IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.34035 of 2018

Arising Out of PS. Case No.-285 Year-2013 Thana- BUDDHACOLONY District- Patna

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Nayyar Khurshid S/o Dr. M.K. Haque, R/o Flat No. 406, Surya Vihar, Exhibition Road, P.S.- Gandhi Maidan, Town and District- Patna.

... ... Petitioner/s

Versus

The State Of Bihar

... ... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. P.K. Sahi, Sr. Advocate
Mr.Sanjan Kumar Sharan

For the Opposite Party/s : Mr.Sri Kumar Virendra Narayan

For the Informant : Mr. Umesh Prasad Singh, Sr. Advocate

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

ORAL ORDER

18 24-04-2019 Heard learned counsels for the parties.

The petitioner is apprehending arrest in a case registered for the offences punishable under Sections 409,420,467,468 and 120B/34 of the IPC.

The prosecution case as per the written report of Pradeep Kumar Sinha, Unit Head, M/s Sahara India Mass Communication, Patna submitted to the SHO, Buddha Colony Police Station is to the effect that the petitioner Nayyar Khurshid was working in the office of the Sahara India as Business Advisor and was responsible for sale and publication of advertisement of Urdu newspaper 'Roznama Rashtriya Sahara' from 28.8.2006 to 31.7.2013 on payment of allowance of Rs.34000/- per month, on yearly contractual basis. The petitioner was responsible for collection of fund from advertisement and sale of the Urdu newspaper and to deposit in the account of Sahara Organisation. In publication of advertisement in the said Urdu newspaper, since the Company suffered perpetual loss, hence an enquiry was conducted and it was found that the petitioner, in order to have political gain, caused economic loss to M/s Sahara India Mass Communication, in conspiracy with his associates, namely, Kumari Nirmala Anshula Ekka, Kumari Arshi, Md. Shamim and Md. Tahir. During enquiry, it was found that the petitioner under a planned conspiracy, through the correspondents and stringers misused the money received in lieu of the advertisement through his private assistant Rup Narayan and got the amount deposited in the account of Kumari Nirmala Anshula Ekka, Kumari Arshi, Md. Shamim and Md. Tahir in different branches of State Bank of India and Bank of Baroda. It is specifically alleged that the petitioner, from 2006 to September, 2010, collected an amount of Rs.1,34,22,538/-, in lieu of the publication in the said newspaper through different stringers but it was not deposited in the account of Sahara India Mass Communication. Similarly, from 2010 to 31.10.2013, Rs.78,00,305/- was collected through correspondents and stringers in lieu of the advertisement but the same was not deposited. As such the petitioner and other accused persons misappropriated a total amount of Rs.2,13,13,843/-.

It is submitted by learned Senior counsel for the petitioner that in order to appreciate the issue of delayed filing of anticipatory bail application requires a look to the factual details in chronological order suggests that initially the petitioner preferred an application vide Cr. Misc. No. 2600 of 2014 with a prayer for anticipatory bail in the aforementioned case, but since the petitioner had already preferred Cr. Misc. No. 321 of 2014, with a prayer for quashing of the FIR of Buddha Colony PS Case No. 285 of 2013, wherein, vide order dated 4th August, 2014, passed by a bench of this Court the further proceeding of the learned court below in the said case was stayed, accordingly, the application for grant of anticipatory bail (Cr. Misc. No. 2600 of 2014) was disposed of as infructuous with a liberty to the petitioner to agitate afresh if at all necessary. The said Cr. Misc. No. 321 of 2014 along with Cr. Misc. No. 7983 of 2014 filed by the co-accused Md. Tahir and Md. Samim was finally disposed of by a bench of this Court vide order dated

10.1.2018 directing the investigating agency to conclude the investigation within a period of four months with a liberty to the petitioner to approach this Court again if the investigation is not concluded and directed that since the case has been continuing for very long, the interim protection which has been granted, shall continue till the conclusion of the investigation. Consequently, vide chargesheet no. 111 of 2018, chargesheet was submitted against the petitioner Nayyar Khurshid and co-accused Md. Tahir and Md. Samim for the offences under Sections 420,409,467,468 and 120B/34 of the IPC on 18.4.2018 while the investigation was allowed to continue against Kumari Nirmala Anshula Ekka and Kumari Arshi and a non-FIR accused Rup Narayan. However, the learned Sub-Judge XVI-cum-ACJM, Patna vide order dated 28.5.2018 took cognizance for the offences under Sections 420,409,467,468 and 120B/34 of the IPC and issued summons against the petitioner and co-accused Md. Tahir and Md. Shamim. The filing of the chargesheet against the petitioner has been challenged in Cr. Misc. No. 39227 of 2018 and subsequently by amendment the order of cognizance has been also challenged which is pending before this Court.

On merits of accusation, learned counsel submits that it is not the case of the informant that the petitioner received any money in lieu of the advertisement or that he operated any account in which such money was deposited. On the contrary, the petitioner lodged a complaint bearing Complaint Case No. 2141 of 2013 on 21.6.2013 against the informant and others wherein ultimately cognizance has been taken for the offences with accusation under Sections 323 and 504 IPC only, thereafter, the present FIR was lodged on 30.11.2013. There was no statutory audit and it was in the internal audit of the company wherein it was found that the employees working under the petitioner, after collecting money in lieu of advertisement from the strangers, actually deposited the same in their accounts. The initial audit report is dated 13.10.2008, hence it is apparent that the irregularity came to the notice of the management in the year 2008. Under such circumstances, the lodging of the F.I.R. in the year 2013. i.e., after five years, creates doubt on the bona fide of the F.I.R., particularly when, much prior to that, the petitioner had made a complainant dated 1.4.2013, as contained in Annexure 6, about the state of affairs to Sandeep Wadhwa, the Head of Media and Entertainment (SIME), Noida, giving the details of the area in which the enquiry should be made and thereafter, vide letter dated 19.5.2013, as contained in Annexure 9, the petitioner brought the details of accounts to the notice of A.A. Zaidi, Head (HR), Sahara India and consequently, a detailed complaint, as contained in Annexure 10 was submitted to J.B. Roy, Managing Editor, SIMC, Noida also. In fact, the petitioner was not looking after the marketing. It was being looked after by Rup Narayan and this fact was brought to the notice of J.B. Rai, Managing Editor, SIMC, Noida. Thus, it is submitted that even assuming the entire accusation to be true, it is at best, a case of lack of control or the petitioner being less vigilant and as such, no case under Sections 420,409,467,468 and 120B/34 of the IPC is made out against the petitioner.

It is also submitted that the present anticipatory bail application of the petitioner is maintainable in view of the liberty given by a bench of this Court (Hon'ble Mr. Justice Akhilesh Chandra, since retired) vide order dated 21.11.2014 passed in Cr. Misc. No. 2600 of 2014, as contained in Annexure 1.

So far as issuance of cheque of Rs.32,72,388 dated by the petitioner in favour of the company and subsequently directing the banker to stop payments are concerned, it is submitted that the cheque was issued on the assurance of the company but when the petitioner realized that it was false promise, he directed the banker to stop payment and hence, it cannot be made a ground for presuming that the petitioner misappropriated the alleged amount or it amounts to accepting his guilt by the petitioner. It is lastly submitted that the petitioner is ready to cooperate during trial and will appear regularly before the learned trial court. Statement has been made in paragraph 3 of the petition that the petitioner is not having any criminal antecedent.

Mr. Umesh Prasad Singh, learned Senior counsel appearing for the informant submits that the present anticipatory bail application is not maintainable in view of the fact that the initial bail application was disposed of on the ground that the stay of the further proceeding of learned Court below is operating by virtue of interim order passed in the quashing application being Cr. Misc. No. 321 of 2014 and the said quashing application has now been disposed of extending the operation of interim order till the conclusion of investigation. However, since now the chargesheet has been submitted and order of cognizance has been passed, hence only remedy which is available to the petitioner is that he should surrender before the learned Court below and pray for regular bail. Learned Senior counsel has heavily relied upon the judgment of the Supreme Court in the case of Salauddin Abdulsamad Shaikh Vs. State of Maharashtra, (1996) 1 SCC 667, wherein it has been held that if anticipatory bail is granted for a limited duration then after submission of charge sheet, it should be left open to the regular Court to consider the issue of grant of bail on consideration of evidence collected during investigation.

Learned Senior Counsel for the informant further submits that the petitioner was the incharge of the publication of advertisement including finance marketing and circulation of Rashtriya Sahara and Urdu Daily newspaper Roznama. During investigation, the statements of Sams Tabrez, Md. Asif Hussain, Nausad Ahmad, Md. Neyaz Kasmi, Afaque Asad Azad, Firoz Alam and Istihak Alam were recorded under Section 164 of the Cr.P.C. before the learned Judicial Magistrate Ist Class, Patna on 28.1.2014 and 11.2.2014. The said statements are contained in Annexure B series to the counter affidavit filed on behalf of the informant, which suggest that the amounts in lieu of the advertisement were being deposited in the account of the subordinate employees of the petitioner at the instance of the petitioner and the account holder used to withdraw the amount as per desire of the petitioner but no amount was ever given to the company and one of the employees working under the petitioner, namely, Anshula Ekka, in her bail application, filed before the learned Sessions Judge, has stated that she used to withdraw the money and give it to the petitioner. The petitioner promised to reimburse the company and in lieu thereof, he had issued the cheque of Rs.32,72,388/- dated 18.6.2013.

It is lastly submitted by learned Senior counsel for the informant that the petitioner did not allow the investigation to conclud for a considerable period, however, it was only concluded when a bench of this Court while disposing of the quashing application, fixed a period of four months to conclude the investigation.

Learned APP appearing for the State, however, supports the argument of learned Senior counsel for the informant and submits that since charge sheet has been submitted, hence the petitioner should surrender and pray for regular bail.

<u>RE:- Maintainability of Instant Anticipatory Bail Application.</u>

Having heard learned Senior counsels for the parties, it is true that initial anticipatory bail application of the petitioner was disposed of since interim order was passed in the quashing application but the liberty was given to the petitioner to renew the prayer for anticipatory bail if necessary. In this context, relevant portion of the order dated 21.11.2014 passed in Cr. Misc. No. 2600 of 2014 is quoted here under:-

> "Further, it is also undisputed that further proceedings of the court below have already been stayed in the aforesaid proceeding.
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> In that view of the matter, this application (in connection with Budha Colony P.S. Case No. 285 of 2013, G.R. No. 7065 of 2013, pending before Judicial Magistrate Ist Class, Patna) has become infructuous, accordingly, stands disposed of with a liberty to the petitioner to agitate afresh if at all, necessary."

Hence, on this score, it cannot be said that the present anticipatory bail application is not maintainable, because under Section 438 of the Cr.P.C., any person may apply for anticipatory bail if he has reason to believe that he may be arrested on accusation of having committed a non-bailable offence. In the present case, after charge sheet being submitted and after lapse of the interim order passed in the quashing application and the consequent order of taking cognizance being passed, the petitioner is having a reasonable apprehension giving him a cause to maintain instant anticipatory bail application.

So far as ratio laid down by the Three Judge Bench in the case of Salauddin (supra) prescribing grant of anticipatory bail for a limited period, has been considered by the Supreme Court in the case of Bharat Choudhary Vs. State of Bihar and Ors. (2003) 8 SCC 77 and it is held that the said judgment does not put any restriction on the power of the Court empowered to grant anticipatory bail under Section 438 of the Cr.P.C. Paragraph 8 of the judgment reads as follows:

> “8. The learned counsel, as stated above, has relied on the judgment of this Court referred to herein above. In that case i.e. namely Salauddin Abdulsamad Shaikh, a three-Judge Bench of this Court stated thus :-
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> "When the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration, the court granting anticipatory

bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted. Ordinarily the court granting anticipatory bail should not substitute itself for the original court which is expected to deal with the offence. It is that court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail."

From a careful reading of the said judgment we do not find any restriction or absolute bar on the concerned Court granting anticipatory bail even in cases where either cognizance has been taken or a chagesheet has been filed. This judgment only lays down a guideline that while considering the prima facie case against an accused the factum of cognizance having been taken and the laying of chargesheet would be of some assistance for coming to the conclusion whether the claimant for an anticipatory bail is entitled for such bail or not. This is clear from the following observations of the Court in the above case:

"It is, therefore, necessary that such anticipatory bail orders should be of limited duration only and ordinarily on the expiry of the duration or extended duration, Court, granting anticipatory bail, should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or chargesheet is submitted."

From the above observations, we are unable to read any restriction on the power of the courts empowered to grant anticipatory bail under Section 438 of the Crl. P.C. We respectfully agree with the observations of this Court in the said case that the duration of anticipatory bail should be normally limited till the trial court has the necessary material before it to pass such orders and it thinks fit on the material available before it. That is only a restriction in regard to blanket anticipatory bail for an unspecified period. This judgment in our opinion does not support the extreme argument addressed on behalf of the learned counsel for the respondent-State that the courts specified in Section 438 of the Crl.P.C. are denuded of their power under the said Section where either the cognizance is taken by the concerned court or charge sheet is filed before the appropriate Court. As stated above this would only amount to defeat the very object for which Section 438 was introduced in the Cr.P.C. in the year 1973. As observed above and having heard the learned counsel for the parties, we are of the considered opinion that the appellants in this case should be released on bail, in the event of their being arrested, on their furnishing a self

> bond each for a sum of Rs.5,000/- and a surety to the like sum. The appellants shall abide by the conditions enumerated in Section 438 of the Code."

The factual foundation of Salauddin Abdul Samad Sheikh case is different from the present one. As in the aforesaid case the accused was granted anticipatory bail till conclusion of investigation but in the present case, the petitioner's earlier anticipatory bail application was disposed of since interim order passed in quashing application was operating, however, liberty was given to the petitioner to renew the prayer if such occasion arises. Hence, the petitioner was never granted privilege of anticipatory bail for limited period.

In this context the Constitution Bench Judgment of the Apex Court in the case of Gurbaksh Singh Sibbia & Ors. Vs. The State of Punjab, AIR 1980 Supreme Court 1632, (hereinafter referred to as Sibbia's case) which still holds the field, also suggests that the order under Section 438 of the Cr.P.C. cannot be limited in point of time. Paragraph 38 of the judgment will be useful in this context, which reads as follows:

> "38. There was some discussion before us on certain minor modalities regarding the passing of

> bail orders under S. 438(1). Can an order of bail be passed under that section without notice to the public prosecutor? It can be. But notice should issued to the public prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the 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. Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. 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 an 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 S. 437 or 439 of the code within a reasonably short period after the filing of the F.I.R. as aforesaid. But this need not be followed as an invariable rule. The normal should be not to limit the operation of the order in relation to a period of time."

A perusal of the order passed in Salauddin (supra) shows that the same was passed without reference to any earlier binding precedent including the judgment of the Constitution Bench in Sibbia's case, on the issue of duration of anticipatory bail. Demonstrably, the view taken by the Court in Salauddin's case is clearly contradictory to the dictum laid down by the Constitution Bench in Sibbia's case.

The issue with regard to grant of anticipatory bail for the limited period again came to be considered by the Supreme Court in the case of Siddharam Satlingappa Mhetre Vs. State of Maharastra, (2011) 1 SCC 694, wherein relying heavily upon Sibbia's case and considering the judgment passed in Salauddin (supra), the Supreme Court came to the conclusion that the subsequent judgments did not consider the ratio laid down in Sibbia's case. Paragraph 38 of the judgment reads as follows:

> "38.Thus, the law laid down in para 42 by the Constitution Bench that the normal rule is not to limit operation of the order of anticipatory bail, was not taken into account by the courts passing the subsequent judgments. The observations made by the courts in the subsequent judgments have been made in ignorance of and without considering the law laid down in para 42 which was binding on them. In these circumstances, the observations made in the subsequent judgments to the effect that anticipatory bail should be for a limited period of time, must be construed to be per incuriam and the decision of the Constitution Bench preferred."

The Supreme Court in the case of Siddharam Satlingappa Mhetre, further considered the question whether the powers under Section 438 of the Cr.P.C. are unguided or uncanalized or are subject to all limitation of Section 438 of the Cr.P.C. and relying on Sibbia's judgment, came to the conclusion that there is no justification of reading into Section 438 of the Cr.P.C. the limitations mentioned in Section 437 of the Cr.P.C. Paragraph 98 of the judgment reads as follows:

> "98. The question which arises for consideration is whether the powers under section 438 Cr.P.C. are unguided or uncanalised or are subject to all the limitations of section 437 Cr.P.C.? The Constitution Bench in Sibbia's case (supra) has clearly observed that there is no justification for reading into section 438 Cr.P.C. and the limitations mentioned in section 437 Cr.P.C. The Court further observed that the plentitude of the section must be given its full play. The Constitution Bench has also observed that the High Court is not right in observing 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. The Court observed that "We do not see why the provisions of Section 438 Cr.P.C. should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable."

It was further held that no restriction should be imposed on the ambit and scope of Section 438 of the Cr.P.C.

Paragraph nos. 113 and 134 read as follows:

> "113. It is a settled legal position crystallized by the Constitution Bench of this court in Sibbia's case (supra) that the courts should not impose restrictions on the ambit and scope of section 438 Cr.P.C. which are not envisaged by the Legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it.
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> 134. In view of the clear declaration of law laid down by the Constitution Bench in Sibbia's case (supra), it would not be proper to limit the life of anticipatory bail. When the court observed that the anticipatory bail is for limited duration and thereafter the accused should apply to the regular court for bail, that means the life of section 438 Cr.P.C. would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The Constitution Bench in Sibbia's case (supra) clearly observed that it is not necessary to re-write section 438 Cr.P.C. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under section 438 Cr.P.C. granting bail cannot be curtailed."

The principle held in Salauddin's case has further been diluted by the Supreme Court in the case of Siddharam Satlingappa Mhetre's case. In this context, useful reference may be made to Paragraph 133 of the judgment which reads as follows:

> "In our considered view, the Constitution

> Bench in Sibbia's case (supra) has comprehensively dealt with almost all aspects of the concept of anticipatory bail under section 438 Cr.P.C. A number of judgments have been referred to by the learned counsel for the parties consisting of Benches of smaller strength where the courts have observed that the anticipatory bail should be of limited duration only and ordinarily on expiry of that duration or standard duration, the court granting the anticipatory bail should leave it to the regular court to deal with the matter. This view is clearly contrary to the view taken by the Constitution Bench in Sibbia's case (supra). In the preceding paragraphs, it is clearly spelt out that no limitation has been envisaged by the Legislature under section 438 Cr.P.C. The Constitution Bench has aptly observed that "we see no valid reason for rewriting section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court or the Court of Session but, for the purpose of limiting it".

Hence it has been held in Siddharam Satlingappa Mhetre's case that in view clear declaration of law laid down by the Constitution Bench in Sibbia's case (Supra) the life of anticipatory bail cannot be put to a limit. Paragraph no. 134 reads as follows:-

> 134. In view of the clear declaration of law laid down by the Constitution Bench in Sibbia's case (supra), it would not be proper to limit the life of anticipatory bail. When the court observed that

> the anticipatory bail is for limited duration and thereafter the accused should apply to the regular court for bail, that means the life of section 438 Cr.P.C. would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The Constitution Bench in Sibbia's case (supra) clearly observed that it is not necessary to re-write section 438 Cr.P.C. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under section 438 Cr.P.C. granting bail cannot be curtailed."

In view of the above discussions, binding precedents of the Hon'ble the Apex Court as also the liberty granted by a co-ordinate bench of this Court, the objection with regard to maintainability of the instant application is being rejected. Accordingly, the anticipatory bail application is held to be maintainable.

From perusal of the accusation in the FIR and submissions of the learned counsel for the informant, it appears that it is not alleged that any amount was entrusted in lieu of the advertisement made in Urdu daily, to the petitioner or the petitioner operated any account or withdrew any money. This is not in dispute that the money was deposited in the account of certain employees and the said money was withdrawn with their signature from their respective account and at this stage, this Court cannot look into the fact that those employees after withdrawing it, had given it to the petitioner or not. These issues can be raised and examined at the stage of the trial.

Considering the fact that the petitioner has enjoyed the privilege of liberty by virtue of the interim orders passed by the two Benches of this Court passed in quashing applications, being Cr. Misc. No. 2600 of 2014 and 321 of 2014 for a considerable period of almost five years and now the investigation has already concluded, this is not the case of State that petitioner has not co-operated in investigation, no purpose will be served in directing the petitioner to surrender. Hence, keeping in view the nature of accusation, and the fact that the investigation has already concluded, the submission on behalf of the petitioner that he undertakes to appear regularly before the learned Court below, coupled with the statement made in paragraph 3 of the petition that the petitioner is not having any criminal antecedent, let the petitioner above named be released on anticipatory bail in the event of arrest or surrender within 12 weeks on furnishing bail bond of Rs.1,00,000/- (One lac) with two sureties of the like amount each to the satisfaction of the learned Sub Judge, Patna in connection with Buddha Colony P.S. Case No.285 of 2013, subject to the conditions laid down in Section 438(2) of the Cr.P.C.

It is made clear that the petitioner will not leave the country without permission of the learned trial Court and the learned trial Court will be at liberty to cancel the bail bonds of the petitioner if he, without reasonable cause, defaults on three consecutive occasions during trial.

(Dinesh Kumar Singh, J)

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