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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 21.11.2019

+ CRL.M.C. 1659/2017 & CrI. M.A.6734/2017

ENFORCEMENT DIRECTORATE Petitioner

Through Mr. Amit Mahajan, CGSC with
Ms. Mallika, Adv.

versus

TILAK RAJ ARORA Respondent

Through Mr. Harish Kohli, Mr. Jitesh Sharma,
Ms. Vikash Kumar & Mr, Rohit
Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

1. Vide the present petition, the petitioner seeks directions thereby to set aside the order dated 13.04.2017 passed by the learned Addl. Sessions Judge in ECIR/20/DLZO1/2015/AD PMLA.

2. Brief facts of the case are that the respondent filed the application for anticipatory bail on 6.4.2017 and Ld. Judge vide the impugned order, while disposing of the application for anticipatory bail has passed the direction that the petitioner agency shall serve three working days notice, on proposing to arrest the petitioner in this case.

3. Learned counsel for petitioner submitted that the directions passed by the Ld. Judge are contrary to the settled law. The Apex Court in a catena of judgments has held that the directions of this nature cannot be passed while disposing of application for anticipatory bail. The Hon'ble Supreme Court in the case of ***Union of India vs. Padam Narain Aggarwal (2008) 13 SCC 305*** in identical circumstances has held as under: -

"64. In our judgment, on the facts and in the circumstances of the present case, neither of the above directions can be said to be legal, valid or in consonance with law. Firstly, the order passed by the High Court is a blanket one as held by the Constitution Bench of this Court in Gurbaksh Singh and seeks to grant protection to respondents in respect of any non-bailable offence. Secondly, it illegally obstructs, interferes and curtails the authority of Custom Officers from exercising statutory power of arrest a person said to have committed a non-bailable offence by imposing a condition of giving ten days prior notice, a condition not warranted by law. The order passed by the High Court to the extent of directions issued to the Custom Authorities is, therefore, liable to be set aside and is hereby set aside."

4. Further, submitted that said judgment has been followed by the Supreme Court consistently and more recently in the case of ***State of Telangana vs. Habib Abdulla Jeelani (2017) 2SCC 779*** The Supreme Court has reiterated the law that while exercising power under Section 438, the courts while disposing of the application cannot pass an order which would amount to the grant of anticipatory bail despite the principles of Section 438 Cr.P.C. not being followed. It is the settled law that the courts

while exercising power under Section 438 of Cr.P.C. are governed by the provisions thereof and do not have any inherent power to pass order such as passed in the present case. The limited power available to the Courts exercising power under Section 438 of the Cr.P.C. is to either grant or reject anticipatory bail. The courts are not empowered to travel beyond the dicta of the statute and pass directions not provided under the Act.

5. Learned counsel further submits that the present case relates to a scam involving approximately Rs.3600 crores and is commonly known as Bank of Baroda Scam. During the course of investigation, various persons have been arrested and the petitioner agency is still in the process of unearthing the trail and a large number of people are involved in the present scam. The impugned order passed by the Ld. Judge will hamper further investigation in the case. The respondent has not cooperated in the investigation and has filed the application for anticipatory bail. The Application for anticipatory Bail and the impugned order passed thereof did not even mention or take note of the gravity of offence therein.

6. On the other hand, learned counsel for the respondent submits that the pursuant to the receipt of summons, the respondent appeared before the IO where he was manhandled and was forced to make statement as per his

dictum. Thereafter, he moved an application seeking anticipatory bail and considering the situation, learned Court passed the impugned order by giving directions to the appellant authority that if they come to the conclusion that interrogation is necessary, they will give notice of three working days to the respondent in advance. Thereafter, he again joined investigation as and when called by the petitioner authority.

7. Learned counsel further submitted that he was neither named in the charge sheet nor in the supplementary charge sheet and he succeeded before the PMLA vide order dated 12/13.04.2017 in ANFPA-PMLA 1875/DLT/2017 and the said order has not been challenged, thus has attained finality and thereafter, the respondent was summoned by the petitioner authority.

8. The issue to be decided before this Court is whether the Court has power to direct the Investigating Agency to issue notice prior to arrest

9. The terms 'arrest' is neither defined in the Code of Criminal Procedure, 1973 nor in the Indian Penal Code, 1960 nor there is any enactment dealing with offences demanding arrest. The word 'arrest' is derived from a French word 'ARRATER'. It means to stop, to restrain a person. 'Arrest' is thus restraining of a person, obliging him to be obedient

to law. It may also be defined as “execution of command of law of a duly authorized officer” as observed in **Union Of India vs Padam Narain Aggarwal** (supra).

10. Section 41 to 44 & 46 Cr.P.C. deals with arrest. Section 41 states that police officer may without an order from a Magistrate and without a warrant, arrest any person who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned.

11. As per Section 42 Cr.P.C., when any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

12. According to Section 43 Cr.P.C. any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so

arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station

13. Section 44 Cr.P.C. stipulates that when any offence is committed in the presence of a Magistrate, whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody. Section 46 Cr.P.C. lays down the manner of arrest. Section 438 Cr.P.C. makes special provisions for grant of anticipatory bail which was introduced in the present Code of 1973. The expression 'Anticipatory Bail' has not been defined in the Code but observed in ***Bal Chand Jain vs. State of MP 1977 2 SCR 5266***, that 'Anticipatory Bail' means bail in anticipation of arrest. The expression is a misnomer in as much as the term 'anticipatory bail' is a misnomer. It is not as if the bail is presently granted by the court in anticipation of arrest. When the court grants anticipatory bail, it makes an order that in the event of arrest a person shall be released on bail. Somewhat extraordinary power is exercised only in exceptional cases and is entrusted to the higher echelons of the judicial service namely the court of Sessions and the High Court. It is also observed that it is an extraordinary remedy and should be resorted to only in special

cases. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail, and recommended introduction of a provision for grant of 'anticipatory bail'.

14. Anticipatory bail being an extraordinary remedy available in special cases, this power has been conferred on the higher echelons of judicial service, namely, the Court of Sessions or the High Court.

15. The Code of Criminal Procedure, 1898 (Old Code) did not contain specific provision with regard to Section 438 of the present Code of 1973. Under the old Code, there was a sharp difference of opinion amongst various High Courts on the question whether a Court had inherent power to make an order of bail in anticipation of arrest. The Law Commission of India recommended to introduce express provision by observing as under:-

"The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting

them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail. 497A. (1) When any person has a reasonable apprehension that he would be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section. That Court may, in its discretion, direct that in the event of his arrest, he shall be released on bail”.

16. The following draft of a new section is placed for consideration:

497A. (1) When any person has a reasonable apprehension that he would be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section. That Court may, in its discretion, direct that in the event of his arrest, he shall be released on bail.

(2) A Magistrate taking cognizance of an offence against that person shall, while taking steps Under [Section 204\(1\)](#), either issue summons or a bailable warrant as indicated in the direction of the Court under Sub-section (1).

(3) if any person in respect of whom such a direction is made is arrested without warrant by an officer in charge of a police station on an accusation of having committed that; offence, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, such person shall be released on bail.[Law Commission of India, Forty-first Report, Vol. 1, p.32, para 39.9.]

17. The suggestion of the Law Commission was accepted by the Central Government and in the Draft Bill of the Code of Criminal Procedure, 1970,

Clause 447 conferred an express power on the High Court and the Court of Session to grant anticipatory bail.

30. The Law Commission again considered the issue and stated;

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith".

[Law Commission of India, Forty-eighth Report, para 31]

18. Keeping in view the reports of the Law Commission, [Section 438](#) was inserted in the present Code. Sub-section (1) of [Section 438](#) enacts that when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or to the Court of Session for a direction that in the event of his arrest he shall

be released on bail, and the Court may, if it thinks fit, direct that in the event of such arrest he shall be released on bail.

19. Sub Section (2) of 438 lays down that when the High Court or the Court of Sessions makes a direction under sub- section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit. Sub Section (3) of 438 lays down that if such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub- section (1)

20. Finally, the ratio of judgment of the Hon'ble Supreme Court in the case of PN Aggarwal (supra) is that the Court has power to grant or not to grant anticipatory bail. But the court has no power to direct the IO to issue notice prior to arrest.

21. Thus, the issue raised in the present petition is no more *res integra* and has already been decided in the cases cited above.

22. Accordingly, the impugned order dated 13.04.2017 passed by the ASJ is hereby set aside. However, liberty is granted to respondent to take legal recourse from any appropriate Court / forum, if any cause of action arises.

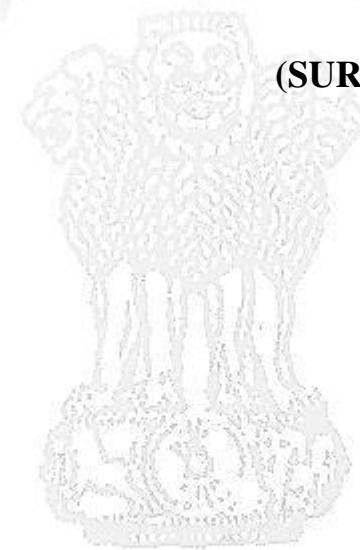
23. The petition is accordingly allowed and disposed of.

24. Pending application, if any, also disposed of.

(SURESH KUMAR KAIT)
JUDGE

NOVEMBER 21, 2019

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