

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-13315-2024

Date of decision:09.04.2024

Bhisham Singh

....Petitioner

V/s

State of Haryana

....Respondent

CORAM: HON'BLE MR. JUSTICE SUMEET GOEL

Present: Mr. Balvinder Sangwan, Advocate for the petitioner.

Ms. Mahima Yashpal, DAG, Haryana.

SUMEET GOEL, J.

1. The present second petition has been filed by the petitioner-
Bhisham Singh under Section 438 of Code of Criminal Procedure, 1973
(hereinafter referred to as 'the Cr.P.C.') seeking pre-arrest anticipatory bail
in FIR No.83 dated 20.07.2023 registered under Sections 354-A of IPC
(Sections 376(2)(n) and 511 of IPC was added later on) at Police Station
Women Police Station, Ballabgarh, Haryana
2. The case set up in the FIR in question (as set out by the
petitioner in the present petition) is as follows:

“To the SHO, Women Police Station, Ballabhgarh. It is requested that I Komal age 24 years, D/o Bhisham Singh is resident of B-608, Malbari County Sec 70, Mujeri, Faridabad. My father forcibly tried to molest me while I was alone. We had gone to for purchasing material for our N.I.T. old shop and when we were taking meal, then he consumed liquor and sat near to me and while talking tried to kiss me and caught hold my hands, pressed towards the floor and tried to enter his hands into my shirt. I shouted and said "No" but he gagged my mouth by his hands and got my mouth shut. I got scared by this action of my father and I did not tell about the same to my mother but after some time, I told about this fact to my friend. My father was knowing about this friend of mine and he tried to pressure and disturb me by

threatening me and asked me to forget my friend otherwise I was threatened to face dire consequences. When I got upset, I came to the police station. Thanking you. 9810926130 KOMAL daughter of Bhisham Singh B-608, Malbari County Sec 70, Mujeri, Faridabad.”

3. After the abovesaid FIR came to be registered under Section 354-A of IPC, investigation was carried out wherein statement of the victim was recorded before the investigating officer as also before the Magistrate under Section 164 of Cr.P.C. & thereafter Sections 376(2)(n)/511 of IPC were added to the FIR in question.

4. The petitioner had earlier applied for grant of pre-arrest/anticipatory bail before this Court which was dismissed as withdrawn on 08.02.2024. The relevant part of said order reads as under:-

“Learned counsel for the petitioner, after arguing for some time, seeks to withdraw the instant petition.

Dismissed as withdrawn.”

Thereafter, the present petition i.e. the second petition for grant of anticipatory/pre-arrest bail has been preferred by the petitioner on 11.03.2024.

5. Learned counsel for the petitioner has argued that the petitioner has been falsely implicated in the present case. Learned counsel has further argued that there are material improvements in the stand/statement(s) made by the victim under Section 161 of Cr.P.C. and Section 164 of Cr.P.C. & the victim, by way of such material improvements, has referred to further incidents of assault. Learned counsel has further submitted that after the first petition was withdrawn on 08.02.2024, new documents/photos have come into the possession of the petitioner which provides fresh material and

grounds for consideration as also for grant of anticipatory bail to the petitioner.

6. Learned State counsel has vehemently opposed the grant of anticipatory bail to the petitioner on account of the present petition being non-maintainable as it is a second petition for grant of anticipatory bail as also on merits thereof. Learned State counsel has submitted that the first petition was dismissed as withdrawn on 08.02.2024 before this Court and neither any prayer was made nor liberty was granted to the petitioner to file afresh with better particulars. Accordingly, the State counsel has argued that the instant petition deserves dismissal on this score alone. Learned State counsel, opposing the plea in hand on merits, has submitted that the petitioner has sexually assaulted her own daughter; the victim could not earlier come forward due to obvious family/societal pressure(s) & the custodial interrogation of the petitioner is pertinently required for an effective investigation in view of the nature of allegations/offences involved in the case. Thus, learned State counsel has prayed for dismissal of the instant petition.

Prime Issue

7. The prime issue for consideration in the present case is as to whether the petitioner deserves to be granted the anticipatory bail in the facts and circumstances of the instant case. The analogous legal issue, that arises for consideration is, as to whether a second petition for anticipatory bail filed under Section 438 of Cr.P.C. is maintainable. The further analogous legal issue, that arises for consideration is, if a second anticipatory bail petition is

maintainable in terms of Section 438 of Cr.P.C., then what are the factors/parameters for consideration thereof.

Relevant Statutory provisions

8. Section 438 of the Code of Criminal Procedure, 1973 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 an accusation of having committed a non-bailable 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 cognisable 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 incharge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the Court grants an interim order under sub-Section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public

Prosecutor, the Court considers such presence necessary in the interest of justice]

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including -

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section :Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue aailable warrant in conformity with the direction of the Court under sub-section (1).

[(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376-DA or section 376-DB of the Indian Penal Code (45 of 1860).J"

Relevant Case Law

9. The precedents, *apropos* to the matter(s) in issue, are as follows:

(i) In a judgment titled as ***Babu Singh and others vs. The State of U.P. 1978 AIR (Supreme Court) 527***, the Hon’ble Supreme Court has held as under:-

"2.But an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. While we surely must set store by this circumstance, we cannot accede to the faint plea that we are barred from second consideration at a later stage. An interim direction is not a conclusive adjudication, and updated reconsideration is not overturning an earlier negation. In this view, we entertain the application and evaluate the merits pro and con."

(ii) A three Judges bench of Hon'ble Rajasthan High Court in a judgment titled as **Ganesh Raj vs. State of Rajasthan & others, 2005(3) RCR (Criminal) 30**, has held as under:

"25. In the ultimate analysis, placing reliance on the ratio indicated in Kalyan Chandra Sarkar's case (supra), we hold that 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. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Second or subsequent anticipatory bail application shall not be entertained on the ground of new circumstances, further developments, different considerations, some more details, new documents or illness of the accused....."

(iii) A five Judges bench of Hon'ble Calcutta High Court in a judgment titled as **Sri Sudip Sen vs. The State of West Bengal, 2010 Cr.L.J 4628** has held as under:

"We, therefore, sum up our conclusions thus :-
(1) Whether the applicant/accused can move second application for anticipatory bail in case his first application is rejected; if yes, in what contingencies before the same Court or to the superior court?

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(c) A person will be entitled to move the High Court or the Court of Session, as the case may be, for the second time. He can do so only on the ground of substantial change in the facts and circumstances of the case due to subsequent events. However, he will not be entitled to move the second application on the ground that the Court on earlier occasion failed		

to consider any particular aspect or material on record or that any point then available to him was not agitated before the Court.”

(iv) A division bench of Hon'ble Andhra Pradesh High Court in a judgment titled as *K. Gajendra Naidu vs. State of A.P. Represented by Inspector of Police, Vigilance Cell, Civil Supplies Dept., Hyderabad, 1993(1)ALT(CRI)290* has held as under:

“7. For the aforementioned reasons we hold that there is no bar for maintaining successive applications under Section 438 Cr.P.C., 1973 muchless the second application. Office shall post the Criminal Petition before a single Judge for disposal of the same on merits.”

(v) A division bench of Hon'ble Madhya Pradesh High Court in a judgment titled as *Imratlal Vishwakarma vs. State of Madhya Pradesh, 1997(1) Crimes 289*, has held as under:-

“3. Following question therefore has been referred to this Bench :

"Whether a second application for anticipatory bail is maintainable and whether it would make any difference if earlier application was dismissed on merits or on account of having been withdrawn or not pressed?"

Our answer to the said question is that the second petition for anticipatory bail is maintainable and it would not make any difference if earlier application was dismissed on merits or on account of having been withdrawn or not pressed.

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8. Therefore, petitioner can, even if the first application filed under Section 438, Criminal Procedure Code is rejected, file a fresh application under Section 438, Criminal Procedure Code and obviously, the principle of res judicata would not apply in such a matter. If the application has been filed on the same grounds which had already been considered earlier while rejecting the first bail application, it can be rejected summarily on the ground that the same grounds have been re-agitated in the fresh petition and the petition has not been moved on any new ground. However, it shall have to be considered in each petition on the facts and circumstances of that case that the said aspects had been pressed into service in the previous petition which was rejected and no

new ground has been shown to exist for releasing the petitioner on bail under Section 438, Criminal Procedure Code. This can be determined only on the facts and circumstances of each case and the Court has to decide as to whether the fresh petition has been filed on the same grounds which were considered and not accepted, or rejected in the previous petition and no new ground has been made out in the second application. In our opinion, to say that the second application filed under Section 438, Criminal Procedure Code would not be tenable, would be laying down something which is not there in codified and legislated legislation.”

(vi) A division bench of Hon’ ble Gauhati High Court in a judgment titled as ***Runu roy vs. State of Assam, 2005(17) RCR(Criminal) 602***, has held as under:-

“13. Accordingly, we hold that within the parameters set forth by the Apex Court in Babu Singh (Supra) which would also apply to the applications filed under Sections 438 and 439 of the Code a second application under section 438 Code of Criminal Procedure, 1973 would be maintainable and constrained to overrule the view taken by the learned Single Judge in Utpal Sarma (Supra)”

(vii) In a judgment titled as ***Rani Dudeja vs. State of Haryana, 2017(13) SCC 555***, the Hon’ble Supreme Court has held as under:-

“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 for res judicata could not have operated in an application for bail.”

(viii) In a case titled as ***“Manjinder Kaur vs. State of Punjab, 2023(3) Law Herald 2080***, this Court has held as follows:-

“2. The question, therefore, which requires to be considered and answered is “whether a second anticipatory bail application under Section 438 Cr.P.C. is maintainable when the first one filed by the petitioner has been withdrawn?”

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12. We have already held that second/subsequent/successive anticipatory bail application would not be maintainable where such an application has been dismissed by the Court on merits by passing a speaking order. Further qua the anticipatory bail application, it can be said that once a first bail application under Section 438 Cr.P.C. stand withdrawn, a second or subsequent bail application would not be maintainable merely on the ground that some new inconsequential and cosmetic change in circumstances has/have come about, further developments such as arrest of co-accused or main accused or bail granted to co-accused, different considerations, some more details, new documents or illness of the accused. It would also not be maintainable on a plea or ground that the Court on the earlier occasion failed to consider any particular aspect or material on record or that any point then available to the accused was not taken, agitated or pressed before the Court.

However, the second/subsequent bail application under Section 438 Cr.P.C. would be maintainable only if there is substantial material and substantive change in the fact situation and circumstances of the case due to subsequent events or in law.”

(ix) The Hon’ble Supreme Court in a judgment titled as **G.R. Ananda Babu vs. The State of Tamil Nadu & anr., 2021(1) RCR (Criminal) 843**, has held as under:

“.....The specious reasons of change in circumstances cannot be invoked for successive anticipatory bail applications, once it is rejected by a speaking order and that too by the same Judge.”

Analysis (re law)

10. The pivotal issue, in any plea for grant of bail whether anticipatory bail or regular bail, is the liberty of an individual. Liberty occupies a place of pride in our society and jurisprudence. The framers of the Constitution hence provided *inter alia* in Article 21 of our Constitution that no person shall be deprived of his personal liberty except according to procedure established by law. The Cr.P.C. is one such procedural law which

permits curtailment of liberty of antisocial and antinational elements. Hence while interpreting any aspect pertaining to bail, a Court ought to keep the above concept in cardinal focus.

10.1 An analytical perusal of Cr.P.C. would elucidate that this statute does not contain any provision relatable to maintainability or otherwise of second/successive bail petitions, including one(s) seeking anticipatory bail. Once there is no statutory prohibition provided for in law, a Court is not logically empowered to import into it such prohibitions especially in case of codified and legislated law. It is trite law that Courts ought not to read a provision in codified law which has not been specifically provided for by the legislature especially when such reading results into deprivation of rights.

10.2 The Hon'ble Supreme Court in case of **Babu Singh** case (supra) has held that rejection of a bail petition does not, by itself, forbid a Court from considering another one later in point of time. It can be safely inferred that the decision of a Court *qua* bail petition (whether regular bail petition or anticipatory bail petition) is essentially an interlocutory order and hence the concept of *res judicata* does not apply. Almost all the Hon'ble High Courts have enunciated the view that second/successive plea(s) for grant of anticipatory bail is maintainable *albeit* with some circumspection and material change of circumstance(s) being a prime requirement. The full bench of Hon'ble Rajasthan High Court in case of **Ganesh Raj** case (supra), the full bench of Hon'ble Calcutta High Court in case of **Sri Sudip Sen** case (supra), the division bench of Hon'ble Andhra Pradesh High Court in case of **K.Gajendra Naidu** case (supra), the division bench of Hon'ble Madhya Pradesh High Court in case of **Imratlal Vishwakarma** case (supra) and the

division bench of Hon'ble Gauhati High Court in case of **Runu Roy** case (supra) have, inexorably, echoed this exposition.

10.3 Judicial experience indicates that, more often than not, an attempt is made by the non-applicant i.e. the State/complainant/victim to differentiate between the situations wherein first/earlier anticipatory bail petition has been dismissed as withdrawn/dismissed as not pressed *vis-à-vis* where the earlier petition has been dismissed on merits thereof. In other words, it is canvassed that where the first/earlier petition has been dismissed as withdrawn, that the petitioner/applicant-accused has given up on his right(s) and hence subsequent anticipatory bail petition is not maintainable. The Hon'ble Supreme Court in case of **Rani Dudeja** case (supra) has held that the second anticipatory bail would be maintainable even in case wherein earlier one was dismissed as withdrawn. A division bench of this Court, while answering a reference in this regard, has held in case of **Manjinder Kaur** case (supra) that the second anticipatory bail petition would be maintainable wherein the first one has been dismissed as withdrawn. To the similar effect is the *ratio decidendi* of a division bench of Madhya Pradesh High Court in the case of **Imratlal** case (supra). Hence, this seeming conundrum stands set at naught. Accordingly, it is ineluctable that the second/successive petition(s) for grant of anticipatory bail is maintainable even when the first/earlier one was dismissed as withdrawn.

10.4 The issue that next craves attention is as to what are the factors/parameters for consideration of second/successive anticipatory bail petition(s). The concordant view of all the Hon'ble High Courts is that the essential prerequisite for consideration of second/successive anticipatory bail

petition(s) is material/substantial change in circumstances, unearthing of substantial new material and other factors of akin nature. The Hon'ble Supreme Court in case of *G.R. Ananda Babu* case (supra) has enunciated that specious reason of change in circumstances cannot be relied upon for invoking successive anticipatory bail petition(s). Accordingly, the new grounds pleaded/change in circumstances ought to be substantial in nature.

10.5 No rigid or universal criteria can possibly be delineated to conclusively govern the exercise of judicial discretion, in determining, as to what would constitute as the above stated substantial change in circumstances. Factual flexibility, one additional or different fact, may make a sea of difference between two cases. There is no gainsaying that each case has its own distinct and unique facts and, hence, exercise of such judicial power is best left to the judicial discretion of a Court in accordance with the settled norms of our jurisprudence.

11. As an epilogue to the above rumination, the following principles emerge:

I Second/successive anticipatory bail petition(s) filed under Section 438 of Cr.P.C., 1973 is maintainable in law & hence such petition ought not to be rejected solely on the ground of maintainability thereof.

II Such second/successive anticipatory bail petition(s) is maintainable whether earlier petition was dismissed as withdrawn/dismissed as not pressed/dismissed for non-prosecution *or* earlier petition was dismissed on merits.

III For the second/successive anticipatory bail petition(s) to succeed, the petitioner/applicant shall be essentially/pertinently required to show substantial change in circumstances and showing of a mere superficial or ostensible change would not suffice.

IV No exhaustive guidelines can possibly be laid down as to what would constitute substantial change in circumstances as every case has its own unique facts/circumstance. Accordingly, this issue is best left to the judicial wisdom and discretion of the Court dealing with such second/successive anticipatory bail petition(s).

V In case a Court chooses to grant second/successive anticipatory bail petition(s), cogent and lucid reasons are pertinently required to be recorded for granting such plea despite such a plea being second/successive petition(s). In other words, the cause for a Court having successfully countenanced/entertained such second/successive petition(s) ought to be readily and clearly decipherable from the said order passed.

VI Once a plea for anticipatory bail has been dismissed as withdrawn/dismissed as not pressed/dismissed for non-prosecution *or* dismissed on merits by the High Court, no second/successive anticipatory bail petition(s) shall be entertained by a Sessions Court.

Analysis (re facts of the present case)

12. Now this Court reverts to the facts of the present case.

12.1 The allegations made in the FIR against the petitioner (herein) were related to sexual assault by the petitioner upon his own daughter. Initially, the FIR was registered under Section 354-A of IPC whereinafter

the offences of Section 376(2)(n)/511 of IPC were added thereto. The first anticipatory bail filed by the petitioner was dismissed as withdrawn on 08.02.2024. The instant petition i.e. second petition for grant of anticipatory bail has been filed thereafter on 11.03.2024. The sole ground, as urged by learned counsel appearing for the petitioner, to file the second anticipatory bail is that the petitioner has come into possession of certain photographs which substantiate the case of the petitioner. Copies of said photographs have been appended as Annexure P-11. It is worthwhile to note herein that no explication whatsoever has been put forward as to why these photographs were not previously produced along with the earlier anticipatory bail petition nor it has been explained as to how these photographs have now come to the knowledge/possession of the petitioner. Nevertheless, the perusal of said photographs (Annexure P-11) does not further the cause of petitioner for maintaining the second anticipatory bail. Therefore, in the considered opinion of this Court, mere factum of reliance upon the said photographs cannot be a substantial change in circumstance(s) and/or availability of fresh relevant material to entertain the second anticipatory bail petition. Further; arguments advanced by learned counsel for petitioner regarding the offence of rape not made out from allegations made, there being delay in lodging of FIR and the statement(s) made by victim being afterthought are only repetition of plea(s) made/available at time of making of first bail petition. These, by no stretch of legal imagination, can be said to be material change in circumstances or new substantial material coming to fore. Hence, the present petition deserves dismissal on this score itself.

12.1 The allegations raised against the petitioner are extremely serious in nature. Even if it be assumed that no recovery is to be made from the petitioner, this by itself would not be sufficient cause to grant anticipatory bail to the petitioner. In cases of a nature, as the present one is, custodial interrogation does go a long way in carrying out effective investigation. The nature as also severity of allegations made against the petitioner, especially the fact that the petitioner is accused of having sexually assaulted his own daughter, disentitles him for grant of anticipatory bail. Accordingly, the present petition deserves to be dismissed on merits thereof as well.

Decision

13. The present second petition for grant of anticipatory bail filed by the petitioner-Bhisham Singh is dismissed.

Nothing said hereinabove shall be construed as an expression of opinion on the merits of the case.

(SUMEET GOEL)
JUDGE

April 09, 2024
Ajay

Whether speaking/reasoned:	Yes
Whether reportable:	Yes