

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPLICATION (BAIL) NO. 28 OF 2020

Mr. Wilson Godinho,
R/o. 3rd Floor,
Navelkar Trade Centre,
M.G. Road, Panaji, Goa.

... Applicant

Versus

1) State of Goa,
Through Public Prosecutor
High Court, Panaji, Goa.

2) The Police Inspector,
Old Goa Police Station,
Goa.

... Respondents

Shri Nitin Sardessai, Senior Advocate with Ms. Gautami Kamat
and Shri Siddharth Sardessai, Advocates for the applicant.

Shri Pravin Faldessai, Additional Public Prosecutor for the
respondent- State.

Shri Bhupesh M. Prabhu Dessai, Advocate for the intervenor.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on : 18th February, 2020.

Pronounced on : 27th February, 2020.

ORDER:

The applicant seeks his release on bail in anticipation of arrest by invoking the jurisdiction of this Court under Section 438 CrPC, 1973. Heard Shri Nitin Sardessai, learned Senior Counsel with Ms. Gautami Kamat, learned Advocate for the applicant, who submitted at the outset that the custodial interrogation of the

applicant was not required in an offence under Section 306 IPC. It was his contention looking to the scene of Crime that it was a case of murder and not suicide. He referred to the complaint of the sister of the deceased dated 18/01/2020 and adverted to the WhatsApp message to submit that it could not have been typed by the deceased within a minute and which he proceeded to demonstrate in Court. It was also his contention that the WhatsApp message purportedly from the deceased relating to his suicide did not co-relate with the WhatsApp chat which the deceased had with his friend which showed minimal grammatical errors unlike those in the WhatsApp message. It was his contention that it was for the Investigating Agency to find out whether the note was planted and whether it was a case of murder or suicide. He placed reliance in **Joginder Kumar v/s. State of UP and others** [1994 4 SCC 260], and **Siddharam Satlingappa Mhetre v/s. State of Maharashtra and others** [(2011) 1 SCC 694] in support of his contention.

2. The gun allegedly used for the suicide was with the Police and so too the phone. He further contended that the intervenor had disturbed the scene of Crime which was an unrebutted

position before going to the Police and reporting the incident. The applicant no sooner had learnt of the WhatsApp message had gone to the Police Station without being armed with an order of anticipatory bail in his favour. He was a family man with business and his reputation was at stake and therefore only because there was a public outcry, there was no basis to arrest the applicant and seek his custodial interrogation. He placed further reliance in **The State of Maharashtra v/s. Anurag Anirudh Sing** [2016 SCC online Bombay 909] and submitted that no recovery was to be made at his instance. He was ready to cooperate and give his statement to the Police and therefore he had to be secured with the favourable order of bail in anticipation of arrest.

3. Shri P. Faldessai, learned Additional Public Prosecutor on behalf of the State invited attention to the ingredients of the offence of abetment to suicide under Section 306 IPC and submitted that the intention of the applicant to recover the money from the deceased amply covered these ingredients. It was his contention that the State was investigating the angle also of murder based on the doubt expressed by the intervenor in her complaint to the Police. On a detailed scene of U.D. Occurrence

Panchanama being drawn at the spot, the 0.32 bore revolver containing bullets and empty case were attached under the Panchanama. The Inquest Panchanama was drawn over the dead body of Prakash and referred to the Police Surgeon to ascertain the exact cause of death. The Forensic Surgeon had certified the cause due to "cranio-cerebral damage as a result of perforating firearm missile injury which was ante-mortem and fresh at the time of death and necessarily fatal". The intervenor in her written complaint alleged that the applicant and one Tahir in furtherance of their common intention had started threatening and pressuring the deceased for the repayment of the amount invested in respect of the property transaction and development situated at Voilem Bhat, Merces which was stopped by the villagers of Merces and thereby forcing her brother to shoot himself thereby abetting him to commit suicide.

4. It was his contention that several statements had been recorded of the family members and the witnesses which indicated that the deceased was noticed to be under tension and pressure and who had disclosed that he had been harassed by the applicant in respect of the property at Voilem Bhat, Merces

which the applicant had purchased through his intervention. The applicant also had approached the deceased to provide him access through the open space and in view thereof the applicant had assured to carry out the development of the property and construct a chapel. The deceased had provided a road to the applicant through the Comunidade property and had also started the development of the open space and the construction of the chapel in the said property which work was stopped as the villagers of Merces opposed the work and stopped the entire development. Since, the project was not completed as assured and the applicant started threatening and harassing the deceased to return the money back due to which he was under tremendous pressure. The complaint of the intervenor also indicated that the possibility of murder could not be ruled out which aspect was also required to be investigated. He further submitted that no doubt the scene of offence was disturbed but there was no reason to infer the involvement of the intervenor.

5. He further submitted that the transaction of the applicant qua the property at Merces had to be investigated. It was not a case that the applicant was not apprehended being the brother of

a local Minister. The investigating agency was carrying out the investigation and only if there was necessity the applicant would be placed under arrest. He placed reliance in **P. Chidambaram v/s. Directorate of Enforcement** [(2019) 9 SCC 24].

6. Shri S.G. Desai, learned Senior Advocate on behalf of the Intervenor who had been permitted to intervene in the proceedings and assist the Prosecution had filed his written synopsis in which he gave a background of the sale transaction relating to the property in question and how the applicant came in contact with the deceased in connection with the said property. The deceased had agreed to provide access through the said property and through the open space provided the applicant spent money to develop the open space by constructing a regular chapel at the place of the existing cross and by developing the open space into a playground and garden etc. and enclosing it with the compound wall to separate from the rest of the property. The applicant had advanced ₹35lakhs or more to the deceased in the interest of his proposal while simultaneously applying for the permission of the local Panchayat for the construction of a compound wall in the said property which did not belong to him

so as to be able to secure access to the property purchased by him. The applicant extended lacks of rupees to the deceased towards the construction of the compound wall, the cross and the park in the amount of ₹35lakhs or more and which compound wall was substantially complete in the open space leaving out space for the road or access to be allotted to the applicant.

7. It was further the case of the intervenor that there was objection from the panch members of local Panchayat seeking a cancellation of the resolution adopted by the panchayat granting permission to the applicant for the construction of the compound wall, cross and play ground. The applicant on receipt of the objections strongly reacted against it and started harassing the deceased and pressurised him to return the sum advanced by him and spent by him on the works and other things. Prakash, since deceased, was therefore, pressurised, threatened and influenced by the applicant from the time the Panchayat members wrote to the Sarpanch requesting for amending or canceling the permission for carrying out the works in the property. The applicant also filed a petition under Section 178 (1) of the Goa Panchayat Raj Act before the Director of Panchayat

praying for the suspension, cancellation of the letter of the Panchayat in respect of the resolution. By order dated 13/09/2019 without giving any notice to the local Panchayat, the Additional Director of Panchayats ex-parte suspended the communication/ objection letter in abuse and misuse of the power and authority vested in her by law. This was brought about since the applicant was a powerful man and able to influence the course of investigation through his brother as he had done in the said petition since his brother is presently a Panchayat Minister. Prakash, since deceased, started getting messages, threats and pressure from the applicant and his business partner Tahir who has surprisingly been left out by Investigating Agency and who had not been called for investigation or arrested till now. The deceased issued a cheque in his own handwriting favouring Wides Properties and Holdings belonging to the applicant in the amount of ₹35lakhs which was found by the intervenor while checking the records left behind by the deceased. This cheque too clearly established that there were transactions between the deceased and the applicant and that the applicant was pressuring him and demanding money from him.

8. It was the contention on behalf of the intervenor that despite the visit of the applicant to the Police Station, the Police allowed him to go inspite of the WhatsApp message accusing him of abetting the suicide which clearly demonstrated that the applicant was a powerful person and could manage the investigation. The intervenor on receipt of the WhatsApp message had rushed to the house of the deceased with her daughter and found 4-5 persons gathered in the porch of the house of the deceased. She had made enquiries with the driver of the deceased who on persuasion revealed that the deceased was in his bedroom. She had found her brother lying still on his bed and tried to wake him up and lifted the bed-sheet with which he was covering his body and surprisingly found his mobile and a revolver lying on his chest. They had then shifted the body to the hospital assuming that he was still alive but was declared brought dead to the hospital. It was the case of the intervenor that the anticipatory bail application was not maintainable in law as he had already moved an identical Application before the sessions judge which was rejected by an order dated 23/01/2020 and in the absence of any change in circumstances from the date of the order on 23/01/2020 till now, a second bail Application

was not tenable. In that context, reliance was placed in **Kamlesh v/s State of Maharashtra** [MANU/MH/1290/2006], **Maya Rani Guin and Etc. v/s. State of West Bengal** [IndianKanoon.Org/doc/1807354], **Kalyan Chandra Sarkar v/s. Rajesh Ranjan @ Pappu Yadav & Another** [IndianKanoon.org/doc/1521407], **Ashok Pundalik Gavade v/s. State of Maharashtra** [2019 SCC online Bom 155] and **State of Maharashtra v/s. Captain Buddhikota Subha Rao** [1989 suppl (2) SCC 605].

9. It was the contention on behalf of the intervenor that the sessions Court having rejected the anticipatory bail application and this Court having concurrent jurisdiction therefore the present Application was not tenable. The investigation carried out by the Old Goa Police Station then and now by the Crime Branch was influenced and not independent because the applicant was politically connected and being the brother of the incumbent Panchayat Minister who was able to influence the investigation to save his brother. Therefore, custodial interrogation of the applicant was required to find out and extract the truth. The applicant was not protected by any order of interim bail during

anticipatory bail application the pendency of the anticipatory bail application nor was he protected by this Court with any interim order of bail in his favour. Therefore in view of the proviso to Section 438 CrPC, the Officer In-charge of the Police Station could arrest the applicant without a warrant. The applicant had not been arrested for the last more than 15 days which established that the applicant and his brother being powerful were controlling the investigation and seeing that the applicant was not arrested and was not subjected to custodial interrogation. The Public Prosecutor was not competent or had acted on the instructions given to him without any sense of attachment. In that context reliance was placed in **Zahira Habibulla Shaikh and another v/s. State of Gujarat and others** [(2004) 4 SCC 158]. It was further their contention that the investigating Agency had disregarded the efficacy and relevancy of the WhatsApp messages which constituted the dying declaration of the deceased. There was no basis in the case of the State that the deceased was murdered and this line of investigation was being done intentionally in order to protect the accused and he was not at all arrested for the offence under Section 306 IPC.

10. The accusations against the applicant has been made on a sound footing and not with an object of injuring or humiliating him since the accusations against the applicant have come from dying declaration having evidentiary value. The grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the applicant and collecting useful information apart from the material concealed by him. In the event, the applicant was secured with such an order, it would definitely hamper investigation. Anticipatory bail should not be granted to the applicant as custodial interrogation for eliciting more information was necessary. Custodial interrogation was qualitatively more elicitation oriented than questioning a suspect who is well ensconded with a favourable order of anticipatory bail by relying in State Rep. by **The C.B.I. V/s. Anil Sharma** [(1997)7 SCC 187]. The gravity of the offence and a need for custodial interrogation are two important factors for deciding the application. The lopsided investigation being carried out is evident from the fact that the co-accused Tahir is yet to be arrested or summoned for investigation by the Police. This establishes that the Police are acting hand in gloves with the

applicant and are controlled by the applicant and his brother who is the present Panchayat Minister.

11. It was the case on behalf of the intervenor that it was fallacious to say that three WhatsApp messages were not received at 10.40hours since they could not be sent at one given time because messages sent at different time could be received at one time or simultaneously by the receiver if the mobile data of the sender is off at the time of transmission of the WhatsApp messages. He relied on the internet literature from the website to substantiate his contention. The submission on behalf of the applicant that the WhatsApp messages annexed to the complaint by the intervenor were manufactured or planted was patently perverse and misleading. The time reflected on the WhatsApp messages was when they were received and not when the messages were typed and forwarded by its author. The Investigating Officer had attached the mobile of the deceased and also that of the intervenor on which the WhatsApp messages were received by her. The intervenor had separately received the messages from her brother Prakash, since deceased, and not on the group as was alleged. The forwarded messages had been

produced to create confusion and mess and in order to mislead this Hon'ble Court. There was nothing to indicate or investigation did not disclose that the CCTV to the house of the deceased was intentionally disconnected. The deceased had summoned the CCTV operator at the house and told him that the CCTV does not display and to carry out the repairs.

12. There were houses surrounding those of the deceased including those of six tenants and therefore even without the CCTV, a stranger visiting the house could be noticed by the neighbours. The villagers were convinced that the applicant and the Tahir were the culprits on reading the WhatsApp messages and therefore insisted on their arrest. WhatsApp messages were sent to all the members of the group as they owed respect to the deceased and therefore he wanted them to know why he was committing suicide. The custodial interrogation of the applicant was necessary in order to bring out the truth and in order to conduct a thorough investigation to find out how Prakash Naik was harassed and threatened. His custodial interrogation was also necessary to gather all details in respect of the development of the property and the money involved. The applicant was not

only affluent and rich but moreover powerful because of the political influence of his brother. The investigating agency works under the Home Ministry of the State and the State Agency.

13. In the event the applicant was released on bail he would not divulge the truth. The applicant was probably contemplating that if the deceased did not return the money he would not only lose the money but also the suit property which he could not develop being a landlord. The intervenor sought to distinguish the judgments in **Joginder Kumar, Siddharam Mhetre** and **Anurag Sing** (supra) and placed reliance in **Kanwar Singh Meena v/s. State of Rajasthan and another** [(2012) 12 SCC 180], Court on its **Own Motion v/s Mahisha w/o. Krishnakant Deshmukh** [2018 All MR (Cri) 13], **Pokar Ram v/s. State of Rajasthan** [(1985) 2 SCC 597] and **Adri Dharan Das v/s. State of West Bengal** [(2005) 4 SCC 303]. The anticipatory bail application filed by the applicant had to be dismissed in the interest of justice and to avoid miscarriage of justice with a direction to the Investigating agency to ensure impartial, fair, independent and unbiased investigation by arresting the applicant.

14. Shri Nitin Sardessai, learned Senior Advocate in reply met the objection on behalf of the intervenor that this Court had no jurisdiction to deal with anticipatory bail of the applicant since the jurisdiction of this Court was concurrent with that of the Sessions Court under Section 438 CrPC by drawing analogy with Section 397 CrPC wherein the jurisdiction of the High Court and the Sessions Court in exercise of the powers of revision were concurrent. He however brought forth distinguishing features in the power of revision inasmuch as in terms of sub Section 3 of Section 397 CrPC in case an application was made by any person under this section to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them. In other words, there was an inbuilt bar for either of the Courts to entertain a revision at the instance of the same person if a revision was preferred either to the Sessions Court or to the High Court as the case may be barring a second revision to the Sessions Court or to the High Court as the case may be.

15. There was no such rider like sub Section 3 in Section 397 Cr.P.C. in Section 438 Cr.P.C. and therefore there was no reason

for the Court to curb its power in exercise of its jurisdiction under Section 438 CrPC. He Also referred to the Law Commission's 203rd report in that regard and place reliance in **Tarmindar Singh Mehtab v/s. The State of Maharashtra** [MANU/MH/0957/2014], **Jagannath v/s. State of Maharashtra** [MANU/MH/0017/1981], **Arun Madan v/s. State** [(1993) 99 CriJ1493 Delhi] and adverted to **Siddharam Mhetre**(supra) on the point of orbiter of the Hon'ble Apex Court and being binding on this Court. He clearly distinguished the judgments in **Kamlesh, Kalyan Chandra Sarkar** and **Captain Buddhikota Subha Rao** relied on behalf of the intervenor as also that in **Ashok Gavade** and relied in **Royal Medical Trust and Another v/s. Union of India and another** [(2017) 16 SC 605] in the matter of what constituted precedent.

16. Shri Nitin Sardessai, learning Senior Counsel met the next objection on behalf of the intervenor about there being no change in the circumstances and submitted that this plea would arise only if the bail application was moved before the same Court and not before another Court of concurrent jurisdiction seized with the power to deal with the anticipatory bail. He

further distinguished the judgments in **Zahira Habibulla H. Sheikh, P. Chidambaram, Anil Sharma, Francisco Pacheco, Kanwar Singh Meena, Manisha, Pokar Ram and Adri Dharan Das** which were not at all applicable in the given facts and circumstances of the case and once again raised rhetoric question as to why at all the applicant was required in custody. Insofar as the reliance on the Quora Site, he submitted that it was a matter of mere opinion expressed by the people and there was no authenticity to the opinion as expressed by them at a latter point of time. On facts it was his contention that if at all the cheque in question was found by the intervenor in the amount of ₹35 lakhs favouring the applicant's company, it raised a doubt as to why the same was not handed over to the Police for the purpose of carrying out investigation.

17. It was his further contention that in case there was a basis in the threats and pressure offered to the deceased at the instance of the applicant then it did not account why there were no complaints at the instance of the deceased to the Police. There was also a serious doubt as to why the deceased would offer the amount in cheque to the applicant if the money was

given by the applicant to him in cash. There was also a misleading statement at the instance of the Investigating Agency in the reply inasmuch as they had alleged the presence of the applicant and Tahir in the house of the deceased on the date of the incident but which was not borne out of the complaint of the intervenor. The order passed by the learned Sessions Court rejecting the anticipatory bail application was totally erroneous and which had based its finding on the presence of the applicant with Tahir in the house of the deceased shortly prior to his death based on the reply filed by the State. Taking into account all the circumstances, the custodial interrogation of the applicant was not at all required and he had to be set at liberty by the grant of the anticipatory bail application.

18. Shri P. Faldessai, learned Additional Public Prosecutor on behalf of the State submitted that the scene of offence was disturbed when the investigation was initially taken over by the Old Goa Police Station since the body had been moved by the family of the deceased before the arrival of the Police at the spot. The weapon of offence was disturbed and so too the mobile of the deceased as allegedly found on his chest and in the absence

of these vital clues, a material part of the investigation was hampered due to the disturbance of the scene of Crime. Nonetheless all angles of investigation were open and the investigation was being carried out now by the Crime Branch. The intervenor had not handed over the cheque in question to the Investigating Officer. Insofar as the presence of gun residue was concerned it was his submission that the body of the deceased was moved to the GMC hospital suo motu before the arrival of the Police at the Crime scene after being handled by several persons therefore evidence in that regard too was not available. Moreover, some more names were coming forth in the course of the investigation and therefore the application had to be dismissed.

19. Shri Bhupesh Prabhudessai, learned Advocate on behalf of the intervenor met the reply on behalf of the applicant by placing further written synopsis on record and distinguished the judgments relied upon by Shri Nitin Sardessai, learned Senior Advocate on behalf of the applicant and reiterated his earlier argument that a second anticipatory bail application was not maintainable in law unless there was a change in the

circumstances intervening between the first anticipatory bail application and the second necessitating judicial intervention. This was irrespective of the fact whether the second anticipatory bail application was filed in the High Court when the first was filed in the Court of Sessions because concurrent jurisdiction is conferred by Section 438 CrPC either in the High Court or the Court of Sessions. However, such a contention is not tenable looking to the law on the point which has been enunciated on behalf of the applicant and the scheme of Section 438 CrPC which does not envisage an embargo on the exercise of concurrent jurisdiction as otherwise contemplated under Section 397(3) CrPC. Therefore, the contention on behalf of the Intervenor that the anticipatory bail application is not permissible before this Court, one having been moved before the Court of Sessions and being dismissed is untenable. The distinction therefore sought to be made in the case of **Tarmindar Singh** and in the matter of **Arun Madan** and **Jagannath**(supra) do not depart from the position that an anticipatory bail application is available before this Court, the Court of Session having entertained an anticipatory bail application and having dismissed the same.

20. Another point sought to be canvassed is that the prosecutor must not be eager in determining the innocence of the accused when otherwise a prima facie evidence of his involvement in the Crime is evident. In this context, there might appear force in the submission of the Intervenor since from the tenor of submissions which have come forth on behalf of the learned Additional Public Prosecutor, there appears to have been no much seriousness in seeking the custodial interrogation of the applicant and the emphasis is more on the basis that in case there is material and necessity, the State would seek the custodial interrogation of the applicant and not otherwise despite the nature of the offence involved in the present case and the records giving a fair indication of the involvement of the applicant in the Crime.

21. **Siddharam Mhetre**(supra), held that just as the liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order and both are equally important. There is no justification for reading into Section 438 Cr.P.C. and the limitations mentioned in Section 437 Cr.P.C. The plenitude of Section 438 must be given its full play. There is no requirement that the accused must make out a "special case" for

the exercise of the powers to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 Cr.P.C. to a dead letter. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the Court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. The Apex Court spelt out factors and parameters which can be taken into consideration while dealing with the anticipatory bail at paragraph no.112:

“112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

- i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
- ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;
iv. The possibility of the accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The Court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the Court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The Court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

22. In **Siddharam Mhetre**(supra), the Apex Court observed at paragraph no.113 that arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The Court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record. At paragraph 114 it observed that these are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly

visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior Courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior Court against the Court of Sessions or the High Court is always available.

23. In **P. Chidambaram**(supra), where the offence of money-laundering was involved, allegedly showing the involvement of the appellant i.e. an ex-Finance Minister of India and certain others in Crime, having regard to the nature of allegations and state of investigation, held that the investigating agency must be given sufficient freedom in the process of the investigation. The applicant is not entitled to the anticipatory bail as the same would hamper the investigation.

24. In **Kamlesh**(supra), all the applicants had earlier approached this Court by way of applications for anticipatory bail

which were either rejected or after hearing, they were withdrawn. A preliminary objection was raised by the learned Additional Public Prosecutor so also by the learned Advocate assisting the prosecution on behalf of the complainant that since earlier applications of the applicants were either rejected or withdrawn, the present applications on the same set of facts were not maintainable. On the contrary, it was submitted on behalf of the Advocate appearing for the applicants that in his case the applications were only withdrawn and therefore, withdrawal of the applications would not come in the way of entertaining the present applications and even after there was rejection of the earlier application, the same would not come in the way of filing successive applications. In that view the question before the learned Single Judge as His Lordship then was whether the successive bail applications would be tenable for the grant of anticipatory bail after withdrawal or rejection of the earlier application. It considered the Full Bench judgment of the Calcutta High Court in **Maya Rani Guin and etc v/s. State of West Bengal** [2003 C.L.J. 1], which was of the view that since the accusations remain unchanged, entertaining the second

application for anticipatory bail would amount to a review or reconsideration of the earlier order passed by the Court.

25. In **Kamlesh**(supra), the learned Single Judge of this Court considered the Judgment of the Apex Court in Kalyan Chandra Sarkar(supra) who had an occasion to consider the ambit of the Article 21 of the Constitution of India and the eventuality in which the successive applications under section 438 of the Code are tenable and held at paragraph 18 that from a perusal of the provisions of Sections 438 and 439 of the Code of Criminal Procedure, it can be seen that both the provisions are almost analogous. Section 439 empowers the High Court or the Court of Sessions to release on bail an accused of non-bailable offence when he is in custody. The provisions of Section 438 CrPC enable the Superior Courts to direct the release of a person who has reasonable belief that he may be arrested on an accusation of having committed a non-bailable offence. It can be further seen that there is nothing in Section 439 CrPC. which precludes entertaining a subsequent application after rejection of the earlier application. The liberty of the citizen is guaranteed under Article 21 of the Constitution. In order to curtail this fundamental

right, the procedure which prescribes departure from it must be fair, just and reasonable.

26. **Kamlesh**(supra), further observed that the provision of Section 438 CrPC is incorporated in order to grant a safe-guard to a citizen who is entitled to the benefit of presumption of innocence. The provision is incorporated so as to avoid an abuse of the powers by the investigating agency and to avoid the arrest of citizens at the whims and caprice of the Investigating Officers and avoid unnecessary harassment and humiliation. In his view, therefore, the provision of Section 438 CrPC cannot be interpreted in such a manner, which would impose unnecessary restrictions on the said power. Ultimately, it was held that successive applications for anticipatory bail, after rejection of earlier application, would be tenable in law. However, as held in **Kalyan Chandra Sarkar**(supra), the said application is tenable only when there is a change in the facts situation or law which requires earlier view being interfered with or where the earlier view has become obsolete. In that view of the matter, the present applications are tenable in law.

27. In **Kalyan Sarkar**(supra), after rejection of four bail applications earlier, the respondent filed a 5th application which came to be allowed by the High Court on the sole ground that since the respondent accused was under detention for more than one year, he should be released on bail without going into any other aspect of the case. On 6th September, 2000 an appeal filed against the said grant of bail came to be allowed by this Court on the ground that the High Court while granting the bail did not keep in mind the requirement of Section 437(1)(i) of Cr.P.C., however, by the said order this Court held that if any fresh application is made by the accused same shall be decided in accordance with law. Taking advantage of the said observations of this Court the respondent-accused herein made another application for grant of bail on 05/11/2001 which was the sixth application for bail and the said application came to be dismissed by the High Court.

28. In **Kalyan Sarkar**(supra), on 05/11/2001, an SLP filed against the said order of dismissal came to be dismissed by the Apex Court on 07/12/2001. The 7th bail application next filed by the accused-respondent also came to be dismissed by the High

Court. An SLP filed against the said dismissal was also dismissed by the Apex Court on 20/05/2002. On 23/09/2002, the accused-respondent moved the 8th bail application which came to be allowed by the High Court by its order dated 23/05/2003 solely on the ground that the accused-respondent had undergone incarceration for a period of 3 years and that there was no likelihood of the trial being concluded in the near future and appeal filed against the said grant of bail came to be allowed on the ground that the High Court could not have allowed the bail application on the sole ground of delay in the conclusion of the trial without taking into consideration the allegation made by the prosecution in regard to the existence of the prima facie case, gravity of offence, and the allegation of tampering with the witness by threat and inducement when on bail.

29. In **Kalyan Sarkar**(supra), the Apex Court held that since the above factors go to the root of the right of the accused to seek bail, non consideration of the same and grant of bail solely on the ground of long incarceration vitiated the order of the High Court granting bail and observed that though an accused had a right to make successive applications for grant of bail the court

entertaining such subsequent bail applications had a duty to consider the reasons and grounds on which the earlier bail applications were rejected and in such cases the court also had a duty to record what were the fresh grounds which persuaded it to take a view different from the one taken in the earlier applications. The Apex Court in that order also found fault with the High Court for not recording any fresh grounds while granting bail and for not taking into consideration the basis on which the earlier bail applications were rejected.

30. In **Kalyan Sarkar**(supra), the Court also emphasised in the said order that ignoring the earlier orders of this Court is violative of the principle of binding nature of the judgments of the Superior Court rendered in a lis between the same parties, and noted that such approach of the High Court in effect amounts to ignoring or over-ruling and thus rendering ineffective the principles enunciated in the earlier orders especially of the Superior Courts. On that basis, the appeal of the complainant challenging the grant of bail came to be allowed cancelling the bail granted to the respondent. Barely 11 days thereafter a fresh 9th bail application was filed by the respondent without there

being any change in the factual situation which came to be allowed by the High Court and being the subject matter of the above noted two Criminal Appeals.

31. In **Kalyan Sarkar**(supra), it was contended on behalf of the learned Additional Solicitor General appearing for the CBI and the learned Senior Advocate appearing for the complainant that entertainment of the 9th bail application by the High Court on the very same grounds as those urged in the earlier petitions without there being any new facts or grounds amounts to an abuse of the process of the Court and was in derogation of the earlier orders passed by this Court. It was contended on behalf of the appellants that in the earlier proceedings all points available to the accused had been urged and had been negatived by the High Court while rejecting the application for grant of bail and confirmed by the Apex Court and whenever erroneously the bail was granted this Court had interfered by setting aside the grant of such bail. Therefore, in the absence of any new or fresh ground, it was not open to the High Court to have reconsidered the same material and overruled the earlier findings of the court in the guise of considering afresh the existence of a prima facie

case. It was also pointed out that the present application for grant of bail was filed within 11 days of the last order of this Court in the second case referred to hereinabove setting aside the grant of bail and during these 11 days nothing new had transpired to give rise to a fresh ground nor any fresh ground as such has been pleaded.

32. In **Kalyan Sarkar**(supra), the Apex Court had given findings as to the existence of a prima facie case which finding could not have been interfered with by the High Court in the impugned order. It was contended on behalf of the respondent that right to liberty was a fundamental right of a person under Article 21 of the Constitution of India and that right could be curtailed only by a procedure known to law and if that procedure established by law is not followed by the Courts while refusing to grant bail, it was open to the aggrieved person to challenge and re-challenge the same before an appropriate forum. It was further contended that since the principle of res-judicata or estoppel did not apply to criminal jurisprudence, there was no bar for an accused person to make successive bail applications and re-urge the questions which might have been urged earlier

and negated by the Court. Therefore, it was open to a Court considering the grant of a fresh bail application to re-appreciate the material on record and come to a different conclusion even though the same has been rendered by a Superior Court. In other words the rule of finality does not apply to bail petitions.

33. In **Kalyan Sarkar**(supra), the Apex Court further observed that the principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, but the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a Higher Court or a Coordinate Bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the courts must give due weight to the grounds which weighed with the former or Higher Court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be reargued on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting. The Apex Court proceeded to decide whether the

High Court by the impugned order was justified in reconsidering the findings already recorded by the Apex Court and the High Court in the earlier orders and held that reconsideration and recording of a new finding was without there being any fresh factual or legal basis. The approach of the High Court in the impugned order to say the least was irresponsible, contrary to records and law, while ultimately concluding that the High Court was totally in error in allowing the bail application of the respondent by the impugned order.

34. In **Captain Buddhikota Subha Rao**(supra), the Hon'ble Apex Court observed that successive bail applications were rejected on merits. Once that application was rejected there was no question of granting a similar prayer. That is virtually overruling the earlier decision without there being a change in the fact-situation. A change in the fact-situation, would mean a substantial change having a direct impact on the earlier decision and not merely cosmetic changes which are of little or no consequence. Between the two orders there was a gap of only two days and it was nobody's case that during these two days drastic changes had taken place necessitating the release of the

respondent on bail. In such a situation the proper course was to direct the matter be placed before the same learned Judge who had disposed off the earlier applications. Such a practice or convention would prevent an abuse of the process of Court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a Court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be conducive to judicial discipline and would also save the Court's time as a Judge familiar with the facts would be able to dispose of the subsequent application with despatch. It will also result in consistency.

35. In **Zahira Sheikh**(supra), otherwise known as "Best Bakery Case" the Apex Court allowed the bails and held that if the State's machinery fails to protect citizen's life, liberties and property and the investigation was conducted in a manner to help the accused persons, it was but appropriate that the Apex Court should step in to prevent undue miscarriage of justice that is perpetrated upon the victims and their family members. It observed on the conduct of the learned Public Prosecutor in the

matter of its role and duties and observed that though a Public Prosecutor is not supposed to be a persecutor, yet the minimum that was required to be done to fairly present the case of the prosecution was not done. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be a miscarriage of justice. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability to the fair judicial system, and Courts could not also play into the hands of such prosecuting agency showing indifference or adopting an attitude of total aloofness.

36. **P. Chidambaram**(supra), was clearly distinguishable which involved the ex-Finance Minister of the country who was alleged to have indulged in money laundering and being a white collar Crime and also under the provisions of Corruption Act. It was held that grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation.

37. **Anil Sharma**(supra), was not only a Member of Legislative Assembly of the State of Himachal Pradesh but also the son of former Union Minister for Telecommunications against whom the

CBI was investigating a case for the offence under Section 13(2) of the Prevention of Corruption Act relating to acquiring wealth far in excess of his known sources of income. The High Court had granted the bail reminding itself of the principle that "it is well settled that bail and not jail was a normal rule" which was challenged by the CBI on the premise that it was a clear case of corruption in high places and that considering the responsible and high office which the respondent held and the wide influence which he could wield and the great handicap which the investigating agency would be subjected to while interrogating a person armed with an order of anticipatory bail, the discretion under Section 438 should never have been exercised in favour of the respondent. The Apex Court held that the High Court had misdirected itself in exercising the discretionary power under Section 438 of the Code by granting a pre-arrest bail order to the respondent. It also held that custodial interrogation is qualitatively more elicitation oriented than questioning a suspect who is well ensconced with a favorable order under Section 438 of the Code. Effective interrogation of suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in

such interrogation would elude if the suspected person knows that he is well protected and insulted by a pre-arrest bail during the time he is interrogated. Very often interrogation in such a condition would be reduced to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third degree methods need not be countenanced, for, such an argument can be advanced by all the accused in all criminal cases. The responsible Police Officers would conduct themselves in the task of disinterring offences would not conduct themselves as offenders.

38. **Kanwar Singh Meena**(supra) primarily dealt with the principles applicable for the grant of the bail and those for cancellation of bail and so too the judgment in **Manisha** (supra). **Pokar Ram**(supra), too dealt with the considerations for the grant and cancellation of the bail.

39. **Adri Das**(supra), dealt with the powers to grant the anticipatory bail and held that the power exercisable under Section 438 is somewhat extraordinary in character and it is only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for

holding that a person accused of an offence is not likely to otherwise misuse his liberty then power is to be exercised under Section 438. The power being of important nature it is entrusted only to the higher echelons of judicial forums, i.e. the Court of Sessions or the High Court. It is the power exercisable in case of an anticipated accusation of non-bailable offence. The object which is sought to be achieved by Section 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Court of Sessions or High Court, he shall be released immediately on bail without being sent to jail.

40. In **Tarmindar Singh**(supra), the Complainant challenged the maintainability of the application in anticipation of arrest filed under Section 438 CrPC on the ground that once an application is filed before the Sessions Court under Section 438 CrPC, a similar application for anticipatory bail cannot be filed or entertained by the High Court under Section 438 of the CrPC. The learned Counsel had submitted that the remedy open to the applicants/accused was not under Section 438 CrPC in the High Court but either by way of filing a Writ Petition under Article 227 of the Constitution of India or under Section 482 CrPC. It was

further submitted that the Section gave a choice to the accused to apply either before the Sessions Court or before the High Court. However, once the application was made and either of the fora was exploited, then, a second application under the same conditions could not be made under Section 438 of the Code. The practice of filing a second application in the High Court if the application for anticipatory bail was rejected by the Sessions Court was a deviation from the legality and the procedure and not the real object of Section 438 of the Code.

41. In **Tarmindar Singh**(supra), it was further submitted both the Courts are having concurrent jurisdiction under Section 438 of the Code. Therefore, the dual opportunity under Section 438 Cr.P.C. will defeat the very aim and object with which the Legislature has incorporated the said Section. It was advanced on the basis of the recommendations made in the 203rd report of the Law Commission submitted in 2007. It was further contended on behalf of the Prosecutor and the learned Counsel for the accused that it was a settled practice in the Bombay High Court to move an application before the Sessions Court and if it was rejected, then seek remedy before the High Court. This does not

amount to either deviation or being contrary to the concept of concurrent jurisdiction. In that context a legal issue raised by the learned Counsel for the Complainant/Intervenor was whether once the remedy of pre-arrest bail was availed of before the Sessions Court, then the recourse was not available to a party before the High Court under the same Section 438 CrPC. The learned Single Judge of this Court considered the 203rd report of the Law Commission of India which sought to introduce the provision analogous to Section 397(3) CrPC and noted that the recommendations of the Law Commission was not a law as they are not yet accepted and accordingly the Legislature had not yet enacted the Code.

42. **Tarmindar Singh**(supra), considered the judgment in **Dainy @ Raju vs. State of Madhya Pradesh** [1989 J LJ 232] where it was observed at paragraph 19 as below: "19. The jurisdiction of High Court and Court of Session under Section 439 CrPC being concurrent, as a matter of practice, the bail applicants are required ordinarily to approach the Court of Sessions in the first instance and if relief is denied they approach the High Court under Section 439, CrPC itself, not as a superior

Court sitting in appellate or revisional jurisdiction over the order of the Court of Sessions, but because the superior Court can still exercise its own jurisdiction independently, unaffected by the result of exercise by the Court of Sessions because the latter is an inferior Court though vested with concurrent jurisdiction. The application seeking bail before the High Court is accompanied by an order of the Court of Session rejecting a similar prayer. The idea is to provide the superior Court with an advantage of apprising itself with the grounds as considerations which prevailed with the Court of Session in taking the view which it did.”

43. In **Tarmindar Singh** (supra), the learned Single Judge of the Bombay High Court considered the judgment in *Devidas Raghu Naik vs. State* [1989 Cri.L.J. 252], where it was held that when the Sessions Court has refused the bail under Section 439, it does not operate as a bar for the High Court to entertain a similar application under Section 439 on the same facts and for the same offence and in the ultimate allowed the application for bail.

44. In **Jagannath**(supra), the learned Single Judge of this Court held that that the anticipatory bail should not be refused merely because the prosecution claimed that they want the accused in police custody for the purpose of investigation. The genuineness of the alleged need for police custody has to be examined and it must be balanced against the duty of Courts to uphold the dignity of every man and to vigilantly guard his right to liberty without jeopardizing the State objective of maintenance of law and order. In this case too objections were taken on behalf of the complainant with regard to the maintainability of the application for grant of the anticipatory bail. Firstly, it was contended that according to the affidavit filed on behalf of the State, the police custody of the accused was necessary in order to make the recovery of the property and it is submitted that the provisions of Section 167 of the CrPC relating to the police custody of the accused for the purpose of investigation must prevail over the provisions of anticipatory bail contained in Section 438 of the CrPC. It was observed that the anticipatory bail should not be refused merely because prosecution claim that they want the accused in police custody for the purpose of investigation. The genuineness of the alleged need for police

custody has to be examined and it must be balanced against the duty of Courts to uphold the dignity of every man and to vigilantly guard his right to liberty without jeopardizing the State objective of maintenance of law and order. The learned Judge also did not find favour with the every objection raised on behalf of the complainant and in view thereof granted bail to the applicant.

45. In **Arun Madan**(supra), the question that arose for consideration was whether a person could make an application to the High Court for anticipatory bail under Section 438 CrPC after making a similar application under the same Section to the Court of Session without success. It was held by the learned Judge of the Delhi High Court that a bare reading of the Section shows that the High Court as well as the Court of Session have been given concurrent jurisdiction to grant anticipatory bail. It further showed that no restriction as under Section 397(3) and Section 399(3) have been placed under Section 438 for a person wishing to move the High Court for grant of anticipatory bail after similar application has been rejected by the Court of Session.

46. In **Royal Medical Trust**(supra), the Hon'ble Three Judge Bench of the Apex Court held that it is well settled in law that the ratio of a decision has to be understood regard being had to its context and factual exposition. The ratiocination in an authority is basically founded on the interpretation of the statutory provision. If it is based on a particular fact or the decision of the Court is guided by specific nature of the case, it will not amount to the ratio of the judgment. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyze a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates—(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found

therein nor what logically follows from the various observations made in the judgment. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein.

47. Having considered the various judgments relied upon on behalf of the applicant and the Intervenor and coming to the facts of the case, the genesis of the offence is the WhatsApp message purportedly circulated at the instance of the deceased himself indicating his intention to commit suicide being under

tremendous pressure and harassment at the instance of the applicant and Tahir over money transactions and involving property deals. Although it has been the case of the applicant that he had furnished some documents to the prosecution, the approach of the investigating Agency is quite laidback to say the least and who have rested easy on the premise that documents have been furnished by the applicant and also given the details of his call records. The manner in which the investigation had progressed thus far even on an examination of the case diary leaves much to be desired and does not show a conscious effort on the part of the investigating Agency to unearth the Crime and to examine the role played by the applicant in the suicide of the deceased. The offence by itself is serious and the seriousness required to investigate such an offence has unfortunately not been exhibited by the Investigating Agency obviously for the reasons of the applicant being the brother of the local Minister and it appears from the manner of the investigation conducted thus far as borne out from the case diary that there is no seriousness to actually investigate the role of the applicant in the Crime.

48. The applicant admittedly had dealings with the deceased relating to the property at Mercedes and there were money transactions between them. Besides, the applicant wanted to have an access to his property purchased with the intervention of the deceased which was not possible in view of the objections raised on behalf of the villagers of Mercedes and the work of construction undertaken therein was stalled in that regard. It appears from the records that the deceased was under tremendous pressure and threats regarding the money transactions between the applicant and the deceased himself and therefore it cannot be heard on behalf of the applicant that he had reported at the Police Station soon after the circulation of the WhatsApp message and had showed his bonafide. Rather the manner in which the Police allowed him to go at the inception itself on the specious premise that no FIR was registered against him itself speaks volumes about the clout wielded by the applicant being the brother of the local Minister over the Investigating Agency.

49. The Police can be better equipped to unearth the Crime and investigate the role played by the applicant therein which can be

achieved only by his custodial interrogation and not when the applicant seeks to get himself ensconced with the protective wall of the anticipatory bail order in his favour. As clearly held in **Anil Sharma** (supra), by the Hon'ble Apex Court that custodial interrogation is qualitatively more elicitation oriented than questioning a suspect who is well ensconced with a favorable order under Section 438 of the Code and that effective interrogation of suspected person is of tremendous advantage in disinterring many useful informations and other materials which would have been concealed, the custodial interrogation of the applicant is the need of the hour. Success in such interrogation would elude if the suspected person is well protected and insulated by a pre arrest bail order during the time he is interrogated and which would tend to reduce it to a more ritual. The other point canvassed on behalf of the applicant that he is a family man or that his reputation is at stake cannot be juxtapositioned with the need for his custodial interrogation when it is the duty of the State to examine the case in all its details and unearth the Crime which is possible only by the custodial interrogation of the applicant. The applicant if he is a law abiding citizen should not dither or elude the course of

interrogation to clear his name and there is no such thing that his name is likely to be tarnished only because his custodial interrogation is the need of the hour. Having examined the case in all its perspective and feeling it necessary that it is only when the applicant is in custody that the Investigating Agency would be better equipped to unearth the Crime, the application for a pre-arrest bail cannot be entertained under any circumstances. In the result, therefore, i do not find any merit in the application which is hereby dismissed.

NUTAN D. SARDESSAI,J.

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