

CRM-M-23995-2022

DECIDED ON:2nd MARCH, 2023

SUNIL KUMAR

.....PETITIONER

VERSUS

STATE OF HARYANA

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. J.S. Thind, Advocate
for the petitioner.

Mr. Gagandeep Singh Chhina, AAG, Haryana.

Mr. ADS Sukhija, Advocate
for the complainant.

SANDEEP MOUDGIL, J

This is the second petition under Section 438 Cr.P.C. for grant of anticipatory bail to the petitioner in FIR No. 586, dated 17.10.2021, under Sections 120-B, 406, 420, 447 IPC (Section 506 IPC added later on), registered at Police Station Rai, District Sonipat.

At the very outset, it would be relevant to note that the after the dismissal of anticipatory bail application by learned Sessions Judge, Sonipat, vide order dated 02.02.2022 (Annexure P7), the petitioner had approached this Court for the grant of concession of anticipatory bail by filing CRM-M-13665-2022, in which the following order was passed:-

Present: Mr. Anirudh Singh Shera, Advocate for the petitioner.
Mr. Harkesh Manuja, Advocate for the complainant.

SANDEEP MOUDGIL, J (ORAL)

After arguing for some time, learned counsel for the petitioner prays for withdrawal of the present petition.

Dismissed as withdrawn.

(SANDEEP MOUDGIL)

JUDGE

1st APRIL, 2022

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On 01.04.2022, when the first petition for anticipatory bail was withdrawn, the petitioner had an apprehension of arrest. The petitioner's anticipatory bail had already been rejected by the Additional Sessions Judge, Panipat vide order dated 02.02.2022 (P-7) and thus, the withdrawal of the first anticipatory bail application was apparently to avoid a detailed adverse order. This Court is of the opinion that the filing of the present second anticipatory bail petition is not maintainable, but is also misconceived and thus, deserves to be dismissed with costs.

Learned counsel for the petitioner has submitted that the case of the petitioner is also similarly situated with his co-accused Gyanender, who has already been granted the concession of interim bail by this Court vide order dated 24.03.2022 passed in CRM-M-12337-2022. From the plain reading of the FIR, it is evident that the petitioner is not the beneficiary of the cheques, which were paid to the co-accused Nishcal Mittal.

Learned State counsel Mr. Gagandeep Singh Chhina, AAG Haryana has vehemently opposed the present petition primarily on its maintainability urging that second anticipatory bail application is not maintainable. It is further asserted that the allegation qua the petitioner is that he has encroached upon the plot of the complainant. The previous owner of the plot also admitted that he sold the plot to her and possession of specific portion was delivered to her in the year 2013 and later on, some other land was

sold to the petitioners by the land owners but they illegally encroached upon the plot of the complainant.

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. Though, 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) but it 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 01.04.2022 (Annexure P-9) would show that the matter was argued and when this Court's view was evident that it was not inclined to 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 approximately one month from the passing of the said order, though the present petition was filed by some other counsel but on 24.02.2023 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, to consider 2nd

Hence, I am of considered view that after having examined the submissions made by the counsel for the petitioner and the ambit of Section 438 Cr.P.C., this petition fails.

Accordingly, 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

2nd MARCH, 2023
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(SANDEEP MOUDGIL)
JUDGE

Whether speaking/reasoned
Whether reportable

Yes
Yes