

2023:PHHC:166549

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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**CRM-M-40307-2023
DECIDED ON: 18th AUGUST, 2023**

RAJINDER KAUR @ HARJINDER KAUR

.....PETITIONER

VERSUS

STATE OF PUNJAB

... RESPONDENT

CORAM: HON'BLE MR.JUSTICE SANDEEP MOUDGIL.

Present: Mr. G.S. Bhatia, Advocate
for the petitioner

Mr. Rajiv Verma, DAG, Punjab.

SANDEEP MOUDGIL, J

1. The jurisdiction of this Court under Section 438 Cr.P.C., has been invoked for the grant of second anticipatory bail to the petitioner in FIR No. 66, dated 08.04.2023, under Section 304 IPC, registered at Police Station Ajnala, Amritsar.

2. The factual matrix of the present case is that the petitioner is a qualified Nurse having done diploma for three years in General Nursing and Midwifery from Council of Paramedical, Punjab, Mohali affiliated with the Open International University for Complementary Medicine. She has also completed one year diploma in Medical Operation Theatre Technology from Paramedical Council of India Duly recognized from Medical Council of India. She has a long experience since 2008 onwards as OT Assistant in

various hospitals and has also served as Staff Nurse with Adlakha Medical Centre from June, 2013 to May, 2015.

3. The allegation qua the petitioner is that the elder sister namely Soni of the complainant died due to wrong treatment give by her and due to non-cooperation of her brother-in-law, namely Garib Singh (husband of the deceased), who refused to supply the copy of Aadhar Card because of which the treatment of deceased was effected.

4. Learned counsel for the petitioner submits that the petitioner has been falsely implicated in the present case and the FIR in question has been registered without any expert medical opinion from the Medical Board. It is further submitted that the FIR in question is nothing but an abuse of process of law, as there is no evidence to show that the petitioner was negligent in performing her duties.

5. The petitioner earlier also approached this Court for the grant of pre-arrest bail by way of **CRM-M-27540-2023** and that was dismissed as withdrawn vide order dated 30.05.2023. It is apposite to mention here that after the withdrawal of the petition seeking pre-arrest bail by this Court vide order dated 30.05.2023, the petitioner filed a petition i.e. CRM-M-36809-2023 seeking quashing of the FIR in question, which was also dismissed by this Court vide order dated 31.07.2023.

6. The question involved for adjudication, before this Court in the present case, is that whether second anticipatory bail application is maintainable.

7. In the light of the submissions made by the counsel and the material on the case file, this Court needs to examine the questions and answer the same. In the light of arguments raised by counsel for the petitioner

that principle of res judicata could not operate in an application for bail and withdrawal of earlier petition cannot be a ground to deny reagitate the matter on merits placing reliance on a judgment of the Supreme Court in '**Rani Dudeja V. State of Haryana**', (2017) 13 SCC SSS categorically to the observations made in Paras 3 and 4 thereafter as reproduced herein below:-

“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.”

8. 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 561-A 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:-

“31. 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.....”

9. 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)"

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. In the instant case, there is no change in circumstance. In fact, a petition seeking quashing of FIR has already been dismissed by this Court vide order dated 31.07.2023. 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., the petitioner has failed the test for entertaining the second anticipatory bail application.

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.

18th AUGUST, 2023
Sham

- 1. Whether speaking/reasoned?
- 2. Whether reportable?

(SANDEEP MOUDGIL)
JUDGE

- Yes/No
- Yes/No