

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

**CRM-M-52245-2018
Date of decision-04.04.2019**

Darshan Kaur @ Darsho

....Petitioner

Vs.

State of Punjab

...Respondent

CORAM:- HON'BLE MR. JUSTICE MANOJ BAJAJ

Present: Mr. B.S.Kathuria, Advocate for the petitioner.

Mr. Kirat Singh Sidhu, DAG, Punjab.

MANOJ BAJAJ, J.

Petitioner has filed this petition under Section 438 Code of Criminal Procedure for grant of anticipatory bail in case FIR No.98 dated 23.04.2018 registered under Section 22 of Narcotic Drugs and Psychotropic Substances Act, 1985 at Police Station Sadar Nakodar, District Jalandhar.

It is not disputed by learned counsel for the petitioner that while considering the regular bail application, filed by accused (petitioner) under Section 439 Cr.P.C., concession of interim bail was extended by trial Court on 24.07.2018, as the report of the FSL was not received.

In compliance of the order dated 28.11.2018, learned State counsel has produced status report by way of affidavit of Parminder Singh (PPS) Deputy Superintendent of Police, Sub Division Nakodar, Jalandhar on behalf of respondent-State which reveals that the FSL report stands filed before the trial Court on 29.08.2018 and after examination of the same, as

per report the intoxicant recovered from the petitioner contains Alprazolam and falls under commercial category, thus bail bonds and surety bonds of the petitioner were forfeited.

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 moved an application for grant of regular bail under Section 439 Cr.P.C, which stand adjudicated.

Learned counsel for the petitioner contends that since the FSL reprot stands filed, therefore, the petitioner shall be taken into custody. Resultantly, the application under Section 438 Cr.P.C would be maintainable.

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

This Court has examined the issue regarding maintainability of the bail under Section 438 Cr.P.C in CRM-M-15464-2019 decided on 04.04.2019, holding that when the accused has submitted himself before the Court and filed an application under Section 439 Cr.P.C, application for pre-arrest bail is not maintainable. The relevant portion reads as under:-

“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.”

In the above decision, the judgment of Hon'ble Supreme Court in **Gurbaksh Singh Sibbia etc. vs. The State of Punjab 1980 AIR (SC) 1632** was followed.

At this stage, the petitioner has produced the order dated 25.04.2018, passed in CRM-M-10540-2018 to contend that the anticipatory bail was granted to a similar situated accused who was granted interim regular bail, as the FSL report was awaited. The order passed in said case has been perused.

With great hesitation and humility to the Coordinate Bench, I am not inclined to follow the said decision as in the said case, the judgment

of Hon'ble Supreme Court in **Gurbaksh Singh Sibbia etc. vs. The State of Punjab 1980 AIR (SC) 1632**, was not brought to the notice of the said Bench. The relevant portion of Supreme Court judgment reads 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.”

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.

(MANOJ BAJAJ)
JUDGE

04.04.2019 vanita	Whether speaking/reasoned :	Yes	No
	Whether Reportable :	Yes	No