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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-21334-2020 (O&M)

Date of decision- 9.8.2021

Akhtar

...Petitioner

Vs.

State of Haryana and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE MANOJ BAJAJ

Present: Mr. Balraj Gujjar, Advocate for the petitioner.

Mr. Kanwar Sanjiv Kumar, AAG, Haryana.

Mr. Saleem Ahmed, Advocate for respondent Nos.2 to 7.

MANOJ BAJAJ, J.

Akhtar-complainant has filed this petition under Section 439 (2) Code of Criminal Procedure, 1973 to challenge the order dated 18.06.2020 (Annexure P-8), whereby Additional Sessions Judge, Nuh granted anticipatory bail to private respondent Nos.2 to 7, who were declared proclaimed persons on 08.07.2019 (Annexure P-3), in criminal complaint No.39 dated 01.03.2016, titled "Akhtar Vs. Nazar and others".

Briefly the facts of the case are that upon a complaint given by Akhtar, a case FIR No.182 dated 23.11.2013 under Sections 148, 149, 365 and 377 Indian Penal Code, 1860 was registered at Police Station Nagina, District Mewat against various accused persons, including the private

respondents. The translated version of FIR as contained in the petition reads as under:-

“To SHO, P.S.Nagina Distt.Mewat, Subject: For kidnapping and confinement, Sir, it is requested that I, Akhtar s/o Suleman, R/o Jalalpur, Ferozepur(40), Mewat Mandikhera, District Nuh (Mewat), doing the work of agriculture, I have four sons and three daughters. My two sons namely Saleem and Salaudeen have got married to the daughters of Najar s/o Chaw Khan, R/o Vill.Nai. That my daughter in law Sajida wife of my elder son used to come our house after Gona and wife of Salaudeen has not come so far after the marriage. Infact, Sanjida is not liking my elder son Saleem. So, her parental relative want to finish this relationship. Yesterday on dated 18.09.2013 at about 2.00 PM my son along with his uncle Yunus were going to Barkali on motorcycle after taking medicine, then his in-laws came in Bolero Vehicle of white colour without number and were about 8 persons namely, Najar, his nephew Umar s/o Chaw Khan, Tarif s/o Umar, Rasid s/o Abdulah and three other persons to whom we can identify in case they came before us and putting their vehicle before bike at Pulia near Electricity Board and forcibly taken my son. On the spot, Isha s/o Shadi, R/o Jamalpur were cultivating his field adjacent to road and he seen all the incident. They have illegally detained my son in their village and Najar gave threatening at 4.40 from the mobile no.8607084282 of my son and said that bring Rs.2 lacs cash and article of my daughter and done divorce of my daughter otherwise you will have to see bad time. We tried to rescue my son on our level but they did not releasing thus it is requested that after registering case against the accused person and action be taken.”

After registration of above FIR, investigation in the alleged crime was conducted and upon completion a cancellation report under Section 173 (2) Cr.P.C was submitted before the Court of competent jurisdiction, but being dis-satisfied with the same, the petitioner filed a protest petition. Thereafter considering the pre summoning evidence and

other documentary material on record, trial Court vide order dated 08.05.2017 (Annexure P-1), summoned private respondent Nos.2 to 7 for commission of offences punishable under Sections 365, 323 and 34 IPC, whereas qua accused Nos.8 and 9, Sanjida and Ruksar (both daughters of Nazar Ali) protest petition was dismissed. Further, the trial Court found no evidence regarding the alleged commission of offence punishable under Section 377 IPC.

Aggrieved against the deletion of Section 377 IPC in the summoning order, the complainant preferred a criminal revision bearing No.49 of 2017 before Sessions Judge, Mewat and the same was accepted vide order dated 24.08.2017 (Annexure P-2) and the summoning order dated 08.05.2017 was modified by addition of Section 377 IPC qua accused Maksood, Rafik and Tarif (respondent Nos.4, 5 and 7, respectively).

Thereafter, during the trial proceedings before the Judicial Magistrate First Class, Ferozepur Jhirka accused, namely, Umar, Tarif, Rashid, Dillo, Maksood and Rafik (respondent Nos.2 to 7) failed to appear, and in order to secure their presence, the trial Court initiated proceedings under Section 82 Cr.P.C., who were finally declared proclaimed persons vide order dated 08.07.2019 (Annexure P-3). At this stage, the private respondents filed application under Section 438 Cr.P.C for grant of anticipatory bail, however, the same was dismissed as withdrawn on 18.07.2019 (Annexure P-4). Again, a similar application was moved by them before Additional Sessions Judge, Nuh for the same relief, but the second

application was also withdrawn on 17.01.2020 (Annexure P-5). The accused persons continued to remain absent from the trial proceedings, who made third attempt for seeking pre-arrest bail under Section 438 Cr.P.C and this time Additional Sessions Judge, Nuh extended the interim concession to proclaimed persons vide order dated 11.02.2020 (Annexure P-6). The said order was challenged by complainant before this Court through CRM-M-9140-2020 and it was disposed off on 02.03.2020 (Annexure P-7) by passing the following order:-

“The petition is disposed of with a direction to the petitioner to bring all these facts to the notice of Additional Sessions Judge, Nuh, where the petition for grant of pre-arrest bail filed by the accused in the case, is still pending, listed for 8.4.2020, for arguments. Such Court shall consider the contentions raised by the petitioner and deal with those, by giving reasons.”

Thereafter, the Additional Sessions Judge, Nuh finally decided the third application on 18.06.2020, whereby previous order dated 11.02.2020 (Annexure P-6) was made absolute. Hence this petition.

Pursuant to the notice of motion issued on 31.07.2020, Mr. Saleem Ahmed, Advocate appeared on behalf of contesting respondent Nos.2 to 7, but no reply has been filed on their behalf despite number of opportunities.

Learned counsel for the petitioner has argued that the conduct of the accused persons was completely ignored by the Additional Sessions Judge, Nuh while accepting their third anticipatory bail application vide impugned order dated 18.06.2020 and even the objection that they were

proclaimed persons was not dealt with. He has further argued that the previous two applications filed by the accused persons were withdrawn by their counsel and the third application could not have been entertained as there was no change in circumstances, therefore, the impugned order warrants interference. Learned counsel has argued that neither the maintainability of the application was examined nor the directions issued by this Court vide order dated 02.03.2020 (Annexure P-7), were complied with by Additional Sessions Judge, Nuh, while accepting the prayer for anticipatory bail on behalf of proclaimed persons. In support of his arguments, learned counsel has relied upon “State of Madhya Pradesh Vs. Pardeep Sharma”, 2014 (1) R.C.R (Criminal) 269 and decision of this Court in CRM-M-34479-2020, titled as “Harjinder Singh Vs. Sukhdeep Kaur and another”, decided on 27.11.2020. He prayed that the impugned order be set aside.

On the other hand, learned counsel for the respondents has argued that as the previous two petitions filed by the accused persons were withdrawn and were not decided on merits, therefore, the same shall have no bearing on the third application which has been accepted on merits vide order dated 18.06.2020. According to him, the Additional Sessions Judge, Nuh has considered the facts and circumstances of the case and exercised the discretion in favour of the accused, therefore, the complainant cannot maintain this petition under Section 439 (2) Cr.P.C as the said concession has never been misused by the respondents. He further states that as the

respondents have already joined the trial proceedings, therefore, the petition deserves to be dismissed. In support of his case, learned counsel has relied upon “*Sushila Aggarwal Vs. State (NCT of Delhi), 2020 SCC Online SC 98*” and decision dated 03.08.2018 passed in CRM-M-45090-2017 by this Court in “*Baldev Singh Vs. State of Punjab and others*” and prayed for dismissal of the petition.

During the course of hearing, it is not disputed by the learned counsel for the respondents that after withdrawal of the second anticipatory bail application on 17.01.2020 there was no material change in circumstances and the third application was also filed only on apprehension of arrest. He has not explained that as to why the earlier two applications were not pressed by the accused persons.

Learned counsel for the parties have been heard and with their assistance perused the case file.

Chapter XXXIII Code of Criminal Procedure contains provisions relating to bail and bond, and Section 438 Cr.P.C. confers discretionary powers upon the High Court and Court of Sessions to issue directions for release of person apprehending arrest. Section 438 Cr.P.C. reads as under:

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

(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 be issued 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 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 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code.”*

A reading of the above, makes it absolutely clear that the power to grant pre arrest bail is extra ordinary in nature, therefore, the said concession cannot be granted in a routine manner, but in exceptional cases only. In order to claim benefit under Section 438 Cr.P.C., the person seeking intervention of the Court is required to fulfil the requisite condition of apprehension or likelihood of arrest on the accusation of having committed a non-bailable offence. Apart from it, while considering the prayer in this

regard, the Court is supposed to examine various factors i.e. nature of accusation, role attributed to accused, punishment for the alleged offence(s), as well as the conduct of the accused applicant etc and after careful analysis the said discretion is exercised, keeping in mind the sound judicial principles.

The background of the case reveals that the trial proceedings were very much within the knowledge of the private respondents who were initially summoned by trial Court for 21.07.2017 and they had also contested the revision petition filed by the petitioner/complainant, wherein the revisional Court delivered its verdict on 24.08.2017 in favour of the complainant and added Section 377 IPC in prosecution case. As the said order was never challenged by the private respondents, therefore, at that stage it was imperative for them to either submit themselves before the trial Court or to seek their remedy of pre arrest bail. Admittedly, the private respondents had preferred two successive petitions for anticipatory bail after approximately two years, however, the said claim was not pressed and both the petitions were withdrawn on 18.07.2019 and 17.01.2020 (Annexures P-4 and P-5, respectively).

Concededly, the third application, whereupon the impugned order has been passed is founded on the same cause of action without any change in the circumstances, and Additional Sessions Judge, Nuh accepted the prayer without analyzing its maintainability or discussing the merits of the case. Consequently, the sole argument raised by learned counsel for the

private respondents that as the concession of bail has not been misused by them, the order dated 18.06.2020 does not deserve to be cancelled is misplaced as the jurisdiction under Section 439(2) Cr.P.C can be exercised in case the order of bail granted to the accused is perverse.

The reference in this regard can be made to **Brij Nandan Jaiswal Vs. Munna @ Munna Jaiswal, 2009 (1) SCC 678**, it has been held that the order of bail can be questioned on merit as well and the relevant observations contained in Para 7 read as under:-

“7. It is now a settled law that complainant can always question the order granting bail if the said order is not validly passed. It is not as if once a bail is granted by any court, the only way is to get it cancelled on account of its misused. The bail order can be tested on merits also. In our opinion, therefore, the complainant could question the merits of the order granting bail. However, we find from the order that no reasons were given by the learned Judge while granting the bail and it seems to have been granted almost mechanically without considering the pros and cons of the matter.”

The above view was further reiterated by the Hon'ble Supreme Court in **Padmakar Tukaram Bhavnagare Vs. State of Maharashtra (2012) 13 SCC 720** and the relevant observations are extracted below:-

“..... It is true that this Court has held that generally speaking the grounds for cancellation of bail broadly are interference or attempt to interfere with the due course of justice or abuse of the concession granted to the accused in any manner. This Court has clarified that these instances are illustrative and bail can be cancelled where the order of bail is perverse because it is passed ignoring evidence on record or taking into consideration irrelevant material. Such vulnerable bail order must be quashed in the interest of justice. (See: [Dolat Ram v. State of Haryana, 1995 \(1\) SCC 349](#) & [Dinesh M.N.](#)

(S.P.) v. State of Gujarat, 2008 (3) R.C.R. (Criminal) 868: 2008 (4) R.A.J. 596: 2008 (5) SCC66.”

A perusal of the impugned order dated 18.06.2020 makes it absolutely clear that Additional Sessions Judge, Nuh exercised discretion in favour of the accused persons, without dealing with the objections raised by the State counsel who opposed the prayer by highlighting that the applicants are proclaimed persons. The Additional Sessions Judge, Nuh has relied upon the order dated 09.10.2017 whereby co-accused Nazar was granted anticipatory bail and proceeded to extend the interim concession protecting them against their arrest by imposing cost upon the accused persons, despite noticing their conduct that they have already delayed the trial proceedings intentionally. The case of the co-accused Nazar is distinguishable as he had applied for anticipatory bail soon after the decision dated 24.08.2017 by revisional Court whereas the petitioners absconded from the trial proceedings and applied for anticipatory bail for the first time in July, 2019.

By now it is well settled law that the accused person who has been declared proclaimed person under Section 82 Cr.P.C is not entitled to the concession of pre-arrest bail and in this regard reference can be made to **“State of Madhya Pradesh Vs. Pardeep Sharma”, 2014 (1) R.C.R (Criminal) 269** and the relevant part is extracted below:-

“Recently, in Lavesh vs. State (NCT of Delhi), (2012) 8 SCC 730, this Court, (of which both of us were parties) considered the scope of granting relief under Section 438 vis-à-vis to a person who was declared as an absconder or proclaimed

offender in terms of Section 82 of the Code. In para 12, this Court held as under:

“12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as “absconder”. Normally, when the accused is “absconding” and declared as a “proclaimed offender”, there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail.”

It is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail.”

In the present case, Additional Sessions Judge, Nuh has exercised the extra ordinary discretion under Section 438 Cr.P.C in favour of the proclaimed persons in an illegal and arbitrary manner, and that too after a long delay without even seeking explanation for their continuous absence from the trial proceedings. Even before this Court, learned counsel for the contesting respondents is unable to justify their conduct and therefore, this Court finds that there exists reasonable grounds for exercise of power under Section 439 (2) Code of Criminal Procedure. The judicial pronouncements relied upon by the learned counsel for private respondents are not attracted in the facts and circumstances of this case.

Thus, this Court has no hesitation in holding that the impugned order dated 18.06.2020 has been passed by Additional Sessions Judge, Nuh

by violating the directions dated 02.03.2020 passed by this Court as well as without considering the maintainability or merits of the application, law on the subject and objections on behalf of the prosecution and it amount to grave judicial indiscipline warranting disciplinary action against the presiding officer.

Resultantly, petition is allowed and the impugned order dated 18.06.2020 is set aside and it is ordered that respondent Nos.2 to 7 shall surrender forthwith before the trial Court and in case any application for bail is filed by them, the same shall be decided in accordance with law.

Let a copy of this order be sent to Registrar General of this Court for placing it before Hon'ble the Chief Justice for further orders on administrative side.

(MANOJ BAJAJ)
JUDGE

9.8.2021

vanita

Whether speaking/reasoned :	Yes	No
Whether Reportable :	Yes	No