

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1483 OF 2019

The State of Maharashtra
Through the Azad Nagar Police Station,
Dhule, Dist. Dhule.

... **PETITIONER**

Versus

Sunil Mishrilal Bafna,
Age: 60 years, Occu: Business,
R/o. D/31, Mahendra Wodds,
Wakad, Pune.

... **RESPONDENT**

...
A.P.P.for Petitioner/State : Mr. S.B. Joshi
Advocate for Respondent : Mr. A.G. Talhar
...

CORAM : MANGESH S. PATIL, J.
DATE : 30.09.2019

ORAL JUDGMENT :-

Heard. Rule. The Rule is made returnable forthwith. The learned advocate Mr. A.G. Talhar waives service for the respondent. With the consent of both the sides the matter is heard finally at the stage of admission.

2. The prosecutor submitted an application in the anticipatory bail proceeding initiated by the respondent seeking a direction under Sub-section 4 of Section 438 of the Cr.P.C. to keep him personally present at the time of hearing of anticipatory bail. By the impugned order the learned Sessions

Judge rejected the application of the prosecutor on the ground that since the respondent was not protected by any interim relief, no such request could be entertained.

3. The learned A.P.P. submits that the learned Sessions Judge ought to have considered it independently. The respondent no.2 could have been protected for the time being, instead of rejecting the application of the prosecutor out-rightly. The learned Sessions Judge could have granted interim protection and could have considered the request on its own merits. Therefore the impugned order may be quashed and set aside.

4. The learned advocate for the respondent referring to his affidavit in reply submits that no fault can be found in the impugned order since grant of interim protection is a *sine qua non* for entertaining the request under Sub-section 4 of Section 438 of the Cr.P.C. The learned advocate also referred to various factual aspects touching the merits of the case.

5. Obviously, it is trite that since there was no ad interim bail granted to the respondent no direction under Sub-section 4 of Section 438 of the Cr.P.C. could have been issued which is a condition precedent for exercising that power. To this extent, there is no error committed by learned Sessions Judge.

6. However, it is equally important to note that the learned Sessions Judge has also observed that since the respondent was not seeking any interim relief, a direction under Sub-section 4 of Section 438 of the Cr.P.C. could not be given. Going by the wording of Section 438 of the Cr.P.C. it nowhere requires the applicant to seek any interim protection. The scheme of the provision is quite apparent. Whenever an application for anticipatory bail is filed the Court is expected to hear it on merits and in an appropriate case it may straightway reject it considering various aspects. It is thereafter laid down that if the Court decides to entertain the application, an interim order has to be passed granting ad interim bail and a notice thereafter is to be issued to the prosecutor. It nowhere requires any request being made by the applicant. Once the Judge decides to entertain the application for anticipatory bail it is imperative on his part to grant ad interim bail and it is only thereafter that notice to the prosecutor is to be issued. There is no such stage as to issue any notice before admission of such application for anticipatory bail.

7. It is therefore apparent that if the prosecutor had filed an application under Sub-section 4 of Section 438 of the Cr.P.C. the Sessions Judge instead of out-rightly rejecting it only on the ground that there was no interim protection could have *suo moto* granted interim protection and

directed the respondent no.2 to remain present at the hearing of the anticipatory bail application. It could have been in the fitness of things and could have protected the rights of both the sides.

8. Considering all the aforementioned aspects, the impugned order to the extent it rejects only the request only for want of an interim protection is liable to be quashed and set aside.

9. The Writ Petition is partly allowed. The impugned order is quashed and set aside. The learned Sessions Judge may grant interim protection to the respondent and then shall re-hear and decide the application filed by the prosecutor under Sub-section 4 of Section 438 of the Cr.PC. on its own merits uninfluenced by the observations made herein-above but shall not reject it only on the ground of there being no ad interim bail. The rule is accordingly made absolute.

[MANGESH S. PATIL, J.]