

201

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-49467-2019 (O&M)
Date of Decision: 14.07.2021

Sunita Tanwar

.. Petitioner

Vs.

State of Haryana

..Respondent

CORAM: HON'BLE MR. JUSTICE MANOJ BAJAJ

Present: Mr. Sanjiv Gupta, Advocate for the petitioner.

Kanwar Sanjiv Kumar, AAG, Haryana.

Mr. Lekh Raj Sharma, Advocate
for the complainant.

...

Manoj Bajaj, J. (Oral)

Petitioner has filed this petition under Section 438 Code of Criminal Procedure for grant of anticipatory bail in case FIR No.32 dated 27.09.2018 under Sections 406, 420 and 120-B IPC, registered at Police Station B.P.T.P., Faridabad, who apprehended her arrest at the hands of police.

The FIR was registered on the basis of a complaint made by Vaijanti Mala and the allegations noticed by the Addl. Sessions Judge, Faridabad in the order dated 23.10.2019, while declining the bail application of petitioner, read as under:

“In brief, the prosecution case is that one Vaijanti Mala gave an application before the police authority making allegations against KST Infra Structure, having registered office at 257, Atma Ram Street, Main Market, Badarpur, New Delhi, Corporate office at Third Floor, Statesman House,

Barakhamba Road, Cannaught Place, New Delhi, Marketing Office at D-13, First Floor, JMD Regend Square MG Road, Gurgaon, branch office at E-30, FF, Shopping Arcad, Block-B, Sushant Lok-I, Gurgaon, office at 307, third Floor, Shopping Arcad, Block-B, Sushant Lok-I, Gurgaon. It has been alleged that FIR was lodged against Kuldeep Singh Tanwar, Sunita Tanwar, applicant no.1, Digvijay Tanwar, applicant no.2, Neetu Chaudhary, Rekha, Tarun Bareja and Sunny Dua. It has been averred that another company G-Max Infra Strcutre and having its registered office at New Delhi and Pawan Kumar Gupta, Akash Gupta and Hansraj Ahuja are the Directors and officers in the said company. It has been alleged that the applicants along with one Manish Tewatia has booked a shop in their project and accused Tarun Bareja and Sunny Dua being representatives of KST Infra Structure came to them with a scheme that if they buy the shop in the mall, then they can improve their life style. The mall is being constructed in the name of KST Metropolitan Shopping Arcad at Sector-89, Faridabad. It has been alleged that accused no.1 to 8 disclosed that the possession of the shop would be allotted within 36 months and till then assured return plan of 12% interest would be paid. The accused no.2 and 3 also disclosed that they are the owner of the property. The complainant and others at the instance of accused no.1, 2, 3, 5, 6, 7 and 8 got allotted a 250 square feet of shop on 02.02.2013 and deposited an advance amount of Rs.25,000/-. The receipt was issued by accused no.5. The portion was allotted on the first floor of the mall. On 04.04.2013, as per the compromise, the complainant paid Rs.23,50,000/-. The amount was paid to accused no.1 and receipt was issued by accused no.5 and 6, as per the buyer agreement. The accused persons also issued 36 postdated cheques bearing signatures of accused no.2, as per the agreement made by accused no.2 and 3, out of which 20 cheques were encashed. However, remaining cheques could not be honoured for want of balance amount and for some cheques, payment was stopped. It has been alleged that the intention of the parties was to cheat them. The project has not yet started and only few structures have been raised and alleged that accused no.2, 3, 5, 6, 7 and 8 have played fraud upon them. It has also been alleged that the accused were not having a valid licence, as the licence issued in their favour was expired in 2010 itself. They approached the accused, but their offices were found locked. It has been alleged that the accused persons, under a conspiracy, illegally grabbed the amount from the complainant and 5-6 other persons also, who have been arrayed as witnesses in the case. It is alleged that a total amount of Rs.1,44,76,886/- has been taken by the accused persons.”

At the very outset, Kanwar Sanjiv Kumar, AAG, Haryana, on instructions from ASI Sanjay Kumar, states that despite the concession of interim pre arrest bail granted to the petitioner under Section 438(1) Cr.P.C., vide order dated 26.11.2019, she has not associated in the investigation till date. According to the learned State counsel, the petitioner was called on number of occasions, but she has not shown any inclination to join the investigation.

In response, Mr. Sanjiv Gupta, learned counsel for the petitioner does not dispute this fact that the petitioner is yet to join the investigation, but submits that as no notice was issued to the petitioner by police, therefore, the petitioner did not join the investigation. Learned counsel has vehemently argued that the learned State counsel be asked to produce strict proof that the petitioner was ever called to join the investigation by way of a written communication and according to him, the State police cannot blame the petitioner for not joining the investigation. Learned counsel for the petitioner has invited the attention of the Court to the order dated 26.11.2019 and argued that the dispute, if any, between the parties is purely of civil nature and further the controversy relating to KST Metropolitan Shopping Archd, has already reached before the National Company Law Tribunal, therefore, the custodial interrogation of the petitioner is not necessary. He prays that the petitioner deserves anticipatory bail.

Heard the learned counsel for the parties and perused the case file carefully.

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 the Court of Sessions to issue directions for release of person apprehending arrest. The nature of power conferred upon higher courts under Section 438 Cr.P.C. has been considered by various High Courts and the Apex Court. 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 jurisdiction to grant the concession of pre arrest bail vests with the High Court or the Court of Sessions and this relief being extra ordinary in nature, cannot be granted in routine manner, but in exceptional cases only. The old Criminal Procedure Code, 1898 did not contain any such provision for pre arrest bail and the above section was inserted in the Code of Criminal Procedure Code, 1973 by way of an amendment suggested by Law Commission. 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.

The above provision was considered in depth by Hon'ble Supreme Court in **Gurbaksh Singh Sibbia etc. Vs. The State of Punjab, 1980 AIR (SC) 1632.,** and the relevant observations read as under:

“7. The facility which Section 438 affords is generally referred to as 'anticipatory bail' an expression which was used by the Law Commission in its 41st report. Neither the section nor its marginal note so describes it but, the expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in Wharton's Law Lexicon, is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance '. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognizance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. The distinction

between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore, means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure, 1973 which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person arrested, unless there be a submission to the custody by word or action". A direction under Section 438 is intended to confer conditional immunity from this 'touch' or confinement."

The Hon'ble Supreme Court while examining the scope of Section 438 Cr.P.C. further examined the investigation part as well and observed as under:

*".....We are concerned here with a situation of an altogether different kind. 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. In fact, two of the usual conditions incorporated in a direction issued under Section 438(1) are those recommended in sub-section (2)(i) and (ii) which require the applicant to co-operate with the police and to assure that he shall not tamper with the witness during and after the investigation. While granting relief under Section 438(1) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, 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, (1961) 1 SCR 14 at p.26** to the effect that when a person not in custody approaches a police officer investigating*

an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Criminal Procedure Code does not contemplate any formality before a person can be said to be taken in custody sub-mission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under Section 167(2) of the Code is made out by the investigating agency.”

A perusal of the above makes it absolutely clear that merely because the accused has been shielded by virtue of an order under Section 438 (1) Cr.P.C. by prohibiting his/her arrest, it would not mean that the investigation in the crime has been put to a halt or suspended qua the said accused. Needless to observe that the investigation in a crime where the accused has been given protective cover is different than the custodial interrogation and this provision was introduced to check the misuse of power to arrest vested with the police. Therefore, this kind of relief is given to an accused who is willing to join the investigation. The field of investigation is occupied by police and whenever an accused is extended benefit of Section 438(1) Cr.P.C., it is incumbent for the said accused to associate and cooperate with the investigation. The Hon'ble Supreme Court after discussing the Gurbaksh Singh Sibbia's case (supra) in **Sushila Aggarwal V. State (NCT of Delhi) and another, 2020 (5) SCC 1**, made the following observations:

“The imposition of conditions under Section 438(2) with reference to Section 437(3), in the opinion of this court, is enough safeguard for the authorities-including the police and other investigating agencies, who have to investigate into crimes and the possible complicity of the applicants who seek such relief. Taking each concern, i.e. the

addition of more serious offences; presence of a large number of individuals or complainants; possibility of non-cooperation - non-cooperation in the investigation or the requirement of the accused's statement to aid the recovery of articles and incriminating articles in the course of statements made during investigations-it is noticeable, significantly, that each of these is contemplated as a condition and is invariably included in every order granting anticipatory bail. In the event of violation or alleged violation of these, the authority concerned is not remediless; recourse can be had to Section 438(2) read with Section 437(3). Any violation of these terms would attract a direction to arrest him. This power or direction to arrest is found in Section 437(5). However, that provision has no textual application to regular bail granted by the Court of Sessions or High Courts under Section 439 or directions not to arrest, i.e. order of anticipatory bail under Section 438. Secondly, Section 439(2) which is cast in wide terms, adequately covers situations when an accused does not cooperate during the investigation or threatens to, or intimidates witness[es] or tries to tamper with other evidence.”

The above decision by the Hon'ble Supreme Court makes it clear that in case the accused who has been given the benefit of pre-arrest bail, is not cooperating in the investigation, the said concession can be withdrawn or cancelled.

In the present case, the petitioner in her petition made specific averments regarding apprehension of arrest based upon accusations by complainant in the subject FIR, who had given unconditional undertaking that in case, this Court imposes conditions upon the petitioner, she would abide by the same. The petitioner also expressed her readiness to join the investigation. The relevant pleadings are extracted below:

“5. That the petitioner is apprehending their arrest and as such kind indulgence of this Hon'ble Court is being craved for grant of kind concession of anticipatory bail. The petitioners undertake to abide by all the terms and conditions so set forth by this Hon'ble Court and will not abscond or tamper with the evidence in any manner. The petitioner is ready to join the investigation. As such kind indulgence of this Hon'ble Court is being craved for grant of kind concession of anticipatory bail.”

Considering the averments and the arguments of the learned counsel for the petitioner, this Court on 26.11.2019 passed the following order:

“CRM-36228-2019

Application is allowed as prayed for.

Main case

Learned counsel for the petitioner contends that the complainant had allegedly invested a sum of Rs.23,25,000/- in a business project namely, KST Metropolitan Shopping Archd at Sector-89, Faridabad. He submits that pursuant to the buy back agreement, a fixed monthly rent was to be paid to the complainant for a period of three years and against the said agreement, approximately 16 cheques issued in favour of complainant were encashed. He submits that subsequently a dispute relating to KST Metropolitan Shopping Archd reached before the National Company Law Tribunal. Learned counsel further submits that the petitioner who is a director, is ready to return the entire investment of the complainant and has brought a sum of Rs.4,65,000/- by way of demand draft bearing No.812908, dated 24.10.2019 in her favour. He submits that in the given facts the custodial interrogation of the petitioner may not be necessary.

Notice of motion for 14.01.2020.

Meanwhile, the petitioner shall join the investigation and would come present as and when called for and in the event of arrest, the petitioner shall be admitted to interim bail on her furnishing personal and surety bonds to the satisfaction of Arresting/Investigating Officer. The petitioner shall also abide by the conditions as specified under Section 438(2) Cr.P.C.”

Apparently, through the above order, specific directions were given to the petitioner to join the investigation and further to comply with the conditions as specified under Section 438 (2) Cr.P.C., but the needful was not done. The admitted stand of the learned counsel for the parties makes it abundantly clear that the petitioner after availing the benefit of interim pre arrest bail under Section 438 (1) Cr.P.C. never bothered to comply with the directions given by this Court in the above order, but on the contrary, has blamed the police for not calling her by way of a written

communication, therefore, this Court has no doubt in holding that the petitioner has not only misused the extra ordinary concession of interim pre arrest bail granted by this Court, but also deliberately delayed the investigation for a long time without any justifiable reasons.

Resultantly, the petition filed by the petitioner for grant of pre arrest bail is dismissed.

14.07.2021
Jasmine Kaur/vanita

(MANOJ BAJAJ)
JUDGE

Whether speaking/reasoned	Yes	No
Whether reportable	Yes	No