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IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH

CRM-M-27662-2024  
DECIDED ON:28.05.2024

BHUPENDER

....PETITIONER

VERSUS

STATE OF HARYANA

....RESPONDENT

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. Ankur Lal, Advocate  
for the petitioner.

Mr. Baljinder Singh Virk, Sr. DAG, Haryana.

Ms. Swati Katoch, Advocate  
for the complainant.

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**SANDEEP MOUDGIL, J.**

1. The jurisdiction of this court under Section 438 of the Code of Criminal Procedure, 1973 has been invoked 2<sup>nd</sup> time by the petitioner-Bhupender seeking anticipatory bail in case FIR No. 397, dated 30.11.2023, under Sections 147, 148, 149, 323, 325, 427 and 506 of the Indian Penal Code, 1860 (for short 'IPC') (offence under Section 307 IPC added later on), registered at Police Station Kasola, Rewari, Haryana.

2. The case set up in the FIR in question (as set out by the petitioner in the present petition) is as follows:-

*“Complaint letter against assault, vandalism of vehicles. Sir, it is requested that I am Rakesh Kumar S/o Dayanand R/o Kumbhawas Hall, BMG Society, Rewari. In Dawana village, 17 Kanal 14 the Marla land has been purchased jointly with*



*Rakesh S/o Bodh Raj R/o Rewari and from the day of purchase, we are in possession of the purchased land as share owners. Along with our said land, it seems to be the land in the possession of Dawana resident Jashrath etc., who want to illegally occupy our said land, due to which, from the point of view of security, to avoid any dispute, we have decided to fence our said land on 26.11.2023. For this, by putting a tarpaulin in a tractor and a J.C.B, he had gone with the machine in Fortuner vehicle number HR-36AN-8081 and along with me in Swift car, Aman S/o Surendra and Kamal S/o Jagram R/o Badrana had taken labor with them, which we were doing on the spot on the land under our control only to limit, we were closing the wire till our part. when suddenly there were Indrajit, Narayan, Lala, Birsingh, Bhupendra, Ajay, Vijay, Bhim, Bajrang, Shivam, Himmat, Shakti came with Agricultural fork, axe, pistol and country-made pistol etc. in their hands they took the women of their house Manbai W/o Malkhan, Manju W/o Rajbir, Rishal W/o Ranjeet, Beena W/o Babu Lal, Umesh W/o Birsingh, Usha Devi W/o Bhupendra, Sunita Devi W/o Bhagirath, Rajesh Bai W/o Inderjeet and Mamta W/o Hari Singh who had sticks, sickles and they came on the spot and attacked us and they have a red coloured Mahindra tractor, with the intention of crushing our workers and my friends with the tractor, but when they could not crush them, Himmat and Shakti took hold of the pistols in their hands and they fired at us with the intention of killing and Bhupendra gave serious injuries to Kamal S/o Jagram R/o Badhrana in his hands, legs and head with the ax he held in his hand and Bir Singh gave serious injuries to Aman S/o Surendra with the ax he held in his hand R/o Badharana was seriously injured on the head and also punched on his hands and legs, both of them are fighting for their life and death from Birendra Hospital, Rewari and all of them by forming a gang, beat all of us and pelted stones on our carts, tractors and JCB's mentioned above. The said people*



*also picked up the fencing made by us and the wire poles kept there and took them to their home, due to which a large number of tress-passers stopped and gathered there and protested. The said accused took away our belongings and fencing from there. They uprooted them and took them away, otherwise they would have created more terror and beaten them. Sir, the accused has beaten us unnecessarily and has caused a loss of about Rs 5 lakh to us by breaking vehicles and taking away our belongings and has publicly threatened us that either we hand over this land to him otherwise he will not let us live and will also occupy land in any condition. Therefore, you are requested to take necessary legal action against the accused and provide security to our life and property. It will be so kind of you. Sd- Rakesh Applicant Rakesh S/o Shri Dayanand R/o Village Kumbhavas, B.M.G, Society, Rewari Mob. 9416441822 Police proceedings: - On 26-11-2023, A information is received from Birendra hospital through phone, that Aman S/o Surender R/o Badhrana and Kamal S/o Jagram, Badrana are admitted and got injures due to fight, kindly send the IO for further investigation. Where ion information EASI Dharmendra reached at Birendra hospital and obtained Rukka and MLR along with X-RAY report. Doctor declared total 3 injuries to kamal in MLR no. 67/23 dated 26/11/2023 and reported the No bone injury. And in MLR no. 66/23 dated 26/11/2023 doctor declared total 5 injuries, suffered to Aman. While perusing the X-RAY report of Aman, doctor declared the fracture. We applied to doctor for recording the statement of injured on which doctor declared UNFIT FOR STATEMENT. So on dated 28/11/2023, a one cross complaint no. 00013236029230418 dated 28/11/2023, presented by Rakesh S/o Dayanand, R/o Kumbhawas Hall, BMG society, Rewari on which today dated 30/11/2023, I HC along with EASI Mukesh 626 and SPO Ajay 256 reached at disputed land, during investigation the offence under section 147, 148, 149, 323, 427, 506, 325 IPC have been*



*found and regarding this and the open fire the higher officials was informed and after this further investigation will be implemented. EASI Mukesh Kumar 626 is being sent to the police station kasola for the registration of the FIR No. 397 on dated 30/11/2023 under section 147, 148, 149, 323, 427, 506, 325 IPC has been registered. Computerised copies have been prepared as per rules and the special report is being sent to the concerned magistrate and the higher officials through post. The police file along with original complaint is being sent to EASI present at place of occurrence. Note: The IO of the case is HC Ashok Kumar 681/RWR. And FIR has been registered in the presence of ASI Ramesh 939/ RWR.”*

3. The petitioner had earlier applied for grant of pre-arrest/anticipatory bail before this Court, which was dismissed as withdrawn on 24.05.2024. Relevant extract of the said order reads as under:-

*“ The jurisdiction of this Court has been invoked under Section 438 Cr.P.C., for grant of anticipatory bail to the petitioner in FIR No.397, dated 30.11.2023 (Annexure P-1), under Sections 147, 148, 149, 323, 325, 427, 506 of IPC (Section 307 IPC has been added later on), registered at Police Station Kasola, District Rewari, Haryana.*

*Mr. Himmat Singh Deol, Advocate has put in appearance on behalf of the complainant and has filed vakalatnama, which is taken on record.*

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

*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 27.05.2024.



4. Mr. Baljinder Singh Virk, Sr. DAG, Haryana, has vehemently opposed the present petition primarily on the ground of maintainability submitting that second anticipatory bail application is not maintainable. Learned State counsel has submitted that the first petition was dismissed as withdrawn on 24.05.2024 after arguing at length and neither any prayer was made nor liberty was granted to the petitioner to file afresh with better particulars. Thus, he has argued that the present petition deserves to be dismissed on this ground alone. On merits, he contends that there is a specific allegation against the petitioner that he has inflicted 'farsa' blow on the head of the injured Kamal and in the photographs he can be seen having a dangerous weapon, which has to be recovered. Thus to unearth the *modus operandi* the custodial interrogation of the petitioner is required.

5. Heard.

6 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.

7. 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 cognizable 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 a bailable 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).]*"

8. On a specific query put-forth by this Court to the counsel for the petitioner that whether there is any change of circumstance that would vest the right with the petitioner for the grant of anticipatory bail at this stage. To that the counsel relies upon the judgment of Coordinate Bench of this Court passed in CRM-M-13315-2024, titled as **"Bhisham Singh vs. State of Haryana"**, decided on 09.04.2024, wherein the Court has held that the second anticipatory bail would be maintainable even in case wherein earlier one was dismissed as withdrawn.

9. 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 of the Code of Criminal Procedure, 1973, is maintainable?

10. From the perusal of record, it is an admitted fact by the counsel for the petitioner that earlier also a petition bearing No. CRM-M-26766-2024 was filed seeking anticipatory bail, but the same was dismissed as withdrawn vide order dated 24.05.2024 (Annexure P-2) after arguing for some time, since the Court was not inclined to accept the said prayer.

11. 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.”*

12. 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 561-A of the old Code, thereafter law



Commission in its 41<sup>st</sup> report advocated the grant of power to superior Courts for the purpose of anticipatory bail, which was also endorsed in the 48<sup>th</sup> 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.....”*

13. 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)"*

14. 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.

15. 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.

16. The constitutional Bench of the Apex Court has interpreted Section 438(1) of Cr.P.C., in **Gurubaksh Singh's** case (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."*

17. 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".*

18. 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.

19. 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.

20. Perusal of the order dated 24.05.2024 (Annexure P-2) would show that the matter was argued at length and when this Court was not inclined to interfere in the matter, the counsel appearing on behalf of the petitioner, in order to avoid a detailed adverse order on merits, sought the permission of this Court to withdraw the said petition. Immediately after two days of the passing of the impugned order, the present petition has been filed by the same counsel submitting that due to miscommunication/incomplete instruction on account of sudden demise of his father-in-law, the petition could not be pressed on merits and was withdrawn. The explanation putforth by the counsel for the petitioner for withdrawing the earlier petition does not inspire confidence of this Court. From the perusal of order dated 24.05.2024 (Annexure P-4), it is evident that once the Court was not inclined to grant relief, as sought by the



petitioner, learned counsel appearing for the petitioner has withdrawn the said petition in order to avoid a detailed adverse order on merits. Thus, by no stretch of legal imagination, can be said to be material change in circumstances or new substantial material coming to fore.

21. 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.

22. Moreover, in the case in hand a specific allegation has been raised against the petitioner that he has inflicted injury with '*Farsa*' on the head of the injured, which is vital part of the body and Section 307 IPC has also been added later on, thus, to unearth all the ramification involved in the present case, his custodial interrogation is necessary.

23. Hence, holding that second anticipatory bail in such circumstances is not maintainable, the present petition stands dismissed.

24. 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

28.05.2024

*sham*

*Whether speaking/reasoned Yes/No*

*Whether Reportable Yes/No*