

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

**CRM-M No. 15464 of 2019
Date of Decision:-04.04.2019**

Balwant Singh @ Banta

...Petitioner

Versus

State of Punjab

...Respondent

CORAM:- HON'BLE MR. JUSTICE MANOJ BAJAJ

Present:- Mr. Gagandeep Singh Manku, Advocate
for the petitioner.

MANOJ BAJAJ J.(Oral)

Petitioner Balwant Singh @ Banta has filed the present petition under Section 438 Cr.P.C. for grant of anticipatory bail in case FIR No.102 dated 23.8.2018, under Section 22 of NDPS Act, 1985 registered at Police Station Subhanpur, District Kapurthala.

Learned counsel for the petitioner was confronted with the issue of maintainability of the petition under Section 438 Cr.P.C., on the ground that the petitioner had already submitted himself before the Court and had moved an application for grant of regular bail under Section 439 Cr.P.C. and the said application stands adjudicated upon vide order dated

08.1.2019.

Learned counsel for the petitioner contends that since the trial Court has issued the non-bailable warrants on 08.1.2019, therefore, the application under Section 438 Cr.P.C. is justified as he has apprehension of arrest pursuant to the said non-bailable warrants.

The submission of learned counsel for the petitioner has been considered and is found without any merit.

The two provisions as contained in the Code of Criminal Procedure, which govern the grant of pre-arrest bail and post arrest bail are distinct and operate in distinct spheres and that too at different stages. A petition for pre-arrest bail is maintainable if the requisite condition under Section 438 Cr.P.C. is fulfilled by the applicant. Whenever a person approaches the High Court or the Court of Sessions for issuance of a direction under Section 438 Cr.P.C. then it is incumbent for him to establish the first and foremost condition of apprehension or likelihood of his arrest on the accusation of having committed a non-bailable offence.

Once such an apprehension exists, the person has a valid reason to approach the competent Court for grant of pre-arrest bail but in case a person is already in custody, the provisions of Section 438 Cr.P.C. has no application.

On the contrary, the provisions governing the concession of regular bail (post arrest) are enshrined in Sections 437 and 439 Cr.P.C.. Section 437 Cr.P.C. confers power upon the Court other than the High Court or the Court of Sessions to grant bail where a person is brought

before it, who being an accused or suspected of the commission of any non-bailable offence. It is further required that the said person/accused stands arrested or is under detention. Section 439 Cr.P.C. confers the special powers for grant of regular bail upon the High Court or the Court of Sessions. One of the essentials to seek the benefit of regular bail is that the person applying for bail is in custody.

It is absolutely clear that these provisions are not over-lapping as they are meant for different purposes and this distinction already stands noticed by Hon'ble Supreme Court in **Gurbaksh Singh Sibbia etc. vs. The State of Punjab 1980 AIR (SC) 1632**, the Larger Bench of Hon'ble Supreme Court has held as under :-

“Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity

against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.

Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned under [Section 437](#) of the Code, as and when an occasion arises. Such a course will defeat the very object of [Section 438](#).

Thirdly, the filing of a First Information Report is not a condition precedent to the exercise of the power under [Section 438](#). The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F.I.R. is not yet filed.

Fourthly, anticipatory bail can be granted even after an F.I.R. is filed, so long as the applicant has not been arrested.

Fifthly, the provisions of [Section 438](#) cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under [Section 437](#) or [Section 439](#) of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested." (Emphasis supplied)

It is clear from the above observations of Hon'ble Supreme Court that the provision of Section 438 Cr.P.C. are not attracted after the arrest of the accused in a particular offence.

Turning to the facts of this case, it is absolutely clear from the order dated 08.1.2019 passed by the trial Court that the accused-petitioner had filed an application under Section 439 Cr.P.C. for grant of regular bail, who already stood arrested for the offence punishable under Section 22/61/85 of NDPS Act. The concession of interim regular bail was extended on 25.10.2018 on a specific ground i.e. the FSL report was awaited. The period of interim bail was also defined i.e. till filing of the FSL Report, which stood filed when the order dated 08.1.2019 was passed.

The petitioner was well aware of this condition and never disputed the same when the concession of interim regular bail was extended to him. It is apparent that upon filing of the FSL Report by the prosecution, the ground for bail ceases to exist and it was incumbent upon the petitioner-accused to surrender himself before the Court on the said date. The FSL Report was filed before the trial Court and after examination of the same, the trial Court on 08.1.2019 proceeded to decide the regular bail application and dismissed the same in view of Section 37 of NDPS Act, 1985.

Consequently, the interim concession extended by the Court came to an end. However, on 08.01.2019, when the order was passed by trial Court, the accused was absent and, therefore, the Court was compelled to issue non-bailable warrants for securing his appearance.

In view of the above discussion, the application filed by the

petitioner for grant of pre-arrest bail under Section 438 Cr.P.C. is not maintainable.

Resultantly, the petition is hereby dismissed.

April 04, 2019
Vijay Asija

(MANOJ BAJAJ)
JUDGE

Whether speaking/reasoned
Whether Reportable

Yes / No
Yes / No