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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ BAIL APPLN. 3312/2022

SH SHAHID HUSSAIN Petitioner

Through: Mr. S. A. Rajput, Adv.

versus

THE STATE (NCT OF DELHI) Respondent

Through: Mr. Raghuvinder Verma, APP for the
State with Inspector Ajit Singh, PS
RPF Tuglakabad.

Mr. Subhash Tanwar, CGSC with Mr.
Sandeep Mishra, Mr. Ashish
Choudhary, Adv.

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Date of Decision: 12th December, 2022

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (Oral)

1. The present bail application has been filed under section 438 Cr.P.C. for grant of anticipatory bail in FIR bearing No. 0007/2022 registered under section 3 Railway Property (Unlawful Possession) Act, 1966 at P.S. RPF, Tuglakabad.
2. Vide order of this Court dated 09.11.2022 the petitioner was directed to join the investigation at PS RPF, Tuglakabad on 10.11.2022 at

10:00 AM and on subsequent dates as and when directed by the concerned IO. Further, Status Report was directed to be filed. The Status Report has been placed on record. As per the Status Report the petitioner namely Shahid Hussain has joined the investigation, however, he has not given any satisfactory reply regarding the recovery of the case property and is not cooperating during the investigation. The IO submits that even though the petitioner has joined the investigation he is not cooperating and further states that the case property is yet to be recovered.

3. Per contra, learned counsel for the petitioner submits that his client readily joined the investigation and has always been cooperating in the investigation. Learned counsel submits that the petitioner would adhere to all the conditions as imposed by this Court and shall appear before the IO as and when directed. Learned counsel further submits that the other co-accused namely Akil Ahmad, Mohd. Ibrahim, Mohd. Wajid, Rajbir s/o Babu Lal, Mohd. Gulfam, Rajbir @ Raju s/o Sh. Prakash, Arjun Singh, Mohd. Dilshad have already been released on bail by the learned Trial court.
4. It has been submitted that apprehending his arrest, the petitioner moved the learned Sessions Court seeking grant of anticipatory bail which was dismissed by the Learned ASJ – 03, Central District, Tis Hazari Courts, Delhi vide order dated 10.10.2022. Thereafter, second application for anticipatory bail was moved by the petitioner, which too, was dismissed by the Learned ASJ – 03, Central District, Tis

Hazari Courts, Delhi, vide order dated 28.10.2022. Aggrieved thus the petitioner has moved this Court seeking grant of anticipatory bail.

5. The IO submits that recovery of articles for an amount of Rs.14,000/- is yet to be recovered from the petitioner.
6. Learned counsel for the petitioner submits that to show bona fide, the petitioner would furnish a FDR for an amount of Rs.15,000/- before the learned Trial Court within 7 days without prejudice to the rights and contentions of the petitioner.
7. In ***Gurbaksh Singh Sibbia vs State of Punjab***, AIR 1980 SC 1632, a Constitution Bench of the Supreme Court discussed certain considerations to be born in mind for grant of anticipatory bail. Some of which include the following:
 - a. the applicant must show that he has “reason to believe” that he may be arrested for a non-bailable offence. “Reason to believe” must be founded on reasonable grounds and mere ‘fear’ and vague apprehension for arrest is not enough. Section 438(1) Cr.P.C. cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest.
 - b. upon an application being moved for anticipatory bail, the High Court or the Court of Session must apply its own mind to the question and decide whether a case has been made out for granting such relief.

- c. filing of a FIR is not a condition precedent to the exercise of the power conferred under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed. Anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested. The provisions of Section 438 Cr. P.C. cannot be invoked after the arrest of the accused.
- d. a 'blanket order' of anticipatory bail should not generally be passed.

8. In ***Siddharam Satlingappa Mhetre vs. State of Maharashtra and Others***, (2011) 1 SCC 694; the Supreme Court relying upon the Constitution Bench judgment in ***Shri Gurbaksh Singh Sibbia (supra)*** laid down the following factors and parameters to be considered while dealing with an application for anticipatory bail:

“112. ... (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused 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;

(iv) The possibility of the accused's likelihood to repeat similar or other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

113. Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and

particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

114. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualise all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the Judge concerned, after consideration of the entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the Judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the Court of Session or the High Court is always available.”

9. Further in a recent judgement in ***Sushila Aggarwal and Others vs. State (NCT of Delhi) and Another***, (2020) 5 SCC 1, a recent Constitution Bench of the Supreme court laid down the following guiding principles in dealing with applications under Section 438:

“92. This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438 CrPC.

92.1. Consistent with the judgment in Gurbaksh Singh Sibbia v. State of Punjab [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565: 1980 SCC (Cri) 465], when a person complains of apprehension of arrest and approaches for order,

the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

92.2. It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the Public Prosecutor and obtain facts, even while granting limited interim anticipatory bail.

92.3. Nothing in Section 438 CrPC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or

tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified — and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The need to impose other restrictive conditions, would have to be judged on a case-by-case basis, and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

92.4. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

92.5. Anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the charge-sheet till end of trial.

92.6. *An order of anticipatory bail should not be “blanket” in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.*

92.7. *An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.*

92.8. *The observations in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] regarding “limited custody” or “deemed custody” to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565: 1980 SCC (Cri) 465] had observed that : (SCC p. 584, para 19)*

“19. ... 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 [State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504] .”

92.9. It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439(2) to arrest the accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc. ”

10. Thus, it would be safe to conclude that the courts would grant or refuse anticipatory bail after taking into consideration some salient factors namely:

- a. the nature & gravity of the accusation;
- b. the antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;
- c. the possibility of the applicant to flee from justice and;
- d. the possibility of the accused's likelihood to repeat similar or commit other offences

- e. where the accusation has been made with the object of injuring or humiliating the appellant by having him so arrested.
- f. the impact of grant of anticipatory bail particularly in cases of large magnitude affecting a large number of people
- g. the courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of sections 34 and 149, IPC the courts should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern.
- h. while considering the prayer for grant of anticipatory bail a balance has to be struck between two facts, namely, no prejudice should be caused to the free, fair and full investigation, and there should be prevention of harassment, humiliation and unjustified detention of the accused.
- i. the court to consider reasonable apprehension of tampering of witness or apprehension of threat to the complainant.
- j. frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal cause of events, the accused is entitled to an order of bail.

11. It is a settled position of law that the basic rule of criminal jurisprudence is bail not jail. The Supreme Court and this Court by way of a plethora of cases has propounded that the courts must enforce this principle in practice. It is also settled law that denial of bail amounts to deprivations of personal liberty. However, what must be borne in mind is that power conferred under section 438, CrPC is an exceptional power and should be exercised only in exceptional cases and not in general cases. The consideration governing exercise of discretion for granting anticipatory bail are materially different from those of an application for bail. Anticipatory bail is not to be granted as a matter of rule, it should be granted when the Court is convinced that the person would not misuse his liberty.
12. The power of anticipatory bail being of extraordinary nature should be exercised only in exceptional cases. Anticipatory bail is not to be granted as a matter of rule, it has to be granted only when the Court is convinced that exceptional circumstances exist to resort to that extraordinary remedy. Thus, the judicial discretion conferred under section 438 Cr. P. C. must be exercised after proper application of mind to decide whether it is a fit case for granting anticipatory bail or not.
13. Anticipatory bail u/s 438 may be granted to certain categories of persons such as government servants, minors, women, old/ infirm

persons, handicapped persons, persons having permanent disability, persons who are involved in petty cases, person who are likely to be harassed in police custody. However, the discretion of granting anticipatory bail has to be exercised sparingly in appropriate cases with due care and caution imposing required conditions.

14. This court deems it appropriate to reiterate and assert that the discretion vested under section 438 Cr. P. C. should be exercised with care and circumspection depending upon the facts and circumstances of each case justifying its exercise. Thus, the discretion vested should also be exercised with caution and prudence. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. The grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case. As observed in *Sibbia (Supra)* and reiterated in catena of other judgements, the Courts must exercise this jurisdiction under Section 438 CrPC by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do.

15. In the present case, the offence committed is under section 3 Railway Property (Unlawful Possession) Act, 1966. The other co – accused persons in this case have already been granted bail by the learned Trial court. As per the IO, articles for an amount of Rs.14,000/- is yet to be recovered from the petitioner. The petitioner has joined the investigation. Further, learned counsel for the petitioner to show bonafide has submitted that the petitioner will furnish a FDR for an

amount of Rs.15,000/- before the learned Trial Court within 7 days without prejudice to the rights and contentions of the petitioner.

16. In the aforesaid circumstances, let the petitioner furnish a FDR for an amount of Rs. 15,000/- before the learned Trial Court within 7 days. The petitioner is directed to join the investigation as and when directed by the IO. In the event of arrest, the petitioner be admitted to anticipatory bail on furnishing a bail bond of Rs 20,000/- with one surety of the like amount with the satisfaction of the IO/SHO subject to the following conditions:

- a) the petitioner shall regularly attend the trial;
- b) the petitioner shall under no circumstances leave India without prior intimation of the Court concerned;
- c) the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case;
- d) the petitioner shall provide his/her mobile number(s) to the Investigating Officer and keep it operational at all times;
- e) the petitioner shall drop a PIN on the Google map to ensure that his location is available to the Investigating Officer;
- f) In case of change of residential address and/or mobile number, the petitioner shall intimate the same to the Investigating Officer/ Court concerned by way of an affidavit.

g) the petitioner shall not tamper with the evidence.

17. Accordingly, the present petition stands disposed of.

DINESH KUMAR SHARMA, J

DECEMBER 12, 2022

Pallavi

