

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

CRM-M No. 42702 of 2018

Date of decision : 28.11.2018

Aslam Khan

.....Petitioner

Versus

State of Punjab

...Respondent

CORAM : HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present : Mr. Deepak Sonak, Advocate for the petitioner.

Ms. Samina Dhir, DAG, Punjab.

Mr. B. S. Sidhu, Advocate for the complainant.

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DAYA CHAUDHARY, J.

Petitioner Aslam Khan has approached this Court by filing the present petition under Section 438 of the Code of Criminal Procedure, 1973 for grant of anticipatory bail to him in case FIR No.94 dated 30.05.2015 under Sections 406, 420, 120-B of the Indian Penal Code, 1860 registered at Police Station – Mattaur, Distt. SAS Nagar (Mohali).

Learned counsel for the petitioner submits that the petitioner has falsely been implicated in the case, whereas he was working as driver with one Naresh Goyal. As per the allegations in the FIR, an amount of ₹10,00,000/- was received by said Naresh Goyal. Petitioner had signed the agreement to sell under good faith being the employee of Naresh Goyal, whereas he was neither the owner of the property nor he had received the money. Learned counsel also submits that co-accused Neeraj Gupta has

been released on anticipatory bail by the trial Court.

Learned State counsel has disputed the submissions raised by learned counsel for the petitioner on the ground that there are specific allegations against the petitioner that he had executed the agreement to sell. An amount was also paid by the complainant. Learned State counsel further submits that the main accused namely Naresh Goyal, who had received the amount, filed anticipatory bail *i.e.* CRM-M No.17991 of 2016 and it was withdrawn on 31.08.2016. Said Naresh Goyal was declared proclaimed offender in the other case. Learned State counsel further submits that earlier the case was adjourned as the petitioner wanted to settle the dispute with the complainant but he did not make any efforts to settle the dispute. The present petitioner is the main accused as he had signed the agreement to sell and he is a member of a gang involved in a number of cases and complaints. The petitioner entered into agreement to sell with the complainant and allured him to purchase the plot. An amount of ₹10,00,000/- was received, whereas he was not owner of the plot. A false plea has been taken that he was working with Naresh Goyal. There was connivance between the petitioner and co-accused Naresh Goyal.

Heard learned counsel for the parties and have also perused the FIR and other documents available on the file.

It is not disputed that the agreement to sell was executed by the petitioner with complainant, which was duly signed by him. There was no plot in his name and the amount of consideration was also paid. In spite of giving date for execution of sale deed, it was not got executed.

Subsequently, the complainant came to know that there was no plot in the name of the petitioner and the agreement to sell was based on forged and fake documents. Two cheques were given to the complainant by the co-accused which were dishonoured. As submitted by learned State counsel, all the accused are involved in number of cases including the petitioner who have actively participated in the commission of offence with joint modus operandi and caused financial loss to the complainant. During pendency of the petition, the complainant was ready to settle the dispute in case the amount paid to the accused is returned but in spite of having date, the amount was not returned.

It has been settled in various judgments of Hon'ble the Apex Court as well as judgments of this Court that there is a distinction in custodial and non-custodial interrogation and the consequent result of the investigation. There is a perceptible difference in the results of interrogation when a person who has an order of anticipatory bail in his hand and goes to the investigating agency. Under such circumstances, he does not cooperate with the investigating agency and does not want to give correct answer to the questions put to him by the Investigating Officer to reach at the bottom of the case as against the person who is in custody or who does not have protection of anticipatory bail. Same view has been held by Hon'ble the Apex Court in cases ***State Vs. Anil Sharma AIR 1997 SC 3806*** and ***Muraleedharan Vs. State of Kerala AIR 2001 SC 1699***.

It is a well settled law that anticipatory bail cannot be claimed as a matter of right but it is a concession and the same is to be granted by

considering various factors. For grant of anticipatory bail, the nature, gravity of offence as well as role of the accused is to be seen. There are certain factors, which are to be considered while granting bail under Section 438 Cr.P.C. Hon'ble the Apex Court in a judgment rendered in ***Bhadresh Bipinbhai Sheth Vs. State of Gujarat and another 2015 (8) JT 125*** has summarized certain factors to be taken into consideration while granting anticipatory bail, which are reproduced as under:

“The principles which can be culled out, for the purposes of the instant case, can be stated as under:

(i) The complaint filed against the accused needs to be thoroughly examined, including the aspect whether the complainant has filed a false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.

(ii) The gravity of charge and the exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases, the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

(iii) It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion to grant bail must be exercised on the basis of the

available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined the investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided. A great ignominy, humiliation and disgrace is attached to arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.

(iv) There is no justification for reading into Section 438 Cr.P.C. the limitations mentioned in Section 437 Cr.P.C. The plenitude of Section 438 must be given its full play. There is no requirement that the accused must make out a “special case” for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 Cr.P.C. to a dead letter. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.

(v) The proper course of action on an application for anticipatory bail ought to be that after evaluating the averments and accusations available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the anticipatory bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of anticipatory bail. The Public Prosecutor or the complainant would be at liberty to move the same court for cancellation or modifying the

conditions of anticipatory bail at any time if liberty granted by the court is misused. The anticipatory bail granted by the court should ordinarily be continued till the trial of the case.

(vi) It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the Public Prosecutor or the complainant, on finding new material or circumstances at any point of time.

(vii) In pursuance of the order of the Court of Session or the High Court, once the accused is released on anticipatory bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

(viii) Discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under Section 438 Cr.P.C. should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

(ix) No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with legislative intention, the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case.

(x) We shall also reproduce para 112 of the judgment wherein the Court delineated the following factors and parameters that need to be taken into consideration while dealing with anticipatory bail:

(a) The nature and gravity of the accusation and the exact

role of the accused must be properly comprehended before arrest is made;

(b) 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;

(c) The possibility of the applicant to flee from justice;

(d) The possibility of the accused's likelihood to repeat similar or other offences;

(e) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(f) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(g) 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 the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution, because overimplication in the cases is a matter of common knowledge and concern;

(h) 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 free, fair and full investigation, and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(i) The Court should consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(j) 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 in

entitled to an order of bail.

For the reasons as mentioned above and keeping in view the totality of circumstances explained above, I am of the view that it is not a fit case where the petitioner is entitled for anticipatory bail. Custodial interrogation is required for reaching at the bottom of the nexus to unearth modus operandi adopted by the accused in preparing the forged agreement to sell by causing financial loss to the complainant. Accordingly, the present petition being devoid of any merit is hereby dismissed.

28.11.2018*sunil yadav***(DAYA CHAUDHARY)
JUDGE**

Whether speaking/reasoned : Yes / No

Whether reportable : Yes / No