

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

Crl.P. No.2548 OF 2018

ORDER:

This criminal petition is filed under Section 439(2) Cr.P.C. to cancel the anticipatory bail granted on 14.02.2018 in Crl.P.No.1403 of 2018.

2. The case of the petitioner is that respondents 2 to 4 suppressing the real facts obtained anticipatory bail. Respondents 2 to 4 also filed Writ Petition No. 3213 of 2018 and the same is pending before this Court. The police also failed to bring the said fact to the notice of the Court. The respondents have committed serious offences and the same has to be investigated by the police, and the sole purpose of investigation would fail due to accused being enlarged on bail. It is also contended that there are some unexplained discrepancies with respect to the date of filing of complaint on 22.01.2018 and the same was registered on 31.01.2018. It is also mentioned in the complaint that the accused have been threatening the petitioner with dire consequences, if the petitioner approaches any one including police. The subsequent event is suffice to conclude that the accused violated the terms and conditions of the bail and it is in contravention of Section 439(2) Cr.P.C. A3 made the Court believe that he was at Thimmasamudram, which is around 100 kms from Vijayawada. Even otherwise the distance can be covered within a span of 1 ½ hours from Thimmasamudram to reach Vijayawada. Further it is contended that the custodial interrogation of accused is necessary by the police for completion of investigation. But the Court overlooked this fact and failed to take into consideration of the facts

and circumstances of the case and till today, the property allegedly stolen from the petitioner is not recovered including the documents. When the bail is obtained by playing fraud on the Court, the Court can exercise power under Section 439(2) Cr.P.C. and prayed to cancel the pre-arrest bail granted on 14.02.2018.and set aside the same.

3. During hearing, learned counsel for the petitioner vehemently contended that when the bail was obtained by playing fraud, the Court can cancel pre-arrest bail. In view of the grounds raised in the petition, the bail is required to be cancelled and placed reliance of the Apex Court in **Directorate of Enforcement and another v P.V.Prabhakar Rao¹, Savitri Agarwal and others v State of Maharashtra and another², Bharat Chaudhary and another v State of Bihar and another³, State Rep.by the C.B.I. v Anil Sharma⁴, Ram Govind Upadhyay v Sudarshan Singh and others⁵, State v Captain Jagjit Singh⁶ and Gajanand Agarwal v State of Orissa and others⁷**. On the strength of the principles laid down in the above judgments, learned counsel for the petitioner contended that when a custodial interrogation is required to elicit truth and property is to be recovered, granting of pre-arrest bail to the accused is an irregularity. Therefore, requested the Court to cancel the bail granted to respondents 2 to 4.

¹ (1997) 6 SCC 647

² (2009) 8 SCC 325

³ (2003) 8 SCC 77

⁴ (1997) 7 SCC 187

⁵ (2002) 3 SCC 598

⁶ AIR 1962 SC 253

⁷ (2006) 12 SCC 131

4. Whereas, learned counsel for respondents 2 to 4 while supporting the order passed by the Court, placed reliance in **Abdul Basit Alias Raju and others v Mohd. Abdul Kadir Chaudhary and another**⁸ and prayed for dismissal of the petition.

5. This Court issued direction to the Station House Officer, Penamaluru Police Station, Vijayawada, Krishna District to release A1 to A3 in Crime No.75 of 2018 in the event of their arrest. In para 3 of the order, this Court observed that the incident occurred due to property dispute between the parties and one incident as per the complaint was on 15.01.2018, but the same was not reported to the police. Even this incident is occurred on the day prior to 22.01.2018, the crime got to be registered only on 31.01.2018. This Court concluded that there is a doubt in the case of the prosecution and granted pre-arrested bail with certain directions.

6. The petitioner, who is the *de facto* complainant, raised various grounds mainly on the ground that the Court failed to record sufficient reason to grant pre-arrest bail to respondents 2 to 4 and that the anticipatory bail was obtained by playing fraud on the Court and that the custodial interrogation of respondents 2 to 4 is required to elicit true facts for interrogation by police. But it appears that the State/respondent No.1 did not raise such contention before this Court at the time of granting anticipatory bail to respondents 2 to 4.

7. Learned counsel for the petitioner mainly demonstrated that this Court failed to record reason for granting anticipatory

⁸ (2014) 10 SCC 754

bail. No doubt, the Court is required to record reasons either for granting or refusing bail. In the present case, the Court expressed its opinion that in view of discrepancy and civil disputes between the parties concluded that it is a fit case to grant pre-arrest bail. To grant pre-arrest bail, the basic requirement is that the Court has to come to a *prima facie* conclusion that accused did commit no offence, but no such satisfaction is recorded by the Court while granting pre-arrest bail. For the acts of the Court, the party should not be suffered on the principle of *actus curiae neminem gravabit*.

8. Learned counsel for the petitioner while contending that this Court ignored the basic requirement to grant pre-arrest bail and sought to cancel the bail placing reliance in **Captain Jagjit Singh's** case referred supra. In para 5 of the judgment, the Apex Court held that it appears that the respondent has been committed to the Court of sessions along with the other two persons under Section 120-B of the Indian Penal Code and under Sections 3 and 5 of the Act read with Section 120-B. Prima facie therefore, a case has been found against the, respondent under Section 3, which is a non-bailable offence. It is now the Court to consider whether the order of the High Court should be set aside. Among other considerations, which a court has to take into account in deciding whether bail should be granted in a non-bailable offence, is the nature of the offence; and if the offence is of a kind in which bail should not be granted considering its seriousness, the Court should refuse bail even though it has very wide powers under Section 498 of the Code of Criminal Procedure. From the law declared by the Apex Court in the above judgment, the Court has

to take into consideration of the gravity of the offence and nature of offence and power exercised under Section 439 Cr.P.C.

9. In **Gajanand Agarwal's** case referred supra, the Apex Court adverted to the order passed by the High Court and when no reason has been indicated by the High Court for granting bail except stating that in the peculiar facts and circumstances of the case the bail was being granted because the accused is in custody for ten months, is illegal. The principle laid down in the above judgment is directly applicable to the present facts of the case. But for the act of the Court, the party should not be put to sufferance.

10. In **Ram Govind Upadhyay's** case referred supra, the Apex Court held that for grant of pre-arrest bail, considerations for cancellation of such an order of bail are independent and do not overlap each other, but in the event of non consideration of considerations relevant for the purpose of grant of bail and in the event an earlier order of rejection available on the records, it is a duty incumbent on the High Court to explicitly state the reasons as to why the sudden departure in the order of grant as against the rejection just about a month ago. The subsequent FIR is on record and incorporated therein are the charges under Sections 323 and 504 IPC in which the charge sheet have already been issued. Thus it is clear from the principle laid down therein, the Court is required to record reasons giving departure to the earlier order, which was passed about a month ago rejecting the bail to the petitioner. In such a case, the Court can set aside the order in the

absence of reasons recorded by the Court while granting pre-arrest bail.

11. In **Bharat Chaudhary's case** referred supra, the Apex Court reiterated the object behind grant of pre-arrest bail and held that the power under Section 438 Cr.P.C. can be exercised either by Court of Session or High Court or the Apex Court even when cognizance is taken or a charge sheet is filed. The object of Section 438 Cr.P.C is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The Court has either taken cognizance of the complaint or the investigating agency has filed a charge sheet, would not by itself, in the opinion of the Apex Court, prevent the Courts concerned 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 Courts concerned while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of a charge sheet cannot by itself be construed as a prohibition against the grant of anticipatory bail.

12. If the above principle is applied to the present facts of the case having regard to the allegedly the offence committed by the accused and the gravity of offence is not on par with serious offence against human body like murder, but it is only a theft etc. Even if the gravity of the offence is taken into consideration, the question of custodial interrogation is to be considered only when the investigation agency requested for grant of custodial interrogation to elicit the truth. But the investigating agency did

not raise any objection for grant of pre-arrest bail on the ground that custodial interrogation is required. In such a case, the *de facto* complainant is not competent person to decide whether custodial interrogation is necessary or not and it is for the Investigating Agency to decide whether custodial interrogation is necessary or not. Hence, it is not a ground to cancel the pre-arrest bail.

13. In **Anil Sharma's case** referred supra, the Apex Court held that to grant pre-arrest bail, the custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials, which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third degree methods need not be countenanced, for such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders.

14. Even the above principle is applied to the present facts of the case, it is for the Investigating Agency to decide whether the

custodial interrogation is required or not, but not the *de facto* complainant.

15. In **Savitri Agarwal's** case referred supra, the Apex Court at para 23 held as follows:

"Generalizations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, Courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher Courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by Courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges".

16. In view of the above guidelines, the Court has to keep in mind the gravity of offence. Here in this case, the offence is not punishable with imprisonment for life or capital punishment. The petitioner himself was claiming cancellation of bail stepping into the shoes of Investigating Agency as if custodial interrogation of A1 to A3 is required. But, it is not for the petitioner to decide whether custodial interrogation of A1 to A3 is required to elicit the truth or for recovery of any property allegedly stolen by A1 to A3.

17. In **P.V.Prabhakar Rao's** case referred supra, the Apex Court held as follows:

“The most glaring feature which even the respondent did not repudiate is the magnitude of the criminal conspiracy hatched, the ingenuity with which the cabal was orchestrated and the meticulousness with which it was implemented and the colossal amount of foreign exchange siphoned off from the country. It is not disputed that whomsoever perpetrated this grave economic offence deserves to be dealt with sternly under law.”

18. In view of the law declared by the Apex Court in the above judgments, the prime duty of the Court to grant pre-arrest bail, record quantitative and valid reasons. In any view of the matter, the facts of the case discloses that there was a dispute with regard to the succession of property i.e. Seetha Mahalaxmi executed will in favour of Kamala and later handed over corrected copy to the *de facto* complainant and obtained pattadar passbook, title deeds etc for the agricultural lands.

19. In **Siddharam Satlingappa Mhetre vs State Of Maharashtra And Ors⁹**, the Apex Court laid down the following guidelines to grant pre-arrest bail.

- 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 facts 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;
- iv) The possibility of the accuser'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 case of large magnitude affecting a very large number of people;

⁹ (2011) 1 SCC 694

- 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 case in which accused is implicated with the help of Section 34 and 149 of IPC, 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 witnesses 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.

20. From the facts of the case, the dispute is with regard to the succession of property. Such question is purely civil in nature. Moreover, the Apex Court highlighted the purpose of granting pre-arrest bail in **Gurbaksh Singh Sibbia and Others v. State Of Punjab**¹⁰.

21. Power under Section 438 Cr.P.C is purely discretionary and the Court has to exercise its power judicially based on settled principles, but the circumstances may vary from case to case and the law regarding grant of bail is literally discussed by the Constitutional Bench in **Gurbaksh Singh Sibbia** 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

¹⁰ 1980 AIR 1632

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.

22. No hard and fast rules can be laid down in discretionary matters like the 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; told, equally, 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 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 consideration for grant or refusal of grant 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** case. Though, according to the judgment of the Apex Court, even in economic offences, the Court can grant anticipatory bail, subject to satisfaction of other grounds.

23. Even if the above principles applied to the present facts of the case, the offence committed by the accused is under Section 379 IPC which is non bailable and the other offences are bailable. The gravity of the offence if taken into consideration by applying the law laid down by the Apex Court, the Court can exercise, its discretionary power under Section 438 Cr.P.C. as held in **Gurbaksh Singh Sibbia** referred supra.

24. Learned counsel for respondents 2 to 4 while contending that the cancellation of bail on the ground of it being unjustified, illegal or perverse the remedy available is to challenge in superior Court or forum and placed reliance in **Abdul Basit @ Raju's** case referred supra. The Apex Court held that although the Court granting bail can cancel the bail on the ground of accused's misconduct or new adverse facts having surfaced after the grant of bail, however, in view of express bar contained in Section 362 Cr.P.C., it cannot review its order as to grant of bail on ground of it being unjustified, illegal or perverse. Such challenge to bail order on ground of it being illegal or contrary to law can be determined only by the Court superior to the Court which granted bail.

25. In **State (Delhi Administration) v Sanjay Gandhi**¹¹ the Apex Court laid down the guidelines to exercise power under Section 439(2) Cr.P.C. to issue such direction, which is reiterated in **Surendra Singh v State of Bihar and others**¹². Similarly, the Apex Court in **C.B.I, Hyderabad v Subramani Gopalakrishnan and another**¹³ at para 21 laid down the following guidelines:

“21) It is also relevant to note that there is difference between yardsticks for cancellation of bail and appeal against the order granting bail. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted. Generally speaking, the grounds for cancellation of bail are, interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concessions granted to the accused in any manner. These are all only few illustrative materials. The satisfaction of the Court on the basis of the materials placed on record of the possibility of the accused absconding is another reason justifying the cancellation of bail. In other words, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial.

26. Unless subsequent act of accused falls within the parameters, the Court cannot exercise power under Section 439(2) Cr.P.C. to issue direction to the accused to surrender before police and commit him to prison.

27. The present case would not fall within the ambit of the guidelines issued by the Apex Court in **Sanjay Gandhi**'s case referred supra. On overall consideration of facts and circumstances of the case, including law laid down by the Apex

¹¹ AIR 1978 SC 961

¹² 1990 Cr.L.J 1904

¹³ Cr.L.A.Nos.985-986 of 2011, dt 21.04.2011

Court in various judgments, I find that it not fit case to cancel the pre-arrest bail granted to respondents 2 to 4/A1 to A3. The remedy left open to the petitioner is to challenge the order before the superior Court as stated in **Abdul Basit @ Raju and others's case** referred supra, but that cannot be challenged on the ground that this Court failed to assign reason. Even otherwise, taking into consideration, gravity and seriousness of offence, the bail granted by this Court cannot be cancelled by exercising power under Section 439(2) Cr.P.C. and consequently, the criminal petition is liable to be dismissed.

28. In the result, the criminal petition is dismissed. However, it is left open to the petitioner to challenge the order passed by this Court before superior Court by following the judgment of the Apex Court in **Abdul Basit @ Raju and others's case** referred supra.

Pending miscellaneous petitions in the petition, if any, shall stand closed.

M.SATYANARAYANA MURTHY,J

17.04.2018
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