

**In The High Court for the States of Punjab and Haryana
At Chandigarh**

CRM-M-39172-2021 (O&M)
Date of Decision:- 21.9.2021

Pawan Kumar Petitioner

Versus

State of Haryana and another Respondents

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Mr. Sandeep Sharma, Advocate, for the petitioner.

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GURVINDER SINGH GILL, J. (Oral)

1. The petitioner seeks grant of anticipatory bail in respect of the criminal complaint No. 274, dated 29.1.2018, under Section 138 of Negotiable Instruments Act, wherein his bail has been cancelled on account of his absence before the trial Court on 6.7.2019 and also on subsequent dates.
2. Learned counsel for the petitioner has submitted that his absence as on 6.7.2019 and on the subsequent dates was due to the reason that his son namely Shubam had left his house without telling anyone and the petitioner and other members of his family kept on searching for him and it was only in the first week of June, 2021 that the petitioner came to know about the whereabouts of his son. It has been submitted that it was on account of the mental tension the petitioner was undergoing that he could not appear before

the trial Court on 6.7.2019 and thereafter and that now the trial Court vide order dated 22.1.2020 (Annexure P-1) has ordered for issuance of arrest warrants. Learned counsel has also submitted that it was also on account of spread of pandemic that he was prevented from causing appearance or to contact his counsel.

3. The learned counsel has submitted that although the petitioner moved an application before the Court of Sessions seeking grant of anticipatory bail but the same has been dismissed without appreciating the facts of the case.
4. I have considered the aforesaid submissions.
5. The petitioner remained absent for a period of almost 2 years w.e.f. 6.7.2019. Although the petitioner asserts that it was on account of the fact that his son went missing and that it was only in the first week of June, 2021 that he could be traced, but the said contention cannot be accepted in view of the fact that there is nothing to support the said contention. No DDR in respect of the alleged absence/missing of his son has been placed on record. Apparently, the said contention has been cooked-up by the petitioner. Further, the contention that he was prevented on account of pandemic Covid-19, can also not be accepted as the said virus had not spread in July, 2019 and it is only later somewhere around the beginning of 2020 that the spread of said virus was noticed or identified.
6. Further, a perusal of provisions of Section 438 Cr.P.C. shows that it is only upon an apprehension of arrest consequent upon initiation of some criminal proceedings that the said provisions can be invoked. Section 438 Cr.P.C. 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; 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 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).”

7. The words “*reason to believe that he may be arrested on accusation of having committed a non-bailable offence*”, as existing in section 438 Cr.P.C.

are very significant and show that it is only when a person apprehends his arrest pursuant to an accusation having been made regarding commission of non-bailable offence that provisions of section 438 Cr.P.C. may be availed of. In the instant case the accusation against the accused was made when the complaint came to be instituted and not when the petitioner jumped bail or when the arrest warrants were issued on account of his absence.

8. Hon'ble the Supreme Court in a recent judgment Manish Jain Vs. Haryana State Pollution Board 2020 SCC OnLine SC 1101 has held that when an accused is on bail, he is in a way in constructive custody and if the law requires him to surrender or to take him back in custody, it cannot be said that there is apprehension of his arrest on account of accusation as he is deemed to be in constructive custody already and that in such circumstances provisions of Section 438 Cr.P.C. can not be availed of.
9. In view of the aforesaid discussion, this Court finds that it is only when there is an apprehension of arrest of an accused upon an accusation having been made i.e upon institution of FIR or lodging of complaint or otherwise having been summoned by the Court for the first time to face trial that a person may approach the Courts under provisions of Section 438 Cr.P.C. seeking grant of anticipatory bail. The scope of 438 Cr.P.C. can not be extended to cases where such apprehension of arrest is on account of jumping bail.
10. Further, the reasons assigned by the petitioner to justify his absence do not inspire confidence. Although the petitioner claims that he remained under mental tension as his son went missing for two years but the fact that no complaint seems to have been made to any authority in respect of his son would show hollowness of such claim. The contention that pandemic Covid-

19 prevented him from causing appearance is also unacceptable as the absence is from July, 2019 onwards whereas Pandemic Covid-19 had set in much later.

11. The petition, as such, is found to be sans merit and is hereby dismissed.

12. Before parting with this order, it needs to be added that this Court cannot lose sight of the fact that there would be certain cases where an accused is unable to appear before the trial Court on account of genuine reasons, say- on account of having noted the date incorrectly or on account of certain reasons which are beyond his control. In such cases, the accused can surrender before the trial Court and it is expected that the trial Courts would take a lenient view in genuine cases and decide the regular bail application expeditiously. In a given set of circumstances where the trial Court is satisfied that there were valid reasons for the absence of an accused and that he has surrendered at the shortest possible time, the trial Court can in fact dispose of the regular bail application on the very day the same is presented by accused upon his surrender. The trial Court, in its discretion, may also chose to grant interim bail, in fit cases, but only after surrender of accused.

The petition stands disposed off accordingly.

21.9.2021

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**(GURVINDER SINGH GILL)
JUDGE**

Whether speaking /reasoned

Yes / No

Whether Reportable

Yes / No