

CRM-M-1880-2023
RESERVED ON: 13.01.2023
PRONOUNCED ON: 31.01.2023

.....PETITIONER

STATE OF HARYANA

.....RESPONDENT

Present: Ms. Bindu Tanwar, Advocate
for the petitioner.

SANDEEP MOUDGIL, J

The jurisdiction of this Court under Section 438 Cr.P.C., has been invoked for grant of anticipatory bail to the petitioner in case FIR No.433, dated 03.07.2021, under Sections 120-B, 406, 420 IPC (Sections 467, 468 and 471 IPC added later on), registered at Police Station Suraj Kund, District Faridabad.

The present petitioner had first filed CRM-M-38447-2022 for the grant of anticipatory bail which was dismissed as withdrawn on 23.12.2022 on the ground that certain offences, which were added later on, have not been incorporated. Liberty was granted to file a fresh application. The petitioner has now filed the second petition for the grant of anticipatory bail after about 14 days of the passing of the afore-said order.

Learned counsel for the petitioner has submitted that the present

DER. 12 Petition is second petition for grant of anticipatory bail inasmuch as the first

anticipatory bail petition was withdrawn with liberty to file a fresh one. The complainant has entered into three agreements with one Harender Kumar regarding the selling of the land which was transferred by petitioner through GPA directly from the farmers. The petitioner in collusion with the other farmers of the above said land has cancelled the GPA of the said land.

Notice of motion.

On advance notice, Mr. Gagandeep Singh Chhina, AAG, Haryana accepts notice on behalf of respondent-State and has vehemently argued that the present anticipatory bail is 2nd application which is not maintainable. The petitioner has managed to evade the process of law with malicious intent and not entitled to any benefit on this aspect alone. He also argues that the petitioner has not approached this Court with clean hands who is a habitual offender and as many as 10 FIRs have been registered against him. Accordingly, he prays for dismissal of the present petition.

In the case in hand the nature of allegations and the antecedents of the petitioner would fall in exceptional circumstance. However without going into the merits of the case, at this stage it would be appetite to examine the question on the objections raised by learned State counsel whether 2nd anticipatory bail application is maintainable.

Be that as it may, before going to the merits of the case, this Court, would prefer to adjudicate on the preliminary objection raised by the learned State counsel i.e., whether second anticipatory bail application under Section 438 Cr.P.C., 1973 is maintainable.

Learned counsel for the petitioner has argued that the principle of res judicata could not operate in an application for bail particularly in the light of the

fact that the earlier petition had been withdrawn. The counsel has further asserted

that wherein the petition was rejected on that ground would not mean that he cannot be allowed to re-agitate the matter on merits, while referring to judgment of the Supreme Court in *Rani Dudeja vs. State of Haryana, 2017 Vol. 13, SCC 555* referring to para 3 & 4 thereof, which reads as under:-

“3. The appellant approached the High Court with a petition under Section 438 of the Cr.P.C. By the impugned order dated 07.03.2017, the petition was rejected on the ground that the appellant had filed a petition earlier and the same had been withdrawn and, therefore, the appellant cannot be allowed to re-agitate the matter on merits.

4. We are afraid, the stand taken by the High Court cannot be appreciated. The petition was for anticipatory bail and the one which had been filed earlier might have been withdrawn in a given situation, without inviting the Court to consider the same on merits. On change of circumstances, when another application under Section 438 Cr.P.C., was filed, the High Court should have considered the same on merits. The principle of res judicata could not have operated in an application for bail.”

Heard learned counsel for the respective parties.

To examine the issue and answer the question, I deem it just and fair to begin with noticing the provisions of anticipatory bail as introduced in the Code of Criminal Procedure, 1973 for the first time, since there was no such provision under the old Code of 1898. Earlier there had been conflicting views holding that bail could be granted to a person against whom a report of an offence was made even though, he was neither arrested nor detained and even in a case, where a person was suspected of an offence for which he might be arrested by a Police Officer but majority of view also held that even the High Court did not have inherent power to grant anticipatory bail by invoking Section 561A of the old Code, thereafter law Commission in its 41st report advocated the grant of power to superior Courts for the purpose of anticipatory bail, which was also endorsed in

the 48th report of the Commission and incorporated Clause 447 of the Code of Criminal Procedure Bill, 1970 for the first time, which reads as under:-

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission (41st report). We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the public prosecutor. The initial order should only be an interim one. Further the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interest of justice....."

The said Clause was enacted as Section 438 in the existing Code of Criminal Procedure, 1973. Thereafter, the Hon'ble five Judges of Supreme Court tested the judicial discretion envisaged under Section 438 Cr.P.C., alongwith other factors connected with the said provision in case **Gurubaksh Singh Sibbia vs. State of Punjab, ((1980)2 SCC 565)** and prompted certain principles which may be summarised as under: “

- (i) *The use of the expression 'reason to believe' in Section 438(1) shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief'. 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. Such belief must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be arrested. Specific events and facts must*

be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief. (Paras 35, 40 and 41). A blanket order i.e. an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had should not generally be passed. Such a blanket order-is bound to cause serious interference with the functions of the police. (Paras 40 and 41)

(ii) If an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned under Section 437 of the Code, as and when an occasion arises. (Para 36).

(iii) The filing of an FIR is not a condition precedent to the exercise of the power under Section 438. (Para 37)

(iv) Anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested. (Para 38).

(v) The provisions of Section 438 cannot be invoked after the arrest of the accused. (Para 39)

(vi) An order of bail can be passed under Section 438(1) without notice to the Public Prosecutor or the Government advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage (Para 42)

(vii) Regarding time-limit, if any, for anticipatory bail the court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the

order in relation to a period of time. (Para 42)"

In the light of aforesaid judicial pronouncements and the provisions of Section 438 Cr.P.C., 1973, it is crystal clear that the Court must be satisfied that a fit case had been made out for exercise of such discretion. This Court has to make an effort to strike a balance between the individuals right to personal freedom and the investigational rights of the police. This provision is not to be applied mechanically especially in the light of phraseology "if it thinks fit" as envisaged therein with Sub Section(2) is indicative enough that such order on the face of it must show the reasons for granting anticipatory bail.

The insertion of word "or" in sub-Section 1 of Section 438 has invested this Court with concurrent jurisdiction. Evidently the discretionary power to the Court does not flow from Article 21 of the Constitution of India for grant of anticipatory bail but conferred by the Statute enacted by the Parliament, wherein a distinction from the language of Sections 438 and 439 Cr.P.C., is quite evident that the provisions contained in Section 439 flow from Article 21 of the Constitution of India.

The constitutional Bench of the Apex Court has interpreted Section 438(1) of Cr.P.C., in the case of **Gurubaksh's Singh (supra)**, which indicated:-

"Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The application must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The 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 a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone

that the court can determine whether the applicant has reason to believe that he may be arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applicants for anticipatory bail will be, as large as, at any rate, the adult populace. Anticipatory bail is a device “to secure the individual's liberty”. it is neither a passport to the commission of crime nor a shield against any and all kinds of accusations, likely or unlikely.”

Apart from that, the question “can a formula be devised conferring the power of granting anticipatory bail in straight jacket?” was answered in the negative observing that while laying down cast iron rules in a matter like granting anticipatory bail, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situation. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions and it will be strange, if, by employing judicial artifices and techniques, discretion conferred upon the Courts is cut down by devising a straight jacket formula. Going further, I noticed that the Hon’ble Constitution Bench narrated the situation and contingencies for invoking power under Section 438 indicating in para 8 of the judgment of **Gurubaksh Singh Sibbia vs. State of Punjab (supra)**, which reads as under:

"No one can accuse the police of possessing a healing touch nor indeed does anyone have misgiving in regard to constraints consequent upon confinement in police custody. But, society has come to accept and acquiesce in all that follows upon a police arrest with a certain amount of sangfroid, in so far as the ordinary rule of criminal investigation is concerned. It is the normal day-to-day business of the police to investigate into charges brought before them and broadly and generally, they have nothing to gain, not favours at any rate, by subjecting ordinary criminals to needless harassment. But the crimes, the criminals and even the complainants

can occasionally possess extraordinary features. When the even flow of the life becomes turbid, the police can be called upon to inquire into charges arising out of political antagonism. The powerful processes of criminal law can then be perverted for achieving extraneous ends. Attendant upon such investigations, when the police are not free agents within their sphere of duty, is a great amount of inconvenience, harassment and humiliation. That can even take the form of the parading of a respectable person in hand cuffs, apparently on way to a court of justice. The foul deed is done when an adversary is exposed to social ridicule and obloquy, no matter when and whether a conviction is secured or is at all possible. It is in order to meet such situations, though not limited to these contingencies, that the power to grant anticipatory bail was introduced into the Code of 1973".

Having discussed the factual and legal chronology, this Court convincingly able to observe that while exercising powers under Section 438 Cr.P.C., the Court is duty bound to strike a balance between the individuals right to personal freedom and the investigational right of the police, therefore, the provisions of anticipatory bail cannot be allowed to put to abuse at the instance of unscrupulous petitioner.

Accordingly, the second or subsequent bail application under Section 438 Cr.P.C., can be filed, if there is a change in the fact-situation or in law, which requires the earlier view being interfered with or where the earlier finding has become obsolete. An accused, who has been denied the bail earlier can move a subsequent application only on in that limited area. If the issue, which had been canvassed earlier, would not be permitted to be re-agitated on the same grounds, as it would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.

Perusal of the order dated 23.12.2022 (Annexure P-12) would show that

interfere in the matter, learned counsel for the petitioner, who had filed the first anticipatory bail, in order to avoid a detailed adverse order on merits, sought the permission of this Court to withdraw the said petition. After a period of 14 days from the passing of the said order, the present petition has been filed by another counsel, except change of the counsel, there is no subsequent event or change in circumstance, much less substantial change in circumstance has been pointed out by learned counsel for the petitioner or averred in the present petition.

There is sufficient material though on the merits such as the allegations against the petitioner who is consistently evading the process of law being involved in number of cases against him. Merits are need not to be examine at this stage since the petitioner has failed from all corners to bring out any change of circumstance before this Court after withdrawal of the earlier anticipatory bail petition.

The petitioner is a habitual offender. Such type of person having a shaddy past is certainly not entitled to discretionary equitable relief of pre- arrest bail, which is to be granted in exceptional circumstances and not in routine, as it is meant to save the innocent persons from harassment and inconvenience and not to screen the culprits from arrest and custodial interrogation.

This Court is, therefore, of the considered view after having examined the submissions made by the counsel for the petitioner and the ambit of Section 438 Cr.P.C., that the petitioner does not deserves the concession of anticipatory bail.

Hence, holding that second anticipatory bail in such circumstances is not maintainable, the petition is ordered to be dismissed.

However, it is made clear that anything stated hereinabove shall not be construed as an expression of opinion on the merits of the case.

31.01.2023
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(SANDEEP MOUDGIL)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>