

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL ANTICIPATORY BAIL APPLICATION NO. 1729 OF 2018

Fazlu Rehman	...	Applicant
V/s.		
The State of Maharashtra & Anr.	...	Respondents

Mr.Manish Mazgaonkar for Applicant.
Mr.Amit Palkar, A.P.P. for Respondent-State.

CORAM : A.S. GADKARI, J.

DATE : 23rd April 2019.

P.C. :

1] This is an application under Section 438 of the Code of Criminal Procedure for pre-arrest bail in connection with C.R. No. I-207 of 2005 originally registered with Mahatma Phule Police Station, District Thane, for the offence punishable under Section 302, 120(b), 34 of the Indian Penal Code and Section 3, 25 (1-b) of the Indian Arms Act.

2] Heard the learned counsel for the applicant and the learned APP for the State. Perused the record of investigation.

3] The learned counsel for the applicant submitted that, the crime in-question is of the year 2005 and the police were well aware of

the fact that the applicant was in jail in some other crime at Sabarmati, State of Gujrat. Despite the said fact the Investigating Officer/Investigating Agency did not seek transfer of the applicant in the present crime for last more than 13 years. He submitted that, this denotes that the Investigating Officer/Investigating Agency is not serious enough in seeking custody of the applicant and therefore, the applicant may be granted pre-arrest bail. He further submitted that, the observations made by the Hon'ble Supreme Court in para No.51 in the case of *Narendrajit Singh Sahni and another Vs. Union of India and Others, reported in (2002) 2 SCC 210*, is '*obiter dictum*' and is not binding on this Court as '*ratio decidendi*'. He submitted that, the said observations are contrary to Section 438 of the Code of Criminal Procedure and de hors of the mandate of law enunciated by the Parliament of India. He, therefore, prayed that the applicant may be protected by pre-arrest bail.

4] At the outset, it is to be noted hear that, it is a fact on record that, the Investigating Agency/Investigating Officer was loath in conducting the investigation of the present crime and arresting the applicant, despite having knowledge as per the record, that the applicant

is a hardened criminal and is involved in various crimes in India. The record further indicates that the Investigating Officer was well aware of the fact that, the applicant was lodged in Sabarmati Jail in State of Gujrat in a cognizable and non-bailable offence and the Court of competent jurisdiction in the State of Gujrat has rejected his bail application. It *prima-facie* appears that, the Investigating Officer is not serious in seeking custody of the applicant. However, being a Constitutional Court, this Court cannot give a go-by to those lapses in conducting the investigation. As per the record itself, the applicant is involved in more than 27 offences of cognizable and non-bailable in nature including offence punishable under Section 302 of the Indian Penal Code.

5] The Hon'ble Supreme Court in the case of *Narendrajit Singh Sahni (supra)* in para 51 has held that, on the score of anticipatory bail, it is trite knowledge that Section 438 of the Code of Criminal Procedure is made applicable only in the event of there being an apprehension of arrest. It is further observed that, the petitioners therein were inside the prison bars upon arrest against all cognizable offence, and in the wake of the question posed by it relieving the petitioners from unnecessary

disgrace and harassment would not arise.

6] As noted earlier, it is the contention of the learned counsel for the applicant that, the observations made by the Hon'ble Supreme Court in para 51 is not *ratio decidendi*. However, in view of this Court, it is '*obiter dictum*' and it is the further trite position of law that even obiter by the Hon'ble Supreme Court is having binding effect on the subordinate Courts and therefore, the contention of the learned counsel for the applicant cannot be accepted.

7] In view of the above and after taking into consideration the gravity of the offence, this Court is of the view that, the applicant does not deserve to be released on pre-arrest bail.

8] Application is, accordingly, rejected.

[A.S. GADKARI, J.]