vide an Order dated 29.4.2013. The said accused thereafter filed an anticipatory bail application in the nature of transit anticipatory bail before the Madhya Pradesh High Court which was allowed on certain conditions. The complainant/petitioner Sandeep Lohariya challenged the said Order before the Hon'ble Supreme Court in the aforesaid Special Leave to Appeal and the Supreme Court in its Order dated 14th June 2013 has observed and held that, an application for anticipatory bail in the nature of transit bail, which in view of their Lordships has no provision under the Code of Criminal Procedure, 1973. It has been further observed that, it is difficult to comprehend under what provisions and under what authority of law such an application was even registered by the High Court of Madhya Pradesh.

6] A question, whether Section 438 of Code of Criminal

Procedure, 1973 envisages grant of anticipatory bail by any High Court or any Court of Session within the country, irrespective of locale of the commission of the offence, was referred for consideration to the Full Bench of Patna High Court in the case of Sayed Zafrul Hassan & Anr. (supra). While dealing with and answering the said question, the Full Bench of Patna High Court in para-8,9,22 and 23 of the said decision has held as under:-

“8 Adverting now to the language of [Section 438](#) (and in particular in the light of the above), it deserves highlighting that both in Sub-section (1) and Sub-section (2) thereof, the deliberate designed phraseology employed is "the High Court" or "the Court of Session". The section does not say "any High Court" or "any Court of Session". To accept the contention of the petitioners would, therefore, involve the substitution of the word 'the' for 'any' at all places where the phraseology of "the High Court" or "the Court of Session" has been employed. Not only would this be impermissible on the settled canons of construction, but, would be doing plain violence to the specific language of this section itself. To my mind, "the High Court" means the Court having jurisdiction over the area where the accusation of having committed a non-bailable offence is made. "The Court of Session" means that limited geographical area within whose limits such a non-bailable offence may have been committed and the accusation therefor arises. These limitations are inherent in the opening part of [Section 438](#) itself. Indeed, this section does not talk of the High Court or the Court of Session in vacuum or in space but only in the context of and with regard to the commission of a non-bailable offence in the particularised geographical area. It is significant that [Section 438](#) deals with somewhat serious crimes and does

not extend to any or every offence but to the commission of a non-bailable offence. The locale of such a crime is thus inextricably linked to the Court of Session or the High Court which exercises jurisdiction with regard thereto. Therefore, "the High Court" or "the Court of Session" in Section 438 means such a Court within whose territorial jurisdiction the accusation of having committed a non-bailable offence arises or is made. The apprehension of arrest by such accused is with regard to that particular offence having a particular locale and not generically. The clear mandate of the language of [Section 438](#) and the inherent limitations of territorial jurisdiction cannot be overridden by any high-flown and doctrinaire considerations."

"9. Yet again the context and positioning of Section 438 in [the Code](#) is itself a clear pointer to such a limitation. The section is laid in Chapter XXXIII making provisions as to bail and bonds. It is preceded by [Section 437](#) providing when a bail can be taken in case of a non-bailable offence by Courts other than High Court or the Court of Session. Clearly enough [Section 437](#) pertains to and provides for the grant of bail by Magistrates having territorial jurisdiction in non-bailable offences. Even the learned counsel for the petitioners did not take the untenable stand that under [Section 437](#) any Magistrate irrespective of the locale of the crime can assume jurisdiction and grant bail in cases of non-bailable offences. Succeeding [Section 439](#) deals with the special power of the High Court or the Court of Session regarding bail in non-bailable offences. It is undeniable that this section visualises the High Court or the Court of Session having jurisdiction over the area of the commission of the crime, and not any High Court or any Court of Session. The proviso to Sub-section (1) of [Section 439](#) in more serious crimes expressly envisages the giving of notice to the Public Prosecutor before granting bail unless for reason to be recorded in writing it is not practicable to give such notice.

Obviously such a notice is given to the Public Prosecutor having jurisdiction with regard to the commission of the offence. If that be so, there is no reason whatsoever to construe the identical expression of "the High Court" or "the Court of Session" more widely in [Section 438](#). Conversely if in [Section 438](#) "the High Court" or "the Court of Session" is construed as any High Court or any Court of Session, the same construction would have to be placed on those words in the succeeding [Section 439](#) as well, which would obviously lead to absurd results."

"22 Lastly, apart from principle and precedent, the anomalous results that necessarily flow from the construction, that [Section 438](#) confers a jurisdiction on any Court of Session or any High Court to grant bail, cannot be lost sight of. It is a well settled canon that even where two interpretations are possible, the one which would lead to mischievous and anomalous results, must be avoided. To my mind, the stand canvassed on behalf of the petitioner cannot but result in a judicial chaos and an inherent conflict betwixt the comity of Courts. It would necessarily involve that with regard to the grant of anticipatory bail and in particular where there are many accused persons in a case, numerous High Courts and innumerable Courts of Session may exercise jurisdiction with regard thereto. This would inevitably and necessarily lead to contradictory orders and overlapping jurisdictions. The practical difficulties of assuming jurisdiction and considering and granting anticipatory bail at Ernakulam for an offence allegedly committed in Srinagar in a country as vast as ours, are too patent to need elaboration. In Gurbaksh Singh Sibbia's case AIR 1980 SC 1632 :(1980 Cri LJ 1125) their Lordships without being inflexible had directed that notice should issue to the Public Prosecutor or the Government Advocate forth-with and the question of bail should be re-examined in the light of respective contentions of the parties under [Section 438](#). How is a High Court or a

Court of Session in one State to issue or demand compliance with a notice against the Public Prosecutor or the Government Advocate of another faraway State? Whether such a Court would have authority to do so or the investigating agencies of another State are bound to comply with are the moot questions. The difficulty and indeed the futility of such was rightly noticed in [Dr. L.R. Naidu v. State of Karnataka](#), 1984 Cri LJ 757 (Kant). It has to be recalled that the grant or refusal of an anticipatory bail is a matter of urgency which does not brook of long delay. Equally one must be reminded that the provisions for anticipatory bail do not necessarily involve as a pre-requisite a surrender to custody. Therefore, a fugitive offender may well move from court to court ad infinitum and if he fails in one jurisdiction then on to another until he secures relief in the last. It seems plain that somewhat curious and anomalous results which necessarily flow from the stand canvassed on behalf of the petitioners would be an added factor for not subscribing to such a view.”

“23 To finally conclude on this aspect the answer to the question posed at the outset is rendered in the negative and it is held that, [Section 438](#) of the Code does not permit the grant of anticipatory bail by any High Court or any Court of Session within the country where the accused may choose to Apprehend arrest. Such a power vests only in the Court of Session or the High Court having jurisdiction over the locale of the commission of the offence of which the person is accused.”

6] In a reference made by the Division Bench of the Calcutta High Court, a Larger Bench (Five Judges) in the case of [Sailesh Jaiswal Vs. State of West Bengal](#) (supra) was required to consider a question as to, whether Section 438 of Code of Criminal Procedure, 1973 empowers to

grant anticipatory bail irrespective of the place of commission of offence.

The Larger Bench of the Calcutta High Court, after taking into consideration various decisions of the said Court, Supreme Court and also decision of the Full Bench of Patna High Court in the case of Syed Z. Hassan & Anr. (supra) has recorded its conclusion in para-27 which reads as under:

“27 The concept of the anticipatory bail had however been crept in the new code of Criminal Procedure of 1973 prior to it, there was no provision for anticipatory bail, while considering the scope and ambit of [section 438](#) of the Code, it seems that the provision empowers to grant anticipatory bail with the Court of Session or the High Court. The expression, anticipatory bail is truly speaking a misnomer and the section contemplated is not anticipatory bail but merely an order releasing an accused on bail in the event of his arrest. But in view of the discussion made above, we are of the view that where any person has reason to believe that he is likely to be arrested on an accusation of having committed a non-bailable offence, he may either approach to the High Court or Court of Sessions for a direction that in the event of arrest he shall be released on bail. Therefore, on a plain reading of the provision, it speaks that the person allegedly accused of an offence must satisfy the court to which he approached that there are strong reason that he may likely be arrested in non-bailable offences. In support of such belief, he must place sufficient material so that the court would be in a position to form its opinion whether to grant or refuse anticipatory bail. In case, either the High Court or the Court of Sessions on reference of material produced before it that there is likelihood of a person being arrested in a non-bailable offence, it could grant anticipatory bail directing such

person to be released on execution of bond or by Imposing any other condition which the arresting officer deemed it, just and proper. After such person being released on anticipatory bail by the arresting officer, the accused person within reasonable time but in no case beyond 24 hours of arrest shall appear before the court within the Jurisdiction of which he ordinarily resides. Either the Magistrate, Chief Judicial Magistrate or the Court of Sessions upon consideration of the material placed by the arresting officer and on hearing the Public Prosecutor of the locality in which the offences alleged to have been committed shall pass an appropriate order regarding regular bail under [section 81](#) of the Code of Criminal Procedure. The exercise of Jurisdiction of anticipatory bail by any other court namely the High Court or the Court of Sessions beyond the local limits of the Jurisdiction is limited to the extent of consideration of a bail for the transitional period but it has no jurisdiction to transgress into the limits of the local Jurisdiction of the court within which offence is alleged to have been committed. With the above observation, the reference of the Division Bench has been answered.”

7] A Division Bench of this Court in the case of N.K. Nayar And Others (supra), while considering the question as to whether the provisions of Section 438 of the Code of Criminal Code, 1973 can be utilized by this Court when the case or the contemplated criminal proceedings would be in some other State, has held that, if arrest is likely to be effected within the jurisdiction of this Court, the concerned person should have the remedy of applying to this Court for anticipatory bail even if offence might have been committed in some other State. It is further observed that, consequently this

Court would have jurisdiction if a person is likely to be arrested at a place within the jurisdiction of this Court.

8] The learned Single Judge of this Court in the case of Teesta A. Setalvad & Anr. Vs. The State of Maharashtra & Ors. (supra), after referring to the Judgment of Full Bench of Patna High Court in the case of Sayed Z. Hassan & Anr (supra) and the decision of the Division Bench of this Court in the case of N.K. Nayar And Anr (supra) has in para-8 held as under:

8. Generally the powers of High Courts in the cases of anticipatory bail are limited to its territorial jurisdiction and the power cannot be usurp by disregarding the principle of territorial jurisdiction which is in the interest of the comity of the Courts. However, temporary relief to protect liberty and to avoid immediate arrest can be given by this Court.”

9] It appears from the record that, at the time of deciding the case of Teesta A. Setalvad & Anr. (supra), the Order/decision of the Supreme Court in the case of Sandeep Lohariya (supra) dated 14th June 2013 was not brought to the notice of the learned Single Judge of this Court and therefore the learned Single Judge did not had an occasion to consider the said observations of the Supreme Court. Therefore, according to me, the decision of the learned Single Judge of this Court in the case of Teesta A.

Setalvad (supra) does not have binding effect of a precedent.

It further clearly appears to me that in view of the observations made by the Supreme Court in the case of Sandeep Lohariya (supra), the view expressed by the Division Bench of this Court in the case of N.K. Nayar & Anr. (supra) does not hold the field as of today.

10] As noted above, the Supreme Court in the case of Sandeep Lohariya (supra) has categorically observed that, an application for anticipatory bail in the nature of transit bail, which in the view of their Lordships has no provision under the Code of Criminal Procedure, 1973 and it is difficult to comprehend under what provisions and under what authority of law such an application was even registered by the concerned High Court.

11] It is by now well settled that the Code of Criminal Procedure is exhaustive with regard to the matters with which it deals with and is to be read as harmonious whole.

12] After taking into consideration the ratio of the aforesaid decisions and factum of local jurisdiction of High Court, I am in respectful agreement that the view expressed by the Full Bench of the Patna High Court in the case of Sayed Z. Hassan & Anr (supra) and Larger Bench of Calcutta High Court (Five Judges Bench) in the case of Sailesh Jaiswal Vs.

State of West Bengal (supra). According to me the view expressed in the said decisions is indubitably correct and proper expression of law with respect to the interpretation of Section 438 of the Code of Criminal Procedure. My said view is further fortified by the observations of the Supreme Court in the case of Sandeep Lahoriya (supra) as noted hereinabove.

13] The resume of aforesated authorities would with certainty lead to hold that the jurisdiction for control and enquiry of Criminal Courts should be locale commission of crime and not residence of the accused nor place where he might choses to resides and/or found in other part of our country. That the exercise of jurisdiction of anticipatory bail by High Court or the Court of Sessions beyond the local limits of the jurisdiction is limited to the extent of consideration of a bail within its territorial jurisdiction or for the transitional period and it cannot have jurisdiction to transgress into the local limits of the local jurisdiction of any other High Court or Court of Session which is not under under its superintendence and control, within whose Jurisdiction alleged offence has been committed.

14] In view of the above discussion, I am of the considered view that, the present applications for transit anticipatory bail are not maintainable before this Court.

Accordingly both Anticipatory Bail Applications bearing Nos.1599 and 1608 of 2017 are rejected. Consequently, both Criminal Applications bearing Nos. 845 and 847 of 2017 in Anticipatory Bail Application No.1599 of 2017 are disposed off.

15] At this stage Mr. Pradhan, learned Counsel for the applicants submitted that the applicants in both applications have been protected by this Court by way of interim relief since 12.9.2017 and the same may be continued at least one day i.e. for 24 hours, with a view to enable them to approach the Apex Court.

In view thereof, interim relief granted by an Order dated 12.9.2017 is extended till 5.00 p.m. of tomorrow i.e. 15th September 2017, subject to condition that the applicants shall deposit their respective passports with the Commissioner of Police, Mumbai or any Officer authorised/ nominated by the Commissioner of Police, Mumbai on or before 9.00 p.m. today i.e. 14.9.2017, failing which interim protection granted shall stand vacated without further reference to this Court.

[A.S. GADKARI, J.]