

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment delivered on : January 18th, 2017

+ **BAIL APPLN. 28/2017**

VIJAY SINGH

..... Petitioner

Through Mr.Pradeep Kumar and Ms.Kiran,
Advs.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through Mr.Panna Lal Sharma, APP with SI
Jaibir, PS Alipur.

AND

+ **BAIL APPLN. 26/2017**

VIJAY SINGH

..... Petitioner

Through Mr.Pradeep Kumar and Ms.Kiran,
Advs.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through Mr.M.S. Oberoi, APP with SI
Bijender, PS Swaroop Nagar.

**CORAM:
HON'BLE MR. JUSTICE P.S.TEJI**

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ORDER

P.S. TEJL, J.

1. The present applications under Section 439 read with Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as the Cr. P.C.) have been filed by the petitioner for seeking regular bail in a FIR No.14/2016, under Sections 363/365/368/370/ 346/310/120-B/34 IPC, Police Station Alipur (Bail Appln. 28/2016) and in FIR No.50/2016, under Sections 363/367/368/372/373/34 IPC, Police Station Swaroop Nagar (Bail Appln. 26/2017).

2. Perusal of orders passed by the trial court shows that a prayer was made by the accused to grant him interim bail for a period of three months, but the same was not considered rather he was granted interim bail for two months vide order dated 27.08.2016. After considering the request of the accused for the grant of three months' interim bail and granting him interim bail for two months and then further considering his request for extension of interim bail firstly vide order dated 02.11.2016 and then vide order dated 09.11.2016 tantamounts to review of its own order which is not permissible under the criminal law.

3. The provisions of the grant of bail are contained in Sections 437, 438 and 439 IPC. Section 437 is reproduced as under :

“437. When bail may be taken in case of non-bailable offence. (1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than

the High Court or Court of Session, he may be released on bail, but-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence: Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm: Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that It is just and proper so to do for any other special reason: Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court.]

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient

grounds for further inquiry into his¹ guilt the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail] or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court may impose any condition which the Court considers necessary-

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice.

(4) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2), shall record in writing his or its reasons or special seasons] for so doing.

(5) Any Court which has released a person on bail under sub-section (1) or sub-section (2), may, if it

considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non- bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non- bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.”

4. Bail under Section 437 Cr.P.C. is to be sought in a case where the accused is arrested or detained in case of non-bailable offence and produced before a Magistrate. As per Section 437 Cr.P.C, in non-bailable cases in which the person is not guilty of an offence punishable with death or imprisonment for life, the court will exercise its discretion in favour of granting bail subject to sub-section (3) of section 437 if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the court which may defeat the proper investigation and fair trial, the court will not decline bail to

a person who is not accused of an offence punishable with death or imprisonment for life. The jurisdiction under this Section is discretionary but it is required to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interest of the society in general.

5. Section 438 Cr.P.C. reads as under :

“438. Direction for grant of bail to person apprehending arrest.”-(1)Where any person has reason to believe that he may be arrested on 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 that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter-alia, the following factors, namely-

(i)the nature and gravity of the accusation;

(ii)the antecedents of the applicant including the fact as to whether he 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; and.

(iv)where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail.”

6. Section 438 Cr.P.C. provides for the grant of bail in the matters where an accused is apprehending arrest and he can be granted bail

after taking into consideration various factors. The object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a Court has either taken cognizance of the complaint or the investigating agency has filed a chargesheet, would not by itself prevent the concerned courts from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the concerned courts while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of charge sheet cannot by themselves be construed as a prohibition against the grant of anticipatory bail.

7. Section 439 Cr.P.C. is quoted here below:

“439. Special powers of High Court or Court of Session regarding bail.

- (1) A High Court or Court of Session may direct-
- (a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in subsection (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub- section;
 - (b) that any condition imposed by a Magistrate when releasing an person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who

is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.”

8. Section 439 Cr.P.C. makes it abundantly clear that an application for the grant of regular bail can be moved by an accused while he is “*in custody*”. It is only while “*in custody*” an application under Section 439 Cr.P.C. can be moved for the grant of bail. In the present matter, what appears that the application under Section 439 Cr.P.C. was moved by the accused before the trial court on 16.11.2016 when he was not in custody rather he was outside the jail on that day. It is apparent from the record that the application for the grant of regular bail under Section 439 Cr.P.C. was moved by the accused before the trial court on 16.11.2016. For that reason, the bail application moved by the accused/petitioner before the Court of Session was not maintainable.

9. Hon’ble Apex Court in the case of *Sunita Devi v. State of Bihar and Anr. AIR 2005 SC 498* observed as under :

“In view of the clear language of Section 439 and in view of the decision of this Court in *Niranjan Singh and Anr. V. Prabhakar Rajaram Kharote*

and Ors. 1980 CriLJ 426, there cannot be any doubt that unless a person is in custody, an application for bail under Section 439 of the Code would not be maintainable. The question when a person can be said to be in custody within the meaning of Section 439 of the Code came up for consideration before this Court in the aforesaid decision.”

10. Similarly, in ***D.K. Ganesh Babu v. P.T. Manokaran and Ors.*** ***AIR 2007 SC 1450***, it was observed that :

“In *Nirmal Jeet Kaur v. State of M.P. and Anr.* (2004 7 SCC 558 and *Sunita Devi v. State of Bihar and Anr.* Criminal Appeal arising out of the case of *AIR 2005 SC 498* disposed of on 6.12.2004, certain grey areas in the case of *K.L. Verma’s case* (supra) were noticed. The same related to the observation “or even a few days thereafter to enable the accused persons to move the Higher Court, if they so desire”. It was held that the requirement of Section 439 of the Code is not wiped out by the above observations. Section 439 comes into operation only when a person is “in custody”. In *K.L. Verma’s case* (supra) reference was made to *Salauddin’s case* (supra). In the said case there was no such indication as given in *K.L. Verma’s case* (supra), that a few days can be granted to the accused to move the higher Court if they so desire. The statutory requirement of Section 439 of the Code cannot be said to have been rendered totally inoperative by the said observation.”

11. In view of the above discussion and in view of the law laid down in the case of ***Sunita Devi*** (supra) and ***D.K. Ganesh Babu*** (supra), this Court is of the considered that the application for the

grant of bail under Section 439 Cr.P.C. can be moved by an accused only in the case while he is “*in custody*” and none else.

12. Now coming to the facts of the instant case. As per the allegations leveled in FIR No.14/2016, Police Station Alipur, it is alleged against the accused that a child aged about 1 or 1½ years was kidnapped from the custody of his father. Accused was arrested in the present case and he was found involved in other cases of human trafficking of children of tender age. During the course of investigation, role of the accused was found in the kidnapping of the child and kidnapped child was recovered. It was also revealed that accused had conversation with his co-accused Rehan about the child kidnapped in the instant case and such recording is available with the police.

13. As per the allegations leveled in FIR No.50/2016, Police Station Swaroop Nagar, it is alleged against the accused that the complainant Md.Shakeel had made a statement to the police that his son Md.Hasim aged 1½ years was playing in front of his house. Two unknown persons came on a motorcycle and kidnapped the son of the complainant. During investigation, accused/petitioner along with co-accused persons was apprehended and kidnapped child was recovered at the instance of co-accused Kundan and others.

14. The allegations leveled against the accused/petitioner is serious in nature to the effect that above mentioned two FIRs have been registered against him for his alleged involvement in the case of kidnapping of children of tender age. It is also alleged against the

accused that he is involved in several such cases of human trafficking.

15. *The provision of Section 439 of the Cr.P.C. is restricted to be invoked by the person already “in custody”.*

16. Keeping in view the seriousness of the allegations and the specific role assigned to the petitioner in the commission of crime alleged against him, this Court is not inclined to grant bail to the accused/petitioner.

17. Both the bail applications are accordingly dismissed.

18. Before parting with the order, this court would like to place it on record by way of abundant caution that whatever has been stated hereinabove in this order has been so said only for the purpose of disposing of the prayer for bail made by the petitioner. Nothing contained in this order shall be construed as expression of a final opinion on any of the issues of fact or law arising for decision in the case which shall naturally have to be done by the Trial Court seized of the trial.

19. Keeping in view the observations made in para 15, a copy of this order be sent to all the District & Sessions Judges of Delhi with a direction to circulate the order amongst all the criminal courts under their respective jurisdiction for information.

(P.S.TEJI)
JUDGE

JANUARY 18, 2017
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