

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CRIMINAL PETITION No.2011 of 2017

ORDER:

This Criminal Petition under Sections 438 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), is filed to enlarge the petitioners 1 to 3 on pre-arrest bail since they are apprehending arrest in connection with unregistered crime on the file of Visakhapatnam Mahila Police Station, Visakhapatnam District.

Admittedly, no crime was registered as on today for any specific offence and it is not known whether the police are going to register a bailable or non-bailable offence and in such a case, the court cannot grant a blanket pre-arrest bail.

In **Shri Gurbaksh Singh Sibbia case and Ors. v. State of Punjab¹**, discussed on the scope of granting anticipatory bail and in **Savitri Agarwal and ors v. State of Maharashtra²**, the Supreme Court laid that wide discretionary power conferred by the Legislature on the higher echelons in the criminal justice delivery system cannot be put in the form of straight-jacket rules for universal application as the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. A circumstance which, in a given case, turns out to be conclusive, may or may not have any significance in another case. While cautioning against imposition of unnecessary restrictions on the scope of the Section, because, in its opinion, over generous infusion of constraints and conditions, which were not to be found in Section 438 of the Code, could make the provision constitutionally vulnerable, since the right of personal freedom, as enshrined in Article 21 of the Constitution,

¹ AIR 1980 SC 1632

² AIR 2009 SC 3173

cannot be made to depend on compliance with unreasonable restrictions, the Constitution Bench laid down the following guidelines, which the Courts are required to keep in mind while dealing with an application for grant of anticipatory bail:

i) Though the power conferred under Section 438 of the Code can be described as of an extraordinary character, but this does not justify the conclusion that the power must be exercised in exceptional cases only because it is of an extraordinary character. Nonetheless, the discretion under the Section has to be exercised with due care and circumspection depending on circumstances justifying its exercise.

ii) Before power under Sub-section (1) of Section 438 of the Code is exercised, the Court must be satisfied that the applicant invoking the provision has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere "fear" is not belief, for which reason, it is not enough for the applicant to show that he has some sort of vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the Court objectively. Specific events and facts must be disclosed by the applicant in order to enable the Court to judge of the reasonableness of his belief, the existence of which is the *sine qua non* of the exercise of power conferred by the Section.

iii) The observations made in **Balchand Jain v. State of M.P.**³ regarding the nature of the power conferred by Section 438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot be treated as conclusive on the point. There is no warrant for reading into Section 438, the conditions subject to which bail can be granted under Section 437(1) of the Code and therefore, anticipatory bail cannot be refused in respect of offences like criminal breach of trust for the mere reason that the punishment provided for is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the Court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

iv) No blanket order of bail should be passed and the Court which grants anticipatory bail must take care to specify the offence or the offences in

³ (1976) 4 SCC 572

respect of which alone the order will be effective. While granting relief under Section 438(1) of the Code, appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One such condition can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the recovery. Otherwise, such an order can become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed.

v) The filing of First Information Report (FIR) is not a condition precedent to the exercise of power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.

vi) An anticipatory bail can be granted even after an FIR is filed so long as the applicant has not been arrested.

vii) The provisions of Section 438 cannot be invoked after the arrest of the accused. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

viii) An interim bail order can be passed under Section 438 of the Code without notice to the Public Prosecutor but notice should be issued to the Public Prosecutor or to the Government advocate forthwith and the question of bail should be re-examined in the light of respective contentions of the parties. The ad-interim order too must conform to the requirements of the Section and suitable conditions should be imposed on the applicant even at that stage.

ix) Though it is not necessary that the operation of an order passed under Section 438(1) of the Code be limited in point of time but the Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of FIR in respect of the matter covered by the order. The applicant may, in such cases, be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonable short period after the filing of the FIR.

In view of the law declared by the Apex Court, the Court cannot grant blanket order of pre-arrest. If there is tangible material before the Court, there is a possibility of registering the crime in respect of the petitioner, then the court can grant pre-arrest bail. Therefore, the present

petition is not based on any tangible material and consequently, the petition is liable to be dismissed.

In the result, the criminal petition is dismissed. However, the petitioner is at liberty to file a bail application as and when the crime is registered.

Miscellaneous petitions, if any, pending in this criminal petition, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date:14.03.2017
ccm



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