

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**MCRCA No. 1184 of 2021**

Ku. Injoriya D/o Shri Ramprasad, Aged About 21 Years, Caste Harijan, R/o Village Pondidih Chhapar, P.S. and Tehsil Khadgawan, District Korea, Chhattisgarh.

---- Applicant**Versus**

State of Chhattisgarh Through P.S. AJK, Baikunthpur, District Korea Chhattisgarh.

---- Non-applicant

For Applicant : Shri Pawan Shrivastava, Advocate

For Non-applicant/State : Shri Vimlesh Bajpai, Government Advocate

Hon'ble Shri Justice Parth Prateem Sahu**Order on Board****21.09.2021**

1. The applicant has preferred this bail application under Section 438 of the Cr.P.C. for grant of anticipatory bail statng that she is apprehending her arrest in connection with Crime No. 16 of 2019 registered at Police Station AJK, Baikunthpur, District Korea, Chhattisgarh for offence punishable under Section 376(D) of Indian Penal Code (hereinafter referred to as 'IPC'), Section 6 read with 17 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POSCO Act').
2. Facts of the case in nutshell are that, applicant along with others was arrested in connection with instant crime for offence punishable under Section 376(2)(d) of IPC, Sections 4, 6, 5 & 17 of POSCO Act and Section 3(2)(v) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter

referred to as SC/ST Act)'. Applicant was enlarged on bail vide order dated 03.10.2019 in MCRC No.5470 of 2019. Applicant after her release on bail did not appear before the trial Court on 22.10.2019, hence, arrest warrant was ordered. Applicant submitted application for grant of bail on 07.11.2019, which was allowed. Applicant, thereafter, on 03.12.2019 again did not appear before the trial Court and arrest warrant was issued. When applicant remained continuously absent from the proceedings, permanent arrest warrant was issued on 08.04.2021 declaring her absconding. Applicant filed an application under Section 438 of Cr.P.C. seeking anticipatory bail, which came to be dismissed vide order dated 31.07.2021.

3. Shri Pawan Shrivastava, learned counsel for the applicant would submit that applicant is woman and not absented herself to avoid the proceedings. Applicant became ill, which was informed to her counsel, but unfortunately, reason of absent of applicant could not be brought to the notice of trial Court by filing appropriate application. Applicant has placed on record medical prescription in support of his contention. He further submits that Court proceedings were stopped due to spread of COVID-19, hence, applicant could not able to file application for grant of bail earlier.
4. Per contra, Shri Vimlesh Bajpai, learned Government Advocate representing the State opposing the submissions made by learned counsel for the applicant, would submit that after getting benefit of regular bail on 03.10.2019, applicant continuously remained

absent from 03.12.2019 hence, she is not entitled for the benefit of Section 438 of Cr.P.C.

5. I have heard learned counsel appearing for the respective parties.
6. In view of facts and circumstances of the case and submissions made by learned counsel for the respective parties, question arises before this Court is whether application for grant of anticipatory bail under Section 438 of Cr.P.C. in the facts of the case would be maintainable?
7. Shri Pawan Shrivastava, learned counsel for the applicant would submit that provisions of Section 438 of Cr.P.C. provides for grant to anticipatory bail where applicant is apprehending his/her arrest in any crime. Applicant as apparent from Annexure A/1 is apprehending her arrest because of issuance of permanent arrest warrant by the trial Court hence, application under Section 438 of Cr.P.C. is maintainable.
8. To appreciate the submissions made by learned counsel for the applicant, in the facts of the case, I find it appropriate to extract the provisions of Section 438 (1) of Cr.P.C., which reads as under :

“438. Direction for grant of bail to person apprehending arrest.-(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this Section that in the event of such arrest, he shall be

released on bail; and that Court may, after taking into consideration, *inter alia*, the following factors, namely:-

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he 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; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forth with or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a

view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.]

(2) When the High Court or the Court of Session makes a direction under Sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under Sub-section (3) of Section

437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer-in-charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under Sub-section (1).

[(4) Nothing in this Section shall be apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code (45 of 1860).]"

9. From bare perusal of Section 438(1) of Cr.P.C. would show that it provides for jurisdiction to High Court or Court of Sessions to direct that in the event of arrest applicant shall be released on bail, when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. In the case at hand, admittedly, applicant has been roped in a non-bailable offence. She was arrested by the Police in the aforementioned crime, thereafter, she was released on regular bail in MCRC No.5470 of 2019 filed under Section 439 of Cr.P.C.

vide order dated 03.10.2019. Applicant was enlarged on bail by High Court with certain conditions, which reads as under :

- “(i) that the applicant shall make himself available for interrogation before the investigating officer as and when required;
- (ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer;
- (iii) that the applicant shall not act, in any manner, which will be prejudicial to fair and expeditious trial; and
- (iv) that the applicant shall appear before the trial Court on each and every date given to him by the said Court till disposal of the trial.”

One of the conditions as mentioned above is that the applicant shall appear before the trial Court on each and every date given to her by the said Court till disposal of the trial, the applicant has jumped the bail granted by High Court in MCRC No.5470 of 2019 as she after furnishing bail bonds not appeared before the trial Court.

10. High Court of Madras in case of **Natturasu and Others v. The State** reported in **1998 CrLJ 1762** has enumerated the stages of apprehension of arrest and held thus :

“91. When apprehension of arrest arises ?
The apprehension of arrest for a non-

bailable offence, one can have at different stages, namely:

- (a) during the period of investigation by the police after registration of FIR and before filing of the final report under Section 173, CrPC;
- (b) during further investigation under Section 173 (8) CrPC even after filing of the charge-sheet under Section 173 CrPC;
- (c) after taking cognizance by the Magistrate, summoning the accused under Section 204 CrPC through warrant;
- (d) while the Magistrate committing the Sessions case to the Court of Session under Section 209 CrPC and remanding the accused to custody;
- (e) during the enquiry or trial, if the Court, on the basis of the evidence let in, impleads a person as an accused under Section 319 CrPC for the purpose of summoning or detaining him under Section 319 (2) and (3) CrPC.”

I am in respectful agreement with the stages wherein an accused can apprehend arrest as specified above. The subsequent stages of the trial would not cover the situation where an accused who has availed the benefit of anticipatory bail or regular bail and fails to appear before the Court on the dates fixed for trial and thereby misuses the liberty granted to him/her and trial Court issued arrest warrant for the default of giving

appearance. The learned Single Judge in case of **Natturasu** (supra) has further held as under :

“92. The above five contingencies involve different stages. As seen earlier, once the person accused of is released on anticipatory bail or on bail at one stage, the operation of the bail continues till the conclusion of the trial. Therefore, the person, who is already on bail or anticipatory bail, cannot be entitled to apply for a fresh anticipatory bail in respect of the same accusation, in other stages.

93. For instance if a person, who is already on bail, did not appear before the trial Court and that, therefore, the Court issues warrant of arrest, then the said person will certainly have the apprehension of arrest.

94. But, in such a situation, the accused is not entitled to file an application for anticipatory bail, because he is already on bail or anticipatory bail in respect of the accusation of non-bailable offence. He shall, in such circumstance, have to take steps to recall the warrant.

95. Therefore, the application for anticipatory bail would not deal with the situation, wherein the accused had appeared before the Court, in relation to the case in which he already obtained the bail.

96. In other words, the application under Section 438 CrPC, being dealt with only relates to the apprehension of arrest for the

accusation of non-bailable offence only one.”

11. High Court of Madhya Pradesh in case of **Yogendra Singh v. State of M.P. through P.S. Uccehara, District Satna** reported in **2000 (1) M.P.H.T. 409** dealing with identical situation considering the Full Bench decision of Madhya Pradesh High Court in case of **Nirbhay Singh and Another v. State of Madhya Pradesh** reported in **1995 MPLJ 296** and **Natturasu** (supra), has held thus :

“10. I have quoted in *extenso* from the aforesaid decision, as I am in respectful agreement in the law laid down therein. I may hasten to add that emphasis has to be given not only on stage but also on self same accusation. To elaborate if initially the accused is being sought to be arrested for an offence punishable under Section 326 of IPC and has been granted anticipatory bail but later on Section 307 of IPC is added and the Magistrate issues summons to him and he has an apprehension that he may be arrested once he surrenders before the Court an application under Section 438 of the Code at his instance may stand in a different footing but supposing an accused who has been granted benefit of anticipatory bail after a warrant of arrest has been issued under Section 319 of the Code and he after availing the privilege and obtaining the concession of bail does not appear during trial and jumps bail and the Court issues a non-bailable warrant of

arrest for his production, in that case the apprehension may ensure but that will not give him right to approach the Court for grant of anticipatory for the simple reason, at his behest an application for anticipatory bail would not lie. The concept of *ex paritate rationis* will not be attracted inasmuch as the first limb, the apprehension of arrest exists, but the second limb 'self-same accusations' is not amputated. No accused should forget the basic principle that he who seeks liberty must conduct himself with propriety as liberty blossoms in an atmosphere of composite restraint and collective good. Section 438 of the Code can not be given an interpretation to guillotin other provisions of the Code. It is hereby made clear that it would be open to him to take appropriate steps under Section 70 (2) of the Code for recall/cancellation of the warrant so issued against him or, he may, if he so chooses, assail the order issuing warrant as illegal or improper by preferring appropriate application before the higher Courts, wherein the propriety of issuance of warrant may be gone into. The justifiability or the defensibility of the order would be a matter of scrutiny by the Court exercising power and that is a different arena altogether."

12. In the case at hand, it is not the case of the applicant that she was enlarged on bail for some minor offence, thereafter, during the trial, some graver offence is added to the charge, but it is the case where the applicant jumped the bail by not appearing before the

trial Court on the dates fixed for hearing after her release on bail, therefore, in view of aforementioned decisions of High Court of Madras and High Court of Madhya Pradesh, I am of the considered opinion that application for grant of anticipatory bail under Section 438 of Cr.P.C. is not maintainable when the liberty granted to applicant of releasing her on bail was misused.

13. Accordingly, anticipatory bail application is dismissed as not maintainable. However, it would be open for the applicant to take appropriate steps under Section 70(2) of Cr.P.C. for recall/cancellation of warrant issued against her to be decided in accordance with law.

Certified copy as per Rules.

Sd/-
(Parth Prateem Sahu)
Judge

Yogesh