

In the High Court of Punjab and Haryana at Chandigarh

Reserved on : 14.08.2018

Date of Decision: September 05, 2018

1) *CRM M-16853 of 2018 (O&M)*

Ashwani Chawla

.... Petitioner

Versus

State of Haryana

... Respondent

2) *CRM M-17896 of 2018 (O&M)*

Ashwani Chawla

... Petitioner

Versus

State of Haryana and another

... Respondents

3) *CRM M-17889 of 2018 (O&M)*

Ashwani Chawla

... Petitioner

Versus

State of Haryana

... Respondent

CORAM: HON'BLE MR. JUSTICE P.B. BAJANTHRI

Present: Mr. Manish Soni, Advocate,
for the petitioner.

Mr. Ashish Sanghi, DAG, Haryana.

Ms.Munisha Gandhi, Sr. Advocate with
Mr. Viraj Gandhi, Advocate,
for the complainant.

P.B. Bajanthri, J.

1. By this common order, all these three criminal misc. petitions
i.e. CRM M-16853, 17896 and 17889 of 2018 are being decided together.

2. In the afore-mentioned three petitions, petitioner has
questioned the validity of order dated 17.01.2018 of the Judicial Magistrate

First Class, Gurugram (for short 'JMIC') whereby application filed by the petitioner for exemption from personal appearance has been dismissed, as well as, order dated 06.04.2018 passed in application for anticipatory bail under the provisions of Section 438 Cr.P.C. by the Additional Sessions Judge, Gurugram, (for short 'ASJ'), imposing costs to the tune of Rs. 1,00,000/- in each case in favour of the complainant-respondent upon which he was allowed fresh bail on furnishing sureties.

3. Gist of the matter are as follows:-

a) From Bail Application bearing No. 460 of 2018, it is asserted that petitioner was regularly attending hearings, however, on 17.01.2018, he was not well and was not in a position to attend the court hearings. Trial court was duly informed in this regard in the morning itself along with a written application for exemption but, strangely, said fact is not correctly mentioned in the zimni orders with regard to passing order in respect of issuance of non-bailable warrant and later on in subsequent order of the same date trial Court on pretext of non-availability of medical certificate at that point of time wrongly declined the exemption application and passed wrong orders. Resultantly, the bail order of the petitioner was canceled and non-bailable warrant stood issued against him. Hence, he has an apprehension that trial Court may send him in judicial custody or he be arrested. Therefore, the application under Section 438 of the Code of Criminal Procedure, 1973.

b) Three criminal complaints under reference were filed on 14.03.2013 under Sections 138 & 141 of the Negotiable Instruments Act, 1881 by the complainant-company against the

accused-company (M/s Catmos Pvt. Ltd., through its Managing Director Ashwani K. Chawla) as well as against Ashwani K. Chawla by his name as accused No.2-petitioner, he being the signatory of bounced cheques. Parties entered agreement dated 11.11.2009 for supply of ready-made garments by the respondent-complainant to the accused person - petitioner. Petitioner placed purchase orders bearing No.1003-1023 between 21.11.2011 and 28.12.2011 for total value amounting Rs.7,22,24,338/- excluding excise duty & sales tax. Respondent-complainant accordingly supplied 257 garments styles having different sizes, commonly described in the trade as 'SKUS' out of total 303 'SKUS' and delivery was duly received by Petitioner. Respondent-complainant was constrained to withhold delivery of remaining garments on account of gross defaults in payments. There was exchange of e-mails between the parties over the topic and in the meantime 14 cheques issued by the petitioner stood dishonored. Statutory legal notices regarding thereto were issued by the respondent-complainant upon which petitioner proceeded to make payment amounting to Rs.32,10,187/- pertaining to those cheques. Thereafter, vide letter dated 31.08.2012, petitioner acknowledged and admitted its outstanding liability of Rs.4,75,72,580/- as on that day towards respondent and sent nine post-dated cheques for different amounts and bearing different dates between 08.09.2012 and 30.11.2012 regarding outstanding amount. Cheques when presented from time to time stood dishonored by the banker upon which respondent given notices dated 18.12.2012 and thereby

called upon the accused to pay a sum of Rs.1,60,00,000/-, but to no response. Consequently, respondent was compelled to file complaint. Total claim of the respondent through three criminal complaints under reference is stated to be Rs.4,41,03,528/-.

c) Perusal of the JMIC record goes to show that order of summoning to face trial under Section 138 of Negotiable Instruments Act, 1881 was passed against the accused on 06.02.2013. Petitioner - Ashwani K. Chawla surrendered before the court on 10.06.2013 and was allowed to bail in sum of Rs.5,00,000/- with one surety. On very next hearing fixed on 19.07.2013, he avoided to appear in person, but JMIC gone allowing his application seeking exemption. On 31.07.2013, notice of accusation was served upon the petitioner. On four consecutive hearings fixed on 17.08.2013, 02.09.2013, 19.09.2013 and 24.09.2013, petitioner remained absent, but his application seeking exemption from appearance were allowed. When he again failed to appear on 07.10.2013, JMIC gone forfeiting his bail-bonds and issued non bailable warrants against him. He then failed to put the presence and ultimately was declared a proclaimed offender vide order dated 23.12.2013.

d) Petitioner - Ashwani K. Chawla ultimately surrendered before the court on 24.05.2014 and gone tendering bank draft in the sum of Rs.20,000/- in favour of respondent-complainant as per directions of this Court dated 09.05.2014 in his favour upon which he was allowed fresh bail in the sum of Rs.5,00,000/- with one surety. Trial was again put into motion. Respondent-complainant's

evidence stood closed on 07.10.2015 and one of the reasons for this delay was that petitioner had sought six exemptions in the intermittent period (on 07.07.2014, 22.08.2014, 16.10.2014, 12.11.2014, 16.03.2015 and 30.07.2015). Thereafter, petitioner remained in custody for about six months at District Jail, Delhi and not produced by Jail authorities as he was required in many more other cases at different cities. His statement under Section 313 Cr.P.C., was recorded on 24.05.2016 and matter stood adjourned to 07.07.2016 for defence evidence. The defence evidence was closed on 28.08.2017. When matter was running fixed for arguments on 17.01.2018, petitioner had already availed the exemption from appearance on 22 occasions during entire course of trial and had moved various other applications from time to time which stood dismissed (two applications dismissed on 02.09.2013, one application dismissed on 16.10.2014, one application dismissed on 23.11.2016 and last application dismissed on 02.11.2017) which dragged the trial.

Extract of the order dated 17.01.2018 consists of three different orders, which are as follows :

“Ist order :

*Present : AR for complainant in person represented by
Sh. JK Dang, Advocate.*

Accused not present.

Today case was fixed for arguments. Case called several times since morning but neither accused nor his counsel has appeared on behalf of accused. Proxy counsel Sh. Paras Yadav, Adv., appeared on behalf of accused and

requested for adjournment. When he was asked about the whereabouts of accused, he pleaded his ignorance. Let, the case file be taken up after lunch."

IIInd order:

*"Present : AR for complainant in person represented by
Sh. JK Dang, Advocate.*

Accused not present.

It is 02.00 PM now. Case called several times. Neither defence counsel nor anyone appeared on his behalf. Complainant's counsel Sh. JK Dang, Adv., is present in the court and is also ready to argue the matter but in the absence of accused or his counsel, no proceedings can be conducted. Hence, this court has no other option but to issue non bailable warrants against the accused. His bail is cancelled and bail bonds be forfeited to the State. Now, non bailable warrants against accused be issued for 29.01.2018. Notice to his surety be also issued for next date of hearing."

IIIrd order :

*"Present : AR for complainant in person represented by
Sh. JK Dang, Advocate.*

Accused not present.

It is 02.30 PM now. At this stage, Sh. Paras Yadav, proxy counsel again appeared before the court and moved an exemption application on behalf of accused stating that the accused is suffering from viral fever. Exemption application is not supported by any medical certificate. Complainant and his counsel who kept on waiting since morning have left the court premises. This court has already issued non bailable warrants against the accused. The accused is in habit of moving such kind of exemption applications. His conduct has already been noted in the previous orders

passed by this court. It seems that the accused has no regard for this court and he is taking the things in a very casual manner. The defence counsel is also not appearing in the court despite repeated instructions from the court to argue the matter. The case has already been delayed considerably due to the casual approach of the accused and his counsel. Considering the act & conduct of the accused, the exemption application of the accused from personal appearance stands dismissed. Now, the case stands adjourned to the date already fixed, i.e., for 29.01.2018, for issuance of non bailable warrants against the accused."

e) Application seeking pre-arrest bail, the past record of the petitioner is not unblemished. Once he was declared a proclaimed person on account of his unjustified absence after which he was fortunate enough that this Court allowed him pre-arrest bail. For as many as 22 times, he has availed liberty of the court to remain exempted from personal appearance at the time of call of the case. At no stage, he informed the court in advance about his inability to come present on the date fixed in his matter. On 17.01.2018, his counsel Sh. Paras Yadav, Advocate was before the court to request for an adjournment, but even he was not informed by the petitioner about alleged illness and it was for this reason that the counsel pleaded his ignorance about the whereabouts of the petitioner. Now petitioner is coming with a counter allegation over the court that trial court was duly informed about his ill health still trial court, to his strange, not correctly mentioned in the zimni orders in the morning itself that there is a written application seeking exemption from appearance. Court has no

reason to disbelieve JMIC when the trial court in its first zimni order refers the presence of Sh. Paras Yadav, Advocate with a sorry figure about the whereabouts of the petitioner. Petitioner has not whispered even a single word about the conduct of his counsel Sh. Paras Yadav, Advocate and it strengthens that Sh. Paras Yadav, Advocate was actually present before the court on said day, but petitioner was even having a communication gap with his counsel. Petitioner is further levelling allegation over the presiding officer that JMIC on the pretext of non availability of medical certificate at that point of time wrongly declined the exemption application and passed wrong orders. No medical certificate of petitioner has been placed before court to show that petitioner was actually medically declared unfit to attend the court on 17.01.2018. Conduct of the petitioner although makes a tough case, but courts in India are always humane and never go low to teach a lesson to the accused at the stage of grant of concession of bail even if accused has committed some procedural lapses in such like matters. The focus of the courts always remains over deciding the cases on its merits. Since all the three cases before JMIC have already riped and were running fixed for final arguments when the petitioner turned absent in each of them, hence, while deciding his application under the provisions of Section 438 Cr.P.C., Addl. Sessions Judge taken this into account observed, ends of the justice will met if petitioner - Ashwani K. Chawla is stood directed to surrender before JMIC on 11.04.2018 to attend further hearings in all those

matters under a protective order of this court, but he has to indemnify the inconveniences faced by the respondent - complainant, so, he will have to tender bank draft in the sum of rupees one lakh in favour of respondent - complainant in each of the three complaints as costs for unnecessary harassment to complainant, upon which he would be allowed to fresh bail by JMIC in the sum of Rs.5,00,000/- with one surety. The above mentioned cost will, however, not be considered as any payment under the provisions contained under section 446 Cr.P.C. In other words, learned JMIC will have to initiate appropriate steps under section 446 Cr.P.C against the petitioner and his surety, as per law and the above direction for payment of cost to the respondent - complainant can well be considered as a mitigating instance in favour of the petitioner in said proceedings. Bail applications stand disposed of accordingly.

4. Learned counsel for the petitioner in respect of imposition of cost in bail application to the tune of ₹ 1,00,000/- in each case along with surety. It was submitted that while considering grievance under Section 438 Cr.P.C., there is no provision for imposing cost. In support of the said contention, he relied on decision in the case of ***Amaldoss and others Vs. State, Rep. by the Inspector of Police, Patteeswaram Police Station, Thanjavur District*** reported in ***2015 (13) R.C.R. (Criminal) 809*** and ***Dalip S. Dahanukar Vs. Kotak Mahindra Company Limited and another*** reported in ***2007 (6) SCC 528***.

5. Per contra learned counsel for the respondent submitted that having regard to the conduct of the petitioner which is narrated in the

impugned order, Court below has exercised the power to impose cost of ₹ 1,00,000/- in each case while extending the benefit of bail to the petitioner. Therefore, the cited decisions are not helpful to the petitioner.

6. Heard the learned counsel for the parties.

7. First question before this Court is that whether petitioner can challenge the order dated 17.01.2018 under the provisions of Section 482 Cr.P.C. instead of Section 397 Cr.P.C?

8. Supreme Court in the case of ***United Bank of India vs. Satyawati Tandon and others***, reported in (2010) 8 SCC 110, para no. 44 held as under:-

“44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.”

9. In view of above observation, petitioner has no case to set aside the order dated 17.01.2018.

10. Further question of interfering with the order dated 17.01.2018 at this juncture does not arise for the reasons that it lost its effect due to order dated 06.04.2018. Order dated 17.01.2018 is still hold good in the eyes of law as it was passed keeping in view the conduct of the accused. Consequence of this order do not exist due to grant of bail vide order dated 06.04.2018 and its merger in the order of granting bail. Moreover, petitioner had not filed revision against the aforesaid order and approached this Court without availing the remedy of revision. The order dated 17.01.2018 required to be questioned within 90 days. Therefore, on the question of delay in challenging to the order dated 17.01.2018 make this court not to interfere with the same. Accordingly, prayer qua the order stands dismissed.

11. For the purpose of imposing cost of the Addl. Sessions Judge, under the provisions of Section 438 Cr.P.C., it is necessary to go through the provisions. For the sake of convenience, 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:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer-in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

*(2) When the High Court or the Court of Sessions makes a direction under sub-section (1), **it may include such conditions in such direction in the light of the facts of the particular case, as it may think fit, including:***

(i) a condition that the person shall make himself available for interrogation by a police officer as

and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) Such other condition as may be imposed under Section 437(3), as if the bail were granted under that Section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the court under sub-section (1).”

Section 437 (3) Cr.P.C. reads as under:-

“(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 or the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court shall impose the conditions -

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

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

(c) *that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence, and may also impose, **in the interests of justice, such other conditions as it considers necessary.***”

Since the offence is bailable and petitioner is willing to furnish the bail and join the proceedings, so the Court has no occasion to reject the bail except on the ground of conduct of the petitioner. Since, the court can impose whatever the condition as think fit including the condition envisaged under Section 438 Cr.P.C. Similarly, the Court while disposing of petitioner's bail impose condition of payment of Rs. One lakh as costs to the complainant-respondent. Secondly, the petitioner was not exempted from the proceeding under Section 446 Cr.P.C. and he was remain bound to honour the bond and trial. Court was given liberty to proceed with the proceeding under Section 446 Cr.P.C. Meaning thereby, he was punished on two-fold. One by way of imposing cost and second by way of 446 Cr.P.C. proceedings. Reading of the provisions of Section 438 Cr.P.C., there is no power with the court to impose cost. However, the Court can impose any condition to secure the presence of accused before the Court, not any cost.

12. Whenever an application is made under Section 438 Cr.P.C. seeking bail, Court could examine the factual aspect and proceed to either accept or reject the bail application with the conditions which are stated under Section 438 of the Cr.P.C. Perusal of the statutory provision of Section 438 of Cr.P.C., it is evident that Court is not empowered to impose cost while granting bail. If the Court below is of the view that petitioner's

conduct was appreciable in not extending bail in that event ample power was vested with the Court to reject the bail instead of imposing cost with reference to his conduct while extending the benefit of bail. In view of the facts and circumstances, question of imposing cost while granting bail under Section 438 Cr.P.C. is impermissible having regard to Section 438 Cr.P.C. read with the decision cited supra.

13. Accordingly, CRM M-16853, 17896 and 17889 of 2018 are allowed to the extent of quashing cost of ₹ 1,00,000/- in each of the petition imposed vide order dated 06.04.2018 in bail applications.

September 05, 2018
vkd

[P.B. Bajanthri]
Judge

Whether reasoned / speaking : Yes

Whether reportable : No