

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No. 2427 OF 2017

ORDER:

This criminal petition is filed under Section 438 of Criminal Procedure Code (for short "Cr.P.C.") for grant of anticipatory bail to the petitioners in relation to Crime No.194 of 2017 on the file of Raidurgam Police Station, Cyberabad, Ranga Reddy District apprehending their arrest for the offences punishable under Sections 448, 427, 471, 464, 506 r/w 120 b IPC.

The defacto complainant one Mr. P. Venkateshwarlu lodged a complaint dated 18.06.2016 alleging that the defacto complainant and his brother P. Krishna Murthy are the absolute owners and possessors of the property H.No.1-72/5/2/P/11 in Plot No.74 to 79 and H.No.1-72-5/2/P/2 to 5/136 admeasuring 360 Sq.yards in total, situated at PJR Nagar, Anjaiah Nagar Extension, Gachibowli Village, Serilingampally Mandal, Ranga Reddy District. Both the defacto complainant and his brother purchased the above said properties vide registered sale deed bearing document No.4690/2015 dated 22.07.2015 from one Suresh Kumar for valuable consideration. It is the case of the petitioners that they have purchased four plots vide Registered Agreement-cum-General Power of Attorney, documents No.2855/2009 dated 25.06.2009 and two plots vide registered sale deed bearing document No.1712/2010 dated 19.03.2010 representing that he is having marketable title on the basis of link documents furnished by Mr. Suresh Kumar, thus the defacto complainant and his brother

purchased the property and became absolute owners and started construction on the said site.

While the matter stood thus, all of a sudden, one Mr.Abdul Rasheed with the active connivance of the first petitioner Mr. Suresh Kumar started creating all troubles and making false complaints to Municipal and Revenue Authorities and caused undue hardship to the defacto complainant. On enquiry, the defacto complainant found that the first petitioner/A-1 cheated him by creating fake, fabricated registered documents in respect of Plot No.75 and caused undue interference into possession and started disturbing the construction activities, by causing heavy monetary loss and hardship. Mediators namely V. Ramchander and Mohd. Taquee are also involved in creation of fake document which further establishes conspiracy of all the land grabbers i.e. the petitioners has even paid property tax using the fake and forged document to establish his claim. Thus, the petitioners 1 & 2 along with others committed offences punishable under Sections 448, 427, 471, 464, 506 r/w 120 b IPC.

The present petitioners A-1 & 2 sought pre-arrest bail on the ground that the police registered complaint in mechanical manner without application of mind and without conducting any enquiry as to the truth in the allegations made in the complaint. It is further contended that the complaint is filed as a counter blast to Crime No.191 of 2016 dated 17.06.2016 on the file of Raidurgam Police Station, Cyberabad. Further, by taking advantage of the local influential persons who are working as hand-in-gloves with

the police personnel, managed to get registered the above lodged complaint against these petitioners and thus, the allegations made in the complaint would not attract the offences punishable under Sections 448, 427, 471, 464, 506 r/w 120 b IPC and prayed to grant pre-arrest bail to the petitioners in the event of their arrest in connection with the above crime.

During the course of hearing, Sri Mirza Nisar Ahmed Baig Nizami, learned counsel for the petitioners contended that the allegations made in the complaint would not constitute any offences and when the Court comes to a conclusion that there is no *prima facie* material to conclude that the petitioners did commit any offences, the petitioners can be enlarged on bail, since arrest of the petitioners would amount to deprivation of their right of liberty guaranteed under Article 21 of Constitution of India and prayed to enlarge the petitioners on pre-arrest bail, by exercising discretion and placed reliance on the judgment of the Supreme Court in **Bhadresh Bipinbhai Sheth v. State of Gujarat and another**¹.

Whereas, learned Public Prosecutor for the State of Telangana opposed the petition on the ground that the petitioners did not approach the Sessions Court even for the offences punishable under Sections 448, 427, 471, 464, 506 r/w 120 b IPC and straightaway approached this Court and this Court can exercise its discretion either to entertain the bail application or to direct the petitioners to approach the Sessions Court, by placing reliance on the judgment of the Division Bench of this Court in

¹ (2016) 1 Supreme Court Cases 152

Y. Chendrasekhara Rao and others v. Y.V. Kamala Kumari and others².

The first and foremost objection of the learned Public Prosecutor is regarding entertainment of the application straightaway by this Court without approaching the Sessions Court by the petitioners. This Court in **Chendrasekhara Rao** case had an occasion to deal with the scope of Section 438 Cr.P.C, jurisdiction of this Court and Sessions Court and held that the jurisdiction of the High Court and Sessions Court under Section 438 Cr.P.C is concurrent. It was also further held that the High Court cannot compel the parties to approach the Sessions Court and after dismissal of the petition, permit them to approach the High Court. But, held in paragraph 28 of the judgment as follows:

“For the foregoing reasons we hold that it is not obligatory under Section 438 to move the Court of Session in the first instance. It is always open to this Court when an application is filed under Section 438, without first moving the Court of Session, to consider all the circumstances, and if the situation warrants, this Court can direct the party to move the Court of Session. Passing of such an order in consequence of exercise of discretion is different from insisting upon the party to move the Court of Session in the first instance as an inflexible rule of practice. The existing practice of the Registry in returning applications filed under Section 438 on the ground that the Court of Session is not moved in the first instance, is clearly impermissible in law”

In view of the law declared by the Division Bench of this Court in **Chendrasekhara Rao** case, it is purely discretion of the Court to exercise such power under Section 438 of Cr.P.C.

² 1993 Cr.L.J.3508

But, how to exercise such discretion is again another question while considering bail applications. The Supreme Court in **Moti Ram v. State of M.P**³ and **Balchand v. State**⁴ has outlined that an applicant with the status of an accused, can claim judicial liberation *pro tempore* on mere recognizance except where the circumstances are suggestive of thwarting the course of justice. Vast conglomeration of case law already exists for use in courts and are cited either to secure temporary liberation of an accused on a bail application, or to desist such a move on the plea that it thwarts the course of justice. Reliance on precedents to uphold or reject a plea for the grant of bail may be a useful guideline, but it does not necessarily ensure that exercise of discretion has been activated in a way that it addresses the judicial conscience of the court in the case in hand, which does warrant consideration of several tests evolved by judicial decisions. The relevant tests look for their application in each bail action, and it is through this process that discretion is exercised by the court to arrive at the conclusion as to whether the person be released on bail or not. Since disposal of bail applications has become a routine mechanical affair, the decisional process on the issue of bail at the pre-trial or post conviction stage largely hinges on the hunch of the Bench which may be pivoted on the Court's conscience.

In fact, the Courts have evolved tests for the use of judicial discretion. The framework does not contemplate the negating of release of an accused person, nor does it permit thwarting the course of justice together with the interests of the state. Various

³ AIR 1979 SC 429

⁴ AIR 1977 SC 366

tests have been laid down for the purpose by several judicial decisions, which the Courts have been applying while considering bail applications. Normally, the Courts apply the following tests, though the list cannot be said to be exhaustive.

1. the nature of the accusation;
2. the nature of the evidence in support of the prosecution;
3. the severity of the punishment which conviction will entail
4. the character, behaviour, means and standing of the accused;
5. whether facts disclose a bailable offence;
6. likelihood of the accused or any of them absconding, if released on bail;
7. the possibility of the same offence being repeated, if the accused is released on bail;
8. the danger of the accused overawing or threatening prosecution witnesses, if released on bail;
9. the possibility of the accused creating an atmosphere hostile to the conduct of the case;
10. the possibility of the accused on release may convey information to other accused who are not arrested or charge-sheeted;
11. opportunity to the accused to meet his counsel and legal adviser for purposes of his defence;
12. the failing health of the accused when he is languishing in jail as an under trial prisoner;
13. age and sex of the accused;

14. his past conduct and his apprehended behavior, if released on bail;
15. the protracted nature of the trial and the fact that he is languishing in jail since a long time; and
16. the fact that though a long time has elapsed the police have not submitted a charge-sheet.

The above guidelines are only to exercise discretion either to grant or to deny pre-arrest bail, the list is elliptic.

In any view of the matter, it is for this Court to exercise such discretion, either to entertain the application or to direct the petitioners/A-1 & 2 to approach the Sessions Court. But, it depends upon the nature of offence and seriousness of the offence allegedly committed by the petitioners. To ensure fair procedure in dealing with bail matters, the Court should have some clear guidelines to exercise his discretion to ensure the dual interests of justice, i.e the personal liberty of the individual and the safety and security of the State. The Criminal Procedure Code did not specify as to how such discretion is to be exercised.

Regarding proper exercise of judicial discretion Justice Cardozo observed in his book “the Nature of Judicial Process, Yale University Press, (1921), P.141” as follows:

“The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure..... He is to draw his inspiration from concrete principles. He is not to yield sporadic sentiments to vague and unregulated benevolence. He is to exercise his discretion informed by tradition, methodized by analogy, disciplined by system, and

subordinated to the primordial necessity or order in social life.”

Likewise, Lord Mansfield in **Tingley v. Dalby**⁵ also observed that:

“Discretion when applied to a court of justice means, sound discretion guided by law. It must be governed by rules, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular”. Thus, discretion is not based on any single circumstance which necessarily concludes the decision but of the cumulative effect of all circumstances that must weigh with the Court.”

Justice Krishna Iyer is very much critical on the concept of judicial discretion in dealing with a bail petition. He remarked in **G. Narasimhulu v. Public Prosecutor**⁶ as follows:

“Bail – or – Jail?” – at pre-trial or post-conviction stage – belongs to the blurred area of criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Code prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice and public safety and burden of public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process..... So, it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion.”

In view of the observations made by Justice Cardozo and other jurists, the Court has to exercise its discretion judiciously and based on settled principles of law. Hence, what are the settled principles are again is a question.

⁵ 14 N.W., 164 quoted by Justice Krishna Iyer in Babu Singh v. State [AIR 1978 SC 527]

⁶ AIR 1978 SC 429 430

The power of the Court under Section 438 Cr.P.C is purely discretionary and this Court has to exercise its power judiciously based on settled principles. But, the circumstances to exercise such jurisdiction may vary from case to case. The law regarding grant of anticipatory bail is elaborately discussed by the Constitution Bench of the Apex Court in **Gurbaksh Singh Sibbia and Ors v. State of Punjab**⁷ case, as the power of granting 'anticipatory bail' is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or "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" that such power is to be exercised. No hard and fast rule can be laid down in discretionary matters like grant or refusal of bail whether anticipatory or regular bail. The Apex Court further held that, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the state" are some of

⁷ AIR 1980 SC 1632

the considerations which the court has to keep in mind while deciding an application for anticipatory bail. Therefore, anticipatory bail can be granted even in serious cases like economic offences and States should have no concern for grant or refusal of anticipatory bail, as there can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it. Therefore, while dealing with the application for grant of pre-arrest bail or anticipatory bail, the Court must take into consideration the guidelines issued in **Gurbaksh Singh Sibbia**¹ case.

On the strength of the same principles in **Jai Prakash Singh v. State of Bihar**⁸, the Supreme Court held that Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroled in the crime and would not misuse his liberty. The Courts are expected to deal with very serious matters seriously, but not in casual and cavalier manner and grant of anticipatory bail by extending unwarranted sympathy towards accused by exercising discretion. Court might not exercise its discretion in derogation of established principles of law, rather it had to be in strict adherence to them. Discretion had to be guided by law, duly governed by rule and could not be arbitrary, fanciful or vague and Court must not yield to spasmodic sentiment to unregulated benevolence. Any order dehors grounds provided in Section 438 of CrPC is illegal.

⁸ AIR 2012 SC 1676

Keeping in view the various principles enunciated by the Apex Court in the various judgments referred supra, to grant pre-arrest bail to any accused in a cognizable offence, the Court must records its satisfaction that there is no *prima facie* material to conclude that the petitioner did commit no offence and that there is no possibility of the accused tampering the evidence and interfering with the investigation and that the accused will not threaten the witness and cooperate with the Investigating Agency to complete the investigation.

The learned counsel also drawn the attention of this Court to the principles laid down in **Gurbaksh Singh Sibbia**¹ and reiterated the duty of the Court while deciding an application filed under Section 438 of Cr.P.C and the guidelines to be followed for grant of such bail.

Learned Counsel contended that for grant of pre-arrest bail under Section 438 Cr.P.C, certain principles have been laid down by the Apex Court and the Courts are bound to follow the guidelines laid down by the Apex Court in **Bhadresh Bipinbhai Sheth v. State of Gujarat and another**⁹. The Apex Court only reiterated the 10 guidelines laid down in **Siddharam Satlingappa Mhetre vs State Of Maharashtra**¹⁰ which are as follows:

- 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;

⁹ (2016) 1 Supreme Court Cases 152

¹⁰ AIR 2011 SC 312

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.

In **Siddharam Satlingappa Mhetre⁴** case, the Apex Court analyzed the principles in various judgments and considering the law on anticipatory bails in other countries, laid down 10 guidelines which are referred supra.

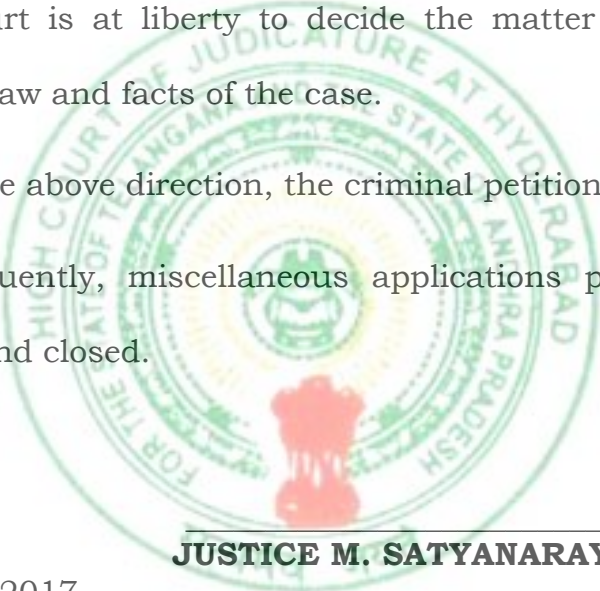
There is no quarrel regarding the law laid down by the Apex Court in **Bhadresh Bipinbhai Sheth³** case. But, the relief under Section 438 Cr.P.C is purely discretionary and the Court has to exercise its discretion judiciously.

In the present case on hand, the offence allegedly committed is not so serious offence requiring immediate decisions by a Higher Court and all the offences are triable by Court of Judicial Magistrate. In such a case, instead of exercising judicial discretion, to entertain such an application, it is appropriate the direct the

petitioners to approach the Sessions Court for grant of pre-arrest bail exercising power under Section 438 Cr.P.C by applying the principle laid down by this Court. If, there is eminent danger to the liberty of the petitioner, then there is any amount of justification in entertaining such application by-passing the jurisdiction of the Sessions Court. But here, there is no eminent threat of arrest. In such a case, it is appropriate to direct the petitioners to approach the Sessions Court exercising discretion by applying the principle laid down in **Chendrasekhara Rao** case. On such filing an application by the petitioners before the Sessions Court, the Sessions Court is at liberty to decide the matter on the settled principles of law and facts of the case.

With the above direction, the criminal petition is disposed of.

Consequently, miscellaneous applications pending if any, shall also stand closed.



JUSTICE M. SATYANARAYANA MURTHY

Dated: 13.04.2017

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