

**IN THE HIGH COURT AT CALCUTTA**  
**(Criminal Revisional Jurisdiction)**  
**CIRCUIT BENCH AT JALPAIGURI**  
**APPELLATE SIDE**

**Present:**

**The Hon'ble Justice Shampa Dutt (Paul)**

**CRR 13 of 2023**

**Safikul Alam @ Safikul Haque @ Alam**

**Vs**

**The State of West Bengal.**

**For the Petitioner** : Mr. Pronojit Roy.

**For the State** : Mr. Aditi Sankar Chakraborty.  
Mr. Arjun Chowdhury.

Heard on : 04.04.2023

Judgment on : 10.04.2023

**Shampa Dutt (Paul), J.:**

1. The present revision has been preferred against an order dated 28.11.2022 passed by the learned Judge, Special Court (under NDPS Act), Jalpaiguri, issuing warrant of arrest against the petitioner in connection with Jaigaon Police Station Case No. 35 of 2022 dated 25.02.2022 under Sections 22(C) of Narcotic Drugs and Psychotropic Substances Act; adding Sections 25/29 of Narcotic Drugs and Psychotropic Substances Act; (NDPS 20 of 2022).
2. The petitioner's case is that Jaigaon Police Station Case No. 35 of 2022 dated 25.02.2022 under Sections 22(C) of Narcotic Drugs and Psychotropic Substances Act, was started on the basis of a complaint lodged by one Dhurba Pradhan, S.I. of Police, Jaigaon Police Station, (hereinafter referred as defacto complainant) with the Officer-in-charge of said Police Station.
3. The allegations leveled in the said complaint is to the effect that on 24.02.2022 defacto complainant received information regarding loading of huge quantity of prohibited drugs. He informed his superiors and after permission of superiors left with other police personals. On reaching Daldabari, he found one truck loaded with bricks, parked inside the premises of Baba Ganinath Iron Store. The complainant intercepted the truck and two persons namely Om Prakash Jaiswal and Dinanath Jaiswal. On being searched he

recovered two cartons containing 28000 pieces of 'SPM-PRX WOCKHARDT' capsules.

4. The petitioner states that he moved an application under Section 438 of Criminal Procedure Code, 1973, before Hon'ble High Court, Circuit Bench at Jalpaiguri, being C.R.M. No. 431 of 2022 and vide order dated **08.12.2022** same was turned down.
5. After completion of investigation, charge-sheet being C.S. No. 270 of 2022 dated 18.11.2022 under Sections 22(C) of Narcotic Drugs and Psychotropic Substances Act; adding Sections 25/29 of Narcotic Drugs and Psychotropic Substances Act was submitted against five (5) persons including the petitioner and on 19.11.2022, cognizance was taken.
6. On **28.11.2022** the learned Special Judge issued warrant of arrest against the petitioner and another co-accused and fixed 14.02.2023 for production, appearance and E.R. of warrant of arrest.
7. **Mr. Pronojit Roy, learned counsel for the petitioner** has submitted that the learned Judge, Special Court (under NDPS Act), Jalpaiguri erred in law and that the order passed by the learned Judge, Special Court (under NDPS Act), Jalpaiguri, is otherwise bad and illegal and is liable to be set aside.
8. **Mr. Roy** has further submitted that it was during the pendency of his application for anticipatory bail that the learned Special Judge issued the warrant of arrest.

9. Hence the revision.
10. From the materials on record it is evident that the petitioner's prayer for anticipatory bail was rejected on 08.12.2022.
11. Warrant of arrest was issued vide order dated 28.11.2022 by the learned Judge, Special Court (NDPS Act), Jalpaiguri.
12. The Supreme Court **in Sushila Aggarwal and Ors. vs State (NCT of Delhi) and Anr., SLP (Criminal) Nos. 7281-7282/2017, on January 29, 2020**, laid down the guidelines required to be kept in mind by Courts dealing with applications under Section 438 Cr.P.C.
13. The Supreme Court in **Prem Shankar Prasad vs The State of Bihar & Anr., Criminal Appeal No. 1209 of 2021, on October 21, 2021**, held:-

*“7.3 In the case of State of Madhya Pradesh vs. Pradeep Sharma (Supra), it is observed and held by this court that if anyone is declared as an absconder/proclaimed offender in terms of section 82 of Cr.PC, he is not entitled to relief of anticipatory bail. In paragraph 14 to 16, it is observed and held as under:-*

*“14. In order to answer the above question, it is desirable to refer to Section 438 of the Code which reads as under:-*

**“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 nonbailable 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—*

*(i) the nature and gravity of the accusation;*

*(ii) the antecedents of the applicant including the fact as to whether he 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; and*

*(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,*

*either reject the application forthwith or issue an interim order for the grant of anticipatory bail:*

*Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.”*

*The above provision makes it clear that the power exercisable under Section 438 of the Code is somewhat extraordinary in character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty.*

**15.** *In Adri Dharan Das v. State of W.B. [(2005) 4 SCC 303] this Court considered the scope*

of Section 438 of the Code as under : (SCC pp. 31112, para 16)

*“16. Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead innocence, since he is not on the date of application for exercise of power under Section 438 of the Code convicted for the offence in respect of which he seeks bail. The applicant must show that he has ‘reason to believe’ that he may be arrested in a non bailable offence. Use of the expression ‘reason to believe’ shows that the belief that the applicant may be arrested must be founded on reasonable grounds. Mere ‘fear’ is not ‘belief’ for which reason it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief of the applicant is based that he may be arrested in nonbailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the court concerned to decide whether a case has been made out for granting of the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail ‘whenever arrested for whichever offence whatsoever’. Such ‘blanket order’*

*should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 is a device to secure the individual's liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. On the facts of the case, considered in the background of the legal position set out above, this does not prima facie appear to be a case where any order in terms of Section 438 of the Code can be passed."*

**16.** *Recently, in Lavesb v. 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 visàvis 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 : (SCC p. 733)*

*"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."*

*Thus the High court has committed an error in granting anticipatory bail to respondent No.2 – accused ignoring the proceedings under Section 8283 of Cr.PC.”*

14. In **Sadhna Chaudhary vs The State of Rajasthan and Anr., Criminal Appeal No. 936 of 2022, on July 12, 2022.** The Supreme Court held:-

*“14. Law on the applicability or grant of anticipatory bail under section 438 Cr.P.C. may be briefly summarised as under:-*

*14.1. In **Shri Gurbaksh Singh Sibbia and Others v. State of Punjab**, a Constitution Bench of this Court, **Chief Justice Y.V. Chandrachud**, speaking for the Court dealt with in detail on the considerations for grant of anticipatory bail.*

*14.2. In **Siddharam Satlingappa Mhetre vs. State of Maharashtra and Others**; this Court relying upon the Constitution Bench judgment in **Shri Gurbaksh Singh Sibbia** laid down in paragraph 112 of the report the following factors and parameters to be considered while dealing with an application for anticipatory bail:-*

*"(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 over-implication 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."

14.3. In yet another recent Constitution Bench judgment in the case of **Sushila Aggarwal and Others vs. State (NCT of Delhi) and Another<sup>3</sup>**, in paragraph 85 of the report **Justice Ravindra Bhatt** laid down the guiding principles in dealing with applications under Section 438.

**Justice M.R. Shah** had authored a separate opinion. **Justice Arun Misra, Justice Indira Banerjee and Justice Vineet Saran** agreed with both the opinions. The concluding guiding factors stated in paragraphs 92, 92.1 to 92.9 are reproduced hereunder:

"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 **Shri Gurbaksh Singh Sibbia and others v. State of Punjab**<sup>4</sup>, 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 Cr. PC, 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), Cr.P.C. [by virtue of Section 438 (2)]. The need to impose other restrictive conditions, would have to be judged on a casebycase 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 chargesheet 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 prearrest bail.*

*92.8. The observations in Sibbia 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 (supra) had observed that*

*"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**5."*

*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."*

15. The conflict between an order of **anticipatory bail** and **non-bailable warrant** has to be met in a pragmatic manner striking a balance between individual's right to personal freedom and the invocation of right of the police and the procedure required to be followed by a Magistrate. Where an order of **anticipatory bail** is passed after issue of **non-bailable warrant** of arrest by a Magistrate, the duty of the police officer entrusted with execution of the **warrant** would be to arrest the person and produce him before the Magistrate who thereupon shall deal with the accused as required by the order of **anticipatory bail**.
16. In the present case the circumstances are different and not conflicting as prayer for anticipatory bail has been rejected on merits.

17. Nature of offence is serious in this case being one under Section 22(C) and under Section 25/29 of the NDPS Act.
18. The revision in this case against the order dated 28.11.2022 issuing Warrant of Arrest has now become infructuous as the anticipatory bail application has been rejected on 08.12.2022.
19. **CRR 13 of 2023 is thus dismissed.**
20. The petitioner is granted two weeks time to surrender before the trial court and pray for necessary relief, which the trial court shall consider in accordance with law, failing which, the Investigating Agency would be at liberty to arrest him and proceed with the investigation as per law.
21. All connected Applications stand disposed of.
22. Interim order if any stands vacated.
23. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.
24. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

**(Shampa Dutt (Paul), J.)**