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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

ANTICIPATORY BAIL APPLICATION NO. 2857 OF 2021

Alnesh Akil Somji

...Applicant

Versus

State of Maharashtra

...Respondent

.....

Mr. Subodh Desai a/w. Mr.Kartik Garg, Mr. Ajay Vazirani,
Mr. Ameya Deosthale and Mr. Sahil Namavati i/b. Lexicon
Law Partners for the Applicant.

Mrs. P.P.Shinde, APP for the Respondent -State.

.....

CORAM : V.G.BISHT, J.

RESERVED ON : 7TH DECEMBER, 2021

PRONOUNCED ON : 14TH DECEMBER, 2021

PC:-

1. The present application has been moved by the applicant under Section 438 of the Code of Criminal Procedure in Crime No. 97 of 2021 registered with Deccan Police Station, Pune City for offence punishable under Sections 406, 420 read with 34 of the Indian Penal Code (the IPC).

2. Learned counsel for the applicant submits that the learned Additional Sessions Judge, Pune rejected the anticipatory bail application of the applicant on the ground of maintainability by relying on the judgment given in **Sunil Kallani V/s. State of Rajasthan**¹ and as also the judgment passed in case of **Narinderjit Singh Sahni and Another Versus Union of India and Others**². According to learned Counsel, the learned Additional Sessions Judge erred in giving a restrictive interpretation to the scope of Section 438 of the Code of Criminal Procedure, 1973 (for short, “the Cr.PC.”). Learned counsel also invited my attention to the various observations made in the case of **Sushila A Aggarwal and others Versus State (NCT of Delhi) and Another**³ and would submit that the impugned order being bad in law, same is liable to be set aside.

3. Mrs. Shinde, learned APP, on the other hand, supported

1 2021 SCC OnLine Raj 1654

2 (2002) 2 Supreme Court Cases 210

3 (2020) 5 Supreme Court Cases 1

the impugned order and also placed reliance in case of **Narinderjit Singh Sahni** (*supra*).

4. In view of above, substantial legal question which looms for determination in this application may be formulated as follows :

Whether an anticipatory bail application would be maintainable by an accused who is already arrested and is in magisterial custody in relation to another crime?

5. I may note here that similar issue arose in **Sunil Kallani** (*supra*) and learned Single Judge after referring the ratio laid down in **Narinderjit Singh Sahni's** case (*supra*) held that anticipatory bail application so moved would not lie. With respect, I am not in agreement with the said view. I have my own reasons to follow hereinafter.

6. Following the above judgment and as also the observations made in the case of **Narinderjit Singh Sahni** (supra), learned Sessions Judge dismissed the applicant's anticipatory bail application on the issue of maintainability only. Therefore, applicant is before this Court.

7. Its cardinal principle of law that every law is design to promote and further the ends of justice. Statutory interpretation, purpose and the spirit of the provision must be gathered from its intendment. The concerned relevant provision of the Cr.P.C with which I am concerned is Section 438 of the Cr.P.C. For proper understanding and scrutiny of the provision, let me reproduce the same :

“438. Direction for grant of bail to person apprehending arrest.-

(1) Where any person has reason to believe that he may be arrested on 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:-

.....

2.

3.

4. Nothing in this section shall 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 376-AB or section 376-DA or section 376-DB of the Indian Penal Code (45 of 1860)”.

8. A plain reading of the provision would show that the only restriction provided is under Section 438 (4) of the Cr. PC, which says that the provision will not apply to accusations of offences which are stated in Section 438 (4) of the Cr.PC. Similarly, certain special statutes have excluded the operation of Section 438 of the Cr.PC for accusation of offences punishable under those special statutes, for example Section

18A of the Schedule Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 bars exercise of powers under Section 438 of the Cr.P.C.

9. The Hon'ble Apex Court in the case of **Sushila A Aggarwal and others** (*supra*), while dealing with the scope of Section 438 of the Cr.P.C has followed the decision in the case of **Shri Gurbaksh Singh Sibbia and others Versus State of Punjab**⁴ and regarding the bar or restriction on the exercise of power to grant anticipatory bail, the Hon'ble Apex Court has held as follows :

“62.....In this background, it is important to notice that the only bar, or restriction, imposed by Parliament upon the exercise of the power (to grant anticipatory bail) is by way of a positive restriction i.e. in the case where accused are alleged to have committed offences punishable under Section 376 (3) or Section 376-AB or Section 376-DA or Section 376-DB of the Penal Code. In other words, Parliament has now denied jurisdiction of the courts

4 (1980) 2 Supreme Court Cases 565

(i.e. Court of Session and High Courts) from granting anticipatory bail to those accused of such offences. The amendment [Code of Criminal Procedure Amendment Act, 2018 introduced Section 438 (4)] reads as follows:

“438. (4) Nothing in this section shall 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 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code”.

63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament’s omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of discretion, be insisted upon- that would amount to judicial legislation”.

10. Similarly, the Hon'ble Apex Court has made following observations in the case of **Shri Gurbaksh Singh Sibbia and others** (*supra*):

“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”.

11. It is thus very clear, according to Hon'ble Apex Court, that anticipatory bail will not be maintainable in case a person is in custody in the same offence for which pre-arrest bail is sought, the restriction, if any, upon maintainability of pre-arrest bail will be there only if a person is in custody in that particular offence itself.

12. From the above pronouncements, two things are clear. First, there is no such bar in Cr.PC or any statute which prohibits Session or the High Court from entertaining and deciding an anticipatory bail, when such person is already in judicial or police custody in some other offence. Second, the restriction cannot be stretched to include arrest made in any other offence as that would be against the purport of the provision.

13. In the present case, the applicant is in custody with respect to offence registered with Koregaon Park Police Station and he is yet to be arrested by police viz-a-viz the FIR registered with the respondent. As per the judgment of the Hon'ble Apex Court in the case of **Shri Gurbaksh Singh Sibbia and others** (*supra*), the restriction is only when the pre-arrest bail is sought for the same offence in which arrest is already made.

14. I may point out here that the case of **Narinderjit Singh Sahni and Another** (*supra*) was in respect of maintainability of Article 32 wherein relief in the nature of Section 438 was sought. Even, the said judgment does not hold in very clear terms that a person arrested in one offence cannot seek the relief provided under Section 438 of Cr.PC in another offence merely on the ground that he stands arrested in another district offence.

15. In my considered opinion, there was no proper interpretation of Section 438 of the Cr.PC at the hands of learned Additional Sessions Judge. Accused has every right, even if he is arrested in number of cases, to move in each of offence registered against him irrespective of the fact that he is already in custody but for different offence, for the reason that the application (s) will have to be heard and decided on merits independent of another crime in which he is already in custody.

16. One cannot and must not venture, under the garb of interpretation, to substantiate its own meaning than the plain and simple particular though provided by statute. What has not been said cannot be inferred unless the provision itself gives room for speculation. If the purpose behind the intendment is discernible sans obscurity and ambiguity, there is no place for supposition.

17. For the aforesaid reasons, the plea of learned APP is raised regarding non-maintainability of the application cannot have my concurrence.

18. In the result, the impugned order of the learned Sessions Judge holding that application under Section 438 of the Cr.PC was not maintainable is hereby set aside. Hence, the following order :

ORDER

(i) The application is allowed.

(ii) The learned Additional Sessions Judge, Pune is

directed to hear Criminal Bail Application No.7755 of 2021 on its own merit and in accordance with law expeditiously and preferably within three weeks from the receipt of this order.

(iii) Meantime, it is further directed that no coercive action shall be taken against the applicant.

(iv) The application stands disposed of.

(V.G.BISHT, J.)