

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No. 7496 of 2021

Along with
Interlocutory Application No. 01 of 2021

Arising Out of PS. Case No.-244 Year-2020 Thana- RIGA District- Sitamarhi

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1. Om Prakash Dhanuka, aged about 70 years, Son of Late Purshottam Lal Dhanuka, Occupier/Managing Director, Riga Sugar Company Ltd., Resident of Dhanuka Gram, PO and PS-Riga, District-Sitamarhi.
 2. Ram Kumar Pandey, aged about 53 years, Son of Late Gajadhar Pandey, General Manager (Commercial), Riga Sugar Company Ltd., Resident of Riga Sugar Mill, Dhanuka Gram, PO and PS-Riga, District-Sitamarhi.

... .. Petitioner/s

Versus

The State of Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. Sidharth Luthra, Senior Advocate with Mr. Y. V. Giri, Senior Advocate and Mr. Ashish Giri, Advocate
For the State	:	Mr. Lalit Kishore, Advocate General with Mr. Gyan Shankar, AC to AG and Ms. Asha Devi, APP
For the Proposed Intervenor	:	Mr. Binod Kumar Labh, Advocate

CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH
ORAL JUDGMENT

Date : 27-07-2021

This matter has been heard *via* video-conferencing.

2. Heard Mr. Sidharth Luthra, learned senior counsel along with Mr. Y. V. Giri, learned senior counsel and Mr. Ashish Giri, learned counsel for the petitioners; Mr. Lalit Kishore, learned Advocate General along with Mr. Gyan Shankar, learned Assistant Counsel to the AG for the State and Ms. Asha Devi, learned Additional Public Prosecutor and Mr. Binod Kumar Labh, learned counsel for the proposed intervenor.



3. The petitioners apprehend arrest in connection with the First Information Report *viz.* Riga PS Case No. 244 of 2020 dated 18.08.2020, instituted under Sections 406, 409 and 420/34 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC'). In this view, they have preferred the instant application under Section 438 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code').

4. The gravamen of the allegation against the petitioners herein, petitioner no. 1 being the Occupier/Managing Director and petitioner no. 2 being the General Manager (Commercial) of Riga Sugar Company Limited (hereinafter referred to as 'RSCL') respectively, is that the payments for purchase of the sugarcane made to the farmers as shown to the Government were actually for satisfying the Kisan Credit Card (hereinafter referred to as 'KCC') loan accounts in the name of such farmers.

5. Learned senior counsel for the petitioners submitted that the initiation of the FIR itself is improper for the reason that they have been made accused in their capacities of being connected with RSCL, which is a separate corporate entity and without RSCL being made a party, they could not have been made accused in their individual capacities, as has been done in the instant case. In this connection, learned senior counsel relied upon



***Sharad Kumar Sanghi v Sangita Rane, (2015) 12 SCC 781 and
Sushil Sethi v State of Arunachal Pradesh, (2020) 3 SCC 420.***

6. Further, it was contended that the allegation itself is founded on erroneous grounds and also, more out of political compulsion(s) rather than any real acts, which may make/indicate any criminal liability against the petitioners. It was contended that the RSCL entered into a tripartite agreement with the concerned Banks and the farmers for advancing them loans under the KCC scheme, and the RSCL was the guarantor for the repayment of both the principal amount and the interest amount to the extent of upper limit of Rs. 3 lakhs per farmer. Moreover, in a documented agreement between the parties, the condition was that the proceeds from the sale of sugarcane by the farmers to the RSCL would be paid by RSCL to the concerned Bank in satisfaction of such KCC loan amount(s). Thus, Mr. Luthra contended that once the RSCL took full responsibility for satisfaction of the KCC loan along with its interest component, which till date it stands by, there could not have been any wrongdoing, much less any criminal offence, attributable to the petitioners. Learned counsel submitted that the fact that the Bank has issued recovery notices to various farmers for non-payment of their loan amounts along with accrued interest is incorrect on the part of the Banks for they were themselves



signatory(ies) to such tripartite agreement, which clearly stipulated that the RSCL took full responsibility for satisfaction of such accounts, inclusive of the principal as well as interest. In this connection, learned counsel has drawn the attention of the Court to various communications, *inter alia*, between the RSCL, the State Government and the concerned Banks which would indicate that all parties thereto were aware of such arrangement being in place from the year 2013 itself. It was submitted that only in the year 2018, when due to various factors, beyond the control of the petitioners, the RSCL went under with debt and was declared a Non-Performing Asset (hereinafter referred to as 'NPA') and, thus, the control of its finances primarily moved either into the Government domain or the respective Banks. It was submitted that as a result of the same, from the actual proceeds of sale of sugar, only 5% was left at the discretion of the RSCL to distribute whereas, the remaining 10% was taken by the Bank and 85%, as per Government decision, was to be credited directly through Real-Time Gross Settlement (hereinafter referred to as 'RTGS') into the accounts of the various farmers, wherein, besides two officers from the RSCL, one Government officer was also a signatory. Learned senior counsel submitted that when such an agreement was already in existence, the FIR was totally uncalled



for and in fact, would be an abuse of the process of the Court. Learned senior counsel drew the attention of the Court towards various statements, immediately prior to the registration of the FIR, issued by people in power in the State Government to indicate that out of sheer political compulsion, such step i.e., lodging of the FIR was taken, in the absence of any real basis. It was the contention of learned senior counsel that at every stage, before every forum and authority, they have taken the categorical and unwavering stand, that it is RSCL which is liable to pay the principal as well as interest component of such KCC loan in the name of the farmers concerned and that the farmers should not be noticed or harassed. It was submitted that once the ball has passed from their end, now it is for the Government or the Banks which have declared RSCL as an NPA, and thus, there is very little the petitioners can do at their level but still, at every stage before every forum, learned senior counsel, upon instructions, took a categorical stand that the RSCL openly admits that it is the responsibility and duty, *in praesenti* and even *in future*, to satisfy the KCC loan account of the farmers concerned, inclusive of the principal amount as well as the interest accrued thereupon. Learned senior counsel further urged that the FIR was silent on the specific roles of the petitioners.



7. Summing up his arguments, Mr. Luthra submitted that from the materials on record, which includes official communications between the parties, it is obvious that right from the year 2000 till the year 2016, the State Government was very much in the loop with regard to the tripartite arrangement between the parties and no objection was raised till the time the letter dated 04.04.2018 was issued to it asking for deposit of 85% in a designated account leaving it only 5% to deal with, at its discretion. He submitted that the petition deserved to be allowed, keeping in mind the principles in ***Gurbaksh Singh Sibbia v State of Punjab, (1980) 2 SCC 565*** and ***Sushila Aggarwal v State (NCT of Delhi), (2020) 5 SCC 1***.

8. *Per contra*, Mr. Lalit Kishore, learned Advocate General submitted that for the limited purpose of consideration of grant of anticipatory bail, the Court may not meticulously look into the defence(s) of the parties as the same was to be looked into at the stage of the trial. Further, it was contended that the petitioner no. 1 has criminal antecedents of three other cases of the years 2016 as well as 2018 and, though he may have been granted the indulgence of anticipatory bail but having again committed an offence, the same is clearly in violation of the terms and conditions of grant of such bail and this in itself, would be



sufficient to deny grant of anticipatory bail in the present proceeding. Further, learned Advocate General contended that the criminal liability being strictly personal, the petitioners undeniably being the Occupier/Managing Director and General Manager (Commercial) are directly linked to the transaction(s) out of which the FIR arises. Thus, he submitted that once that is the case, if required in future, the investigating agency would be free to add to the list of accused the RSCL itself, but not doing it at the very first instance of registration of FIR, would not be fatal to the prosecution. He submitted that the FIR is only the initial cog to set the ball of investigation rolling. It was contended that the allegation that the payment shown has been made to the farmers for purchase of the sugarcane, which was not given to them directly and rather paid to the concerned Banks, for satisfying their KCC loan accounts, was a fraudulent act which the farmers were not aware.

9. The learned Advocate General advanced that a majority of the affected farmers were illiterate and, thus, in good faith, when only a representation was made to them that such payment would be made through the Bank, they may have signed on documents, the import and purport of which they were unlikely to have been fully aware of. It was contended that the petitioners



were in complete knowledge of such transactions not being proper in law, and as such, they could not feign ignorance of such transaction and the nature of the KCC loan. He submitted that by still going ahead with the transactions in question, the petitioners have precipitated a situation today where the poor farmers are being harassed by the Banks not only issuing notices to them for recovery but also starting proceedings including, *inter alia*, under the Bihar and Orissa Public Demands Recovery Act, 1914. It was further contended that the petitioners and the management of RSCL had connived with the Bank authorities in the farmers having availed of KCC loans without being fully aware of the intricacies involved. The learned Advocate General stated that the petitioners being part of the management of RSCL cannot plead innocence, in the facts of the present case. In support of his contention that the petitioners had committed offences within the meaning of the relevant Sections of the IPC invoked in the FIR, reliance was placed on ***R K Dalmia v The Delhi Administration, AIR 1962 SC 1821.***

10. Mr. Binod Kumar Labh, learned counsel for the proposed intervenor submitted that he (the proposed intervenor) was Mr. Yogendra Prasad Yadav, the District Convener of the union of sugarcane farmers who wrote to various authorities,



eventually culminating into the State's decision to go in for an inquiry which resulted in the institution of the present FIR, as noted in the FIR itself and, thus, he has a right to be heard in the present proceeding.

11. At this point, when the Court queried him as to the FIR having been lodged by the State and the law being settled that in criminal matters, ordinarily, the State alone is to be heard and not anyone else, how, as a matter of right Mr. Yadav could claim *locus* in the present proceeding, Mr. Labh was not able to satisfy the Court with regard to a right of him being impleaded formally, or even being heard.

12. In ***P S Saravanabhavandam v S Murugaiyyan***, 1986 SCC OnLine Mad 51, the Madras High Court held:

'1. These two petitions are filed by the relations of the deceased to intervene in the petition for anticipatory bail in Cr. M.P. 8892 of 1985 on the file of this Court.

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15. There is no provision in the Criminal P.C. which enables a third party to get himself impleaded in the proceedings before the criminal court. As already observed, we have only S. 301 Cr. P.C. which enables the private parties to assist the prosecution and also submit written arguments with the leave of the court. According to S. 301 Cr. P.C., such assistance is to be given at the inquiry, trial or appeal in a criminal case. The question that arises is whether private parties can be allowed to intervene in the anticipatory bail petition with a view to represent matters before the court, when there is no provision for intervention in the Criminal P.C. By 'intervention' it is understood that a party who is possession of



facts may appear before the court as an intervener and make his submissions on the matter in issue.

16. In such cases, such a party is shown as intervener in the proceedings before the court. When a party cannot be impleaded in a criminal proceeding, as held by this court, in the decision referred to above, he cannot be permitted to come in under the guise of an intervener. But, at the same time bearing in mind the wholesome observations of the Supreme Court extracted above the right of a party to represent matters before the court cannot be whittled down into a strait jacket formula of locus standi, which is unknown to criminal jurisprudence. It is open to any party to make his representations in the bail proceedings pending before this court before the inquiry or trial starts.

17. In the result, the request of the petitioners to figure as intervenors is negatived, but at the same time, it is open to the petitioners to make representations to this Court relating to the application for anticipatory bail to further the ends of justice. Subject to the above observations, both these petitions are dismissed.

(emphasis supplied)

13. *Smt. Indu Bala v Delhi Administration*, ILR (1990)

1 Del 84 was followed by a learned Single Judge in ***Praveen Malhotra v State*, 1990 (18) DRJ 192**. The Delhi High Court, in a matter under Section 439 of the Code, in *Praveen Malhotra* (*supra*) opined:

‘3. The question for determination is whether applicants have a right to intervene and be heard in opposition to the bail application.

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8. For the present the question to be considered is about the right of a complainant or a third party to intervene at the stage of consideration of the application of bail of one of the accused in the case. The powers of



the High Court to grant bail to the accused are prescribed under Section 439 of the Code. The inherent powers of the High Court under Section 482 of the Code are circumscribed by the limitations provided in the section itself. The inherent powers can be exercised to (1) give effect to any order made under the Code; (2) or to prevent abuse of the process of any court; (3) or otherwise to secure the ends of justice. The High Court has to exercise powers within the limitations provided in the Code of Criminal Procedure.

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14. There can be no doubt that to secure the ends of justice the High Court in exercise of power under Section 482 can take assistance from any person. But it does not mean that any such third person has a right to intervene in the manner claimed in this application.

15. This aims and objects of the applicants—organisations may be very laudable and indeed they are, but that does not help in resolving the question in favour the said organisations. The question is to be resolved bearing in mind the statutory provisions of the Code. Likewise, the other co-applicant, namely, the father of the deceased may be interested in the result of the proceedings but that by itself does not give him any right to intervene in these proceedings.

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18. ...For the reasons aforesaid my answer to the question is that the applicants have no right to intervene and be heard in opposition to the bail application (Cr. M. (M) 161/90).

19. There is no substance in the application which is, accordingly, dismissed.’

(emphasis supplied)

14. In *Vinay Poddar v State of Maharashtra*, 2008

SCC OnLine Bom 1389, the Bombay High Court concluded thus:



‘15. When an application for anticipatory bail is considered, the police may not place all factual details before the Court as the investigation in most of such cases is at a preliminary stage. Therefore, some role can be played by the complainant by pointing out factual aspects. In the circumstances, it is not possible to hold that the first informant or the complainant cannot be heard in an application for anticipatory bail. When the complainant appears before the Court in the course of hearing of an application for grant of anticipatory bail, the Court is bound to hear him. But the said right cannot be allowed to be exercised in a manner which will delay the disposal of an application for anticipatory bail. The delay in disposal of such application may adversely affect the investigation. Therefore, the right which can be spelt out in favour of the first informant or the complainant is of making oral submissions for pointing out the factual aspects of the case during the course of hearing of an application for anticipatory bail before the Court of Session. The said right is to be exercised by the complainant either by himself or through his Counsel. This is not to say that the Sessions Court hearing the application for anticipatory bail is under an obligation to issue notice to the first informant or the complainant. There is no such requirement of issuing notice to the first informant or the complainant at the hearing of the application for anticipatory bail. However, if the complainant or the first informant appears before the Court, he cannot be denied a right of making oral submissions either in person or through his Counsel. It must be noted here that the legal position on this aspect in the case of an application for regular bail may not be the same.’

(emphasis supplied)

15. A perusal of the aforesaid pronouncements lays bare that it is open to the Court to hear even a third party in matters pertaining to bail, if the Court so wishes. It is clear that no right *per se* is available to a third party to intervene and/or address the Court, *ceteris paribus*, in relation to anticipatory bail. Thus,



discretion comes into play, which, obviously, would have to be judiciously exercised. In ***Gudikanti Narasimhulu v Public Prosecutor***, (1978) 1 SCC 240, the Hon'ble Supreme Court noted:

‘3. What, then, is “judicial discretion” in this bail context? In the elegant words of Benjamin Cardozo [The Nature of the Judicial Process — Yale University Press (1921)]:

“The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life”. Wide enough in all conscience is the field of discretion that remains.”

Even so it is useful to notice the tart terms of Lord Camden that [1 Bovu, Law Dict., Rawles' III Revision p. 885 — quoted in Judicial Discretion — National College of the State Judiciary, Rano, Nevada p. 14]

“the discretion of a Judge is the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable....”

4. Some jurists have regarded the term “judicial discretion” as a misnomer. Nevertheless, the vesting of discretion is the unspoken but inescapable, silent command of our judicial system, and those who exercise it will remember that discretion, when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular.

An appeal to a Judge's discretion is an appeal to his judicial conscience. The discretion must be exercised, not in opposition to, but in accordance with, established principles of law. [Judicial discretion, (ibid) p. 33]’



(emphasis supplied)

16. This Court, for the limited purpose of assistance, has heard Mr. Binod Kumar Labh, learned counsel for Mr. Yadav. In this view, Interlocutory Application No. 01 of 2021, stands disposed of. Mr. Labh adopted the arguments of the learned Advocate General and prayed for rejection of the instant petition. He further submitted that the farmers had suffered due to the actions of the petitioners, and they should face consequences for the same.

17. By way of rejoinder, Mr. Luthra, learned senior counsel for the petitioners, submitted that the basic principle of grant of anticipatory bail propounded by the learned Advocate General is misplaced for the reason that if at all, the law did not contemplate any consideration of the circumstances for the defence to argue, then there would not have been a provision for grant of any pre-arrest bail. However, in fairness to the learned Advocate General, he submitted that the Court may not meticulously weigh the defence or render any findings, but definitely, the accused have a right to address the Court to indicate that the allegations may not be correct and/or are patently false. Further, with regard to antecedents of the petitioner no. 1, it was submitted that the mere fact that the accused may have other cases



against him or her, would *ipso facto* not be a ground to refuse such discretion and indulgence to such accused for the very same reason that it is only at the stage of accusation, and unless the accused are proved guilty, in accordance with law, by a competent Court, the presumption would be that they are innocent.

18. It is apposite to note that both learned Advocate General and Mr. Luthra, learned senior counsel were *ad idem* that in a petition under Section 438 of the Code, an in-depth analysis of the matter was not ordinarily warranted, although the Court was entitled to sift and glance through the material(s) on record.

19. Reference can be usefully made to ***Niranjan Singh v Prabhakar Rajaram Kharote, (1980) 2 SCC 559***, wherein it was held:

‘3... Detailed examination of the evidence and elaborate documentation of the merits should be avoided while passing orders on bail applications. No party should have the impression that his case has been prejudiced. To be satisfied about a prima facie case is needed but it is not the same as an exhaustive exploration of the merits in the order itself.’

(emphasis supplied)

20. That apart, in ***Vilas Pandurang Pawar v State of Maharashtra, (2012) 8 SCC 795***, the Hon’ble Supreme Court observed ‘...Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is



limited. The court is not expected to indulge in critical analysis of the evidence on record...’.

21. Having considered the facts and circumstances of the case, and submissions of learned counsel for the parties, the Court finds that a case for interference has been made out.

22. In *Gurbaksh Singh Sibbia (supra)*, the *locus classicus* on Section 438 of the Code, a 5-Judge Constitution Bench of the Hon’ble Supreme Court held as follows:

‘30. In American Jurisprudence (2nd, Volume 8, p. 806, para 39), it is stated:

“Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect that end.”

It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.

31. In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the



converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in State v. Captain Jagjit Singh [AIR 1962 SC 253 : (1962) 3 SCR 622 : (1962) 1 Cri LJ 216] , which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.

32. A word of caution may perhaps be necessary in the evaluation of the consideration whether the applicant is likely to abscond. There can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it. In his charge to the grand jury at Salisbury Assizes, 1899 (to which Krishna Iyer, J. has referred in Gudikanti [(1978) 1 SCC 240 : 1978 SCC (Cri) 115]), Lord Russel of Killowen said: (SCC p. 243, para 5)



“... it was the duty of Magistrates to admit accused persons to bail, wherever practicable, unless there were strong grounds for supposing that such persons would not appear to take their trial. It was not the poorer classes who did not appear, for their circumstances were such as to tie them to the place where they carried on their work. They had not the golden wings with which to fly from justice.”

This, incidentally, will serve to show how no hard and fast rules can be laid down in discretionary matters like the grant or refusal of bail, whether anticipatory or otherwise. No such rules can be laid down for the simple reason that a circumstance which, in a given case, turns out to be conclusive, may have no more than ordinary signification in another case.

33. We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the ground that, after all, “the legislature in its wisdom” has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected.

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35. 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 individuals liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.

36. 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.

37. 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 FIR is not yet filed.

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

39. 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, insofar 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.

40. *We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition (2). We agree that a 'blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.*

41. *Apart from the fact that the very language of the statute compels this construction, there is an important principle involved in the insistence that facts, on the basis of which a direction under Section 438(1) is sought, must be clear and specific, not vague and general. It is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into*



crimes reported to them can be avoided. A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a vacuum.

42. There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can an order of bail be passed under the section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

43. During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in Section 438(2)



(i), (ii) and (iii). The court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made under Section 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the FIR in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various courts have long since been released by this Court under Section 438(1) of the Code.'

23. Although *Sushila Aggarwal (supra)* has partly overruled *Siddharam Satlingappa Mhetre v State of Maharashtra, (2011) 1 SCC 694*, to the extent that it held no conditions can be imposed while granting anticipatory bail, the principles outlined therein can still guide courts. The relevant paragraphs from *Siddharam Satlingappa Mhetre (supra)* are quoted below:

'111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of



each case. As aptly observed in the Constitution Bench decision in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] that the High Court or the Court of Session has to exercise their jurisdiction under Section 438 CrPC by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

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 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 the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication 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.'

(emphasis supplied)

24. In ***P Chidambaram v Directorate of Enforcement***, (2019) 9 SCC 24, though pertaining to an economic offence and the Prevention of Money-Laundering Act, 2002, it was observed:

'69. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 CrPC is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of the applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.'

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72. We are conscious of the fact that the legislative intent behind the introduction of Section 438 CrPC is to safeguard the individual's personal



liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights—safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the appellant under Article 21 of the Constitution of India.'

(emphasis supplied)

25. In *Sushila Aggarwal (supra)*, a 5-Judge Constitution Bench of the Hon'ble Supreme Court re-affirmed *Gurbaksh Singh Sibbia (supra)*, and summarised the law in the following terms:

'92. This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438 CrPC:

*92.1. Consistent with the judgment in *Gurbaksh Singh Sibbia v. State of Punjab* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465], when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.*



92.2. *It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the Public Prosecutor and obtain facts, even while granting limited interim anticipatory bail.*

92.3. *Nothing in Section 438 CrPC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified — and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The need to impose other restrictive conditions, would have to be judged on a case-by-case basis, and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.*

92.4. *Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.*

92.5. *Anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the charge-sheet till end of trial.*



92.6. *An order of anticipatory bail should not be “blanket” in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.*

92.7. *An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.*

92.8. *The observations in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] regarding “limited custody” or “deemed custody” to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] had observed that : (SCC p. 584, para 19)*

“19. ... if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya [State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504] .”

92.9. *It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439(2) to arrest the accused, in the event of violation of any term,*



such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc.

92.10. The court referred to in para 92.9 above is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.

92.11. The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the State or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. (See Prakash Kadam v. Ramprasad Vishwanath Gupta [Prakash Kadam v. Ramprasad Vishwanath Gupta, (2011) 6 SCC 189 : (2011) 2 SCC (Cri) 848] ; Jai Prakash Singh [Jai Prakash Singh v. State of Bihar, (2012) 4 SCC 379 : (2012) 2 SCC (Cri) 468] ; State of U.P. v. Amarmani Tripathi [State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)].) This does not amount to “cancellation” in terms of Section 439(2) CrPC.’

(emphasis supplied)

26. It will not be out of place to recall the instructive observations by the Hon’ble Dr. Sikri, J. penning his concurring opinion in ***Hema Mishra v State of Uttar Pradesh, (2014) 4 SCC 453***:

‘28. A Bench of this Court, headed by the then Chief Justice Y.V. Chandrachud, laid down first principles of granting anticipatory bail in Gurbaksh Singh Sibia v. State of Punjab [(1980) 2 SCC 565 : 1980 SCC (Cri) 465 : 1980 Cri LJ 1125] , re-emphasising that liberty...

“12. ... A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent.” (SCC p. 580, para 12)



29. In *Joginder Kumar v. State of U.P.* [*Joginder Kumar v. State of U.P.*, (1994) 4 SCC 260 : 1994 SCC (Cri) 1172 : 1994 Cri LJ 1981] the Supreme Court observed: (SCC p. 267, para 20)

“20. ... No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest.”

30. It is pertinent to explain that there may be imminent need to grant protection against pre-arrest. The object of this provision is to relieve a person from being disgraced by trumped up charges so that liberty of the subject is not put in jeopardy on frivolous grounds at the instance of the unscrupulous or irresponsible persons who may be in charge of the prosecution. An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail.

31. The purposes for which the provisions of anticipatory bail are made are quite obvious. One of the purposes of the arrest is that the accused should be available to the investigating machinery for further investigation and questioning whenever he is required. Another purpose is that the trial should not be jeopardised and for this purpose the restrictions on the movements of the accused are necessary. 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 the right to liberty without jeopardising the State objective of maintenance of law and order.

32. I would also like to reproduce certain paragraphs from *Kartar Singh v. State of Punjab* [*Kartar Singh v. State of Punjab*, (1994) 3 SCC 569 : 1994 SCC (Cri) 899], wherein K. Ramaswamy, J. speaking for the Court, discussed the importance of life and liberty in the following words: (SCC pp. 715-17, paras 373-74)

“373. The foundation of Indian political and social democracy, as envisioned in the Preamble of the Constitution, rests on justice, equality, liberty and fraternity in secular and socialist republic in which every individual has equal opportunity to strive towards excellence and of his dignity of person in an integrated egalitarian Bharat. Right to justice and equality and stated liberties which include freedom of expression, belief and movement are the means for excellence. The right to life with human dignity of person is a fundamental right of every citizen for pursuit of happiness and excellence. Personal freedom is a basic condition for full development of human personality. Article 21 of the Constitution protects right to life which is the most precious right in a civilised society. The trinity i.e. liberty, equality and fraternity always blossoms and enlivens the flower of human dignity. One of the gifts of democracy to mankind is the right to personal liberty. Life and personal freedom are the prized jewels under Article 19 conjointly assured by Articles 20(3), 21 and 22 of the Constitution and Article 19 ensures freedom of movement. Liberty aims at freedom not only from arbitrary restraint but also to secure such conditions which are essential for the full development of human personality. Liberty is the essential concomitant for other rights without which a man cannot be at his best. The essence of all civil liberties is to keep alive the freedom of the individual subject to the limitations of social control envisaged in diverse articles in the chapter of Fundamental Rights Part III in harmony with social good envisaged in the directive principles in Part IV of the Constitution. Freedom cannot last long unless it is coupled with order. Freedom can never exist without order. Freedom and order may coexist. It is es-



essential that freedom should be exercised under authority and order should be enforced by authority which is vested solely in the executive. Fundamental rights are the means and the directive principles are essential ends in a welfare State. The evolution of the State from police State to a welfare State is the ultimate measure and accepted standard of democratic society which is an avowed constitutional mandate. Though one of the main functions of the democratic Government is to safeguard liberty of the individual, unless its exercise is subject to social control, it becomes anti-social or undermines the security of the State. The Indian democracy wedded to the rule of law aims not only to protect the fundamental rights of its citizens but also to establish an egalitarian social order. The individual has to grow within the social confines preventing his unsocial or unbridled growth which could be done by reconciling individual liberty with social control. Liberty must be controlled in the interest of the society but the social interest must never be overbearing to justify total deprivation of individual liberty. Liberty cannot stand alone but must be paired with a companion virtue; liberty and morality; liberty and law; liberty and justice; liberty and common good; liberty and responsibility which are concomitants for orderly progress and social stability. Man being a rational individual has to live in harmony with equal rights of others and more differently for the attainment of antithetic desires. This intertwined network is difficult to delineate within defined spheres of conduct within which freedom of action may be confined. Therefore, liberty would not always be an absolute licence but must arm itself within the confines of law. In other words there can be no liberty without social restraint. Liberty, therefore, as a social conception is a right to be assured to all members of a society. Unless restraint is enforced on and accepted by all members of the society, the liberty of some must involve the oppression of others. If liberty be regarded a social order, the problem of establishing liberty must be a problem of organising restraint which society controls over the individual. Therefore, liberty of each citizen is borne of and must be subordinated to the liberty of the greatest number, in other words common happiness as an end of the society, lest lawlessness and anarchy will tamper social weal and harmony



and powerful courses or forces would be at work to undermine social welfare and order. Thus the essence of civil liberty is to keep alive the freedom of the individual subject to the limitation of social control which could be adjusted according to the needs of the dynamic social evolution.

374. The modern social evolution is the growing need to keep individual to be as free as possible, consistent with his correlative obligation to the society. According to Dr Ambedkar in his closing speech in the Constituent Assembly, the principles of liberty, equality and fraternity are not to be treated as separate entities but in a trinity. They form the union or trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality. Equality cannot be divorced from liberty. Nor can equality and liberty be divorced from fraternity. Without equality, liberty would produce supremacy of law. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality would not become a natural course of things. Courts, as sentinel on the qui vive, therefore, must strike a balance between the changing needs of the society for peaceful transformation with orders and protection of the rights of the citizen.”

27. For the sake of completeness, the Court indicates that though learned counsel on both ends have cited judgements on other propositions viz. Company concerned not being made a party; civil disputes being given criminal flavour, and; ingredients of the offences alleged, the need to refer thereto is obviated, given the conclusion of the Court, which is for the purpose of the instant petition alone.

28. *Prima facie*, in view of (a) the consistent stand that RSCL has, and continues to have, the obligation of repaying the



principal as well as the interest on the loan amounts; (b) no apparent risk/material to show that the petitioners will flee from justice; (c) no apparent risk/material to indicate any tampering of evidence(s), and; the nature of the alleged offence(s), this Court is of the view that the petitioners deserve to be enlarged on anticipatory bail. The legitimate concern of the State has to be factored in, and the Court will impose additional conditions to balance competing interests.

29. Accordingly, in the event of arrest or surrender before the Court below within six weeks from today, the petitioners be released on bail upon furnishing bail bonds of Rs. 50,000/- (fifty thousand) each with two sureties of the like amount each to the satisfaction of the learned Chief Judicial Magistrate, Sitamarhi in Riga PS Case No. 244 of 2020, subject to the conditions enumerated in Sections 438(2) and 437(3) of the Code, and in addition, the following:

(i) that one of the bailors shall be a close relative of the petitioners, and;

(ii) that the petitioners shall surrender their passports to the Court concerned at the time of taking bail, and;

(iii) that the petitioners shall co-operate with the Court and police/prosecution.



30. It is made clear that any violation of the terms and conditions of bail or failure to co-operate shall lead to cancellation of their bail bonds. It shall also be open for the prosecution to bring any violation of the foregoing directions to the notice of the Court concerned, which shall take immediate action on the same after giving opportunity of hearing to the petitioners.

31. The petition, accordingly, stands allowed, in the above terms.

(Ahsanuddin Amanullah, J.)

P. Kumar

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