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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-30576-2023
DECIDED ON: 03.07.2023

RIFAKAT

.....PETITIONER

VERSUS

STATE OF HARYANA

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. Intizar Ul Hasan, Advocate
for the petitioner.

SANDEEP MOUDGIL, J (ORAL)

1. This is a second petition for grant of anticipatory bail to the petitioner in FIR No.585, dated 04.11.2022, under Sections 147, 148, 149, 188, 323, 452, 379, 427 and 506 of IPC (Section 307 of IPC added later on), registered at Police Station Sadar Nuh, District Nuh.
2. Learned counsel for the petitioner has drawn attention of this Court to an order dated 30.05.2023 passed by the Apex Court, whereby the petitioner has withdrawn the Special Leave Petition with liberty to file a fresh petition before this High Court seeking the same relief and said liberty was granted, therefore, he contends that the second anticipatory bail petition is maintainable.
3. On a question put by this Court that the second anticipatory bail petition would be maintainable only in case there was any inadvertent bona fide error for not bringing any fact before this Court on the previous date of hearing i.e., on 28.03.2023 or there is any subsequent change of circumstances, but the

petitioner has failed to refer any such change of circumstances or factual aspect to claim maintainability of second anticipatory bail petition, except the argument that Section 307, which was added later on is not attributed to the petitioner.

4. On a bare perusal of the FIR and the order dated 28.03.2023, this very argument was raised on that day as well, which was opposed by Mr. Rajesh Lamba, learned Advocate appearing for the complainant before this Court and once the Court was not convinced that petition was sought to be dismissed as withdrawn and at that time, Mr. Manoj Tanwar, learned Advocate was appearing for the petitioner.

5. Today, there is a change of counsel, as Mr. Intizar Ul Hasan, learned Advocate has appeared and on that account, he submits that the petitioner could not heard properly to make out a case that Section 307 is not attributed to the petitioner.

6. Be that as it may, this Court has heard the matter on merits on 28.03.2022 and the change of counsel would not make any difference before this Court on factual aspects, which are apparent from the FIR as well as other material documents i.e., order dated 20.03.2023 (Annexure P-7) passed by the Court below vide which the anticipatory bail petition was dismissed.

7. There is a specific observation in the FIR as well as in the order dated 20.03.2023 (Annexure P-7) passed by the Court below, while declining the concession of anticipatory bail that the petitioner namely Rifakat had thrown the stone, which caused injury on the head and as per the medical report, injury was grievous in nature, which is a vital part of the body.

8. Though, without going into the merits, a mere reference is sufficient enough to record that actually the case was heard at length during the course of hearing of first anticipatory bail petition and there is no such change of factual aspects or any other new ground raised by the counsel for the petitioner today before this Court with the change of counsel as well.

9. In the second anticipatory bail petition, which is otherwise not maintainable, as has been observed by this Court in ***Gaurav Matta vs. State of Haryana*** passed in CRM-M-9494-2023, while relying upon the judgment of 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)"

10. 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.

11. 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.

12. 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.”

13. 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".

14. 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 petitioners.

15. 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.

16. 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., this petition fails.

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

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

(SANDEEP MOUDGIL)
JUDGE

03.07.2023

Meenu

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No