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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. 6561/2022

MANJU BIDHURI

.....Petitioner

Through: Mr. Praveen Suri and Mr.
Akhil Kumar, Advocates.

versus

STATE OF NCT OF DELHI & ANR.Respondents

Through: Mr. Naresh Kumar Chahar,
APP for the State.
Mr. Uttam Dutt, Senior
Advocate with Mr. KD
Khan, Mr. Faiz Imam and
Ms. Sonakshi Singh,
Advocates of R-2.

CORAM:

HON'BLE MR. JUSTICE AMIT MAHAJAN

ORDER

% **09.12.2024**

1. The challenge in the present petition is to the order dated 18.11.2022, whereby the learned Additional Sessions Judge ('ASJ') though did not allow the application filed by Respondent No. 2 under Section 438 CrPC, however, disposed it of by directing that if the Investigating Officer deems fit to arrest the accused/respondent no.2, he shall be given three days prior written notice.

2. The learned Senior counsel for the respondent submits that the trial has since proceeded and bail bond under Section 88 of Code of Criminal Procedure, 1973 ('CrPC') has also been furnished.

3. He submits that the learned ASJ considered the merits of the case and passed the impugned order thereby protecting the accused. He submits that the learned ASJ noted that both parties

CRL.M.C. 6561/2022

Page 1 of 7



are known to each other and there is some money dispute between the accused and the parents of the victim.

4. He further submits that the learned ASJ also noted that the offence alleged against the accused attracted a maximum punishment of up to 05 years and consequently it is mandatory for the investigation agency to give notice under Section 41A of the CrPC requiring the accused to join the investigation.

5. The learned ASJ while exercising the power under Section 438 of the CrPC is bound by its provisions whereby the application seeking relief of bail can either be allowed or dismissed. No inherent powers are provided to the learned ASJ to pass such an order as has been passed in the present case, which has the potential to give the accused person a free hand to commit crime and tamper with the evidence during the period of days in which the police cannot arrest the accused person.

6. In accordance with Section 438 of the CrPC, on the receipt of an application by any person apprehending arrest, the High Court or the Court of Session, upon a consideration of factors, may either reject the application forthwith or issue an interim order for grant of anticipatory bail. Section 438 of the CrPC provides 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 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 in-charge 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. (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 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860).”



7. In the case of ***Union of India v. Padam Narain Aggarwal***: (2008) 13 SCC 305, the Hon'ble Apex Court was dealing with a blanket order restricting the Investigating agency from effecting the arrest of the accused without a ten day prior notice. The relevant observations of the Hon'ble Apex Court are reproduced hereunder:

“44. In the case on hand, the respondents were only summoned under Section 108 of the Act for recording of their statements. The High Court was conscious and mindful of that fact. It, therefore, held that the applications for anticipatory bail, in the circumstances, were premature. They were, accordingly, disposed of by directing the respondents to appear before the Customs Authorities. The Court, however, did not stop there. It stated that even if the Customs Authorities find any non-bailable offence against the applicants (the respondents herein), they shall not be arrested without ten days' prior notice to them.

45. In our judgment, on the facts and in the circumstances of the present case, neither of the above directions can be said to be legal, valid or in consonance with law. Firstly, the order passed by the High Court is a blanket one as held by the Constitution Bench of this Court in Gurbaksh Singh [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] and seeks to grant protection to the respondents in respect of any non-bailable offence. Secondly, it illegally obstructs, interferes and curtails the authority of the Customs Officers from exercising statutory power of arrest of a person said to have committed a non-bailable offence by imposing a condition of giving ten days' prior notice, a condition not warranted by law. The order passed by the High Court to the extent of directions issued to the Customs Authorities is, therefore, liable to be set aside and is hereby set aside.”

(emphasis supplied)

8. Relying on the same, the Hon'ble Apex Court in the case of ***Vijaykumar Gopichand Ramchandani v. Amar Sadhuram Mulchandani*** : 2022 SCC OnLine SC 1861, while dealing with a similar issue, held as under:

“1. A Single Judge of the High Court of Judicature at Bombay, by an order dated 24 November 2021 in Anticipatory Bail Application No 2803 of 2021, directed that the first respondent should be given 72 hours' notice in the event that the State intends to arrest him on the registration



of an FIR making out a cognizable offence....

2. The direction issued by the High Court to the effect that 72 hours' notice should be given to the first respondent in the event that the State finds it necessary to arrest him in connection with any complaint pertaining to a cognizable offence at the behest of the Joint Registrar (Audit) is manifestly incorrect in law. (See in this context, *Union of India v. Padam Narain Aggarwal*). **Such a direction could not have been issued by the High Court.**"

(emphasis supplied)

9. A Coordinate Bench of this Court in the case of ***Enforcement Directorate v. Tilak Raj Arora : 2019 SCC OnLine Del 11711*** set aside the impugned bail order wherein the learned Trial Court had directed the petitioner agency therein to serve a three working days notice on proposing to arrest the accused therein in that case. The Court discussed the issue of whether the investigating agency can be directed to issue notice prior to arresting the accused while deciding the application seeking pre arrest bail under Section 438 of the Code of Criminal Procedure, 1973 (*pari materia* with Section 482 of the BNSS).

The relevant portion of the same is reproduced hereunder:

"18. Keeping in view the reports of the Law Commission, Section 438 was inserted in the present Code. Sub-section (1) of Section 438 enacts that when 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 to the Court of Session for a direction that in the event of his arrest he shall be released on bail, and the Court may, if it thinks fit, direct that in the event of such arrest he shall be released on bail.

19. Sub Section (2) of 438 lays down that when the High Court or the Court of Sessions 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. Sub Section (3) of 438 lays down that 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)



20. Finally, the ratio of judgment of the Hon'ble Supreme Court in the case of PN Aggarwal (supra) is that the Court has power to grant or not to grant anticipatory bail. But the court has no power to direct the IO to issue notice prior to arrest.

21. Thus, the issue raised in the present petition is no more res integra and has already been decided in the cases cited above.”

(emphasis supplied)

10. A Coordinate Bench of this Court in the case of **Pee Empro Exports (P) Ltd. v. State : 2022 SCC OnLine Del 4036**, by relying on the judgments in the cases of **Union of India v. Padam Narain Aggarwal (supra)** and **Sushila Aggarwal v. State (NCT of Delhi) : (2020) 5 SCC 1**, had observed that it was advisable to grant limited anticipatory bail rather than issuing a direction to the Investigating Officer to issue notice prior to arrest, even if the said restriction was limited to the subject FIR. The relevant portion of the same is reproduced hereunder:

“25. However, the factum that in terms of the verdict of the Hon'ble Supreme Court in **Union of India v. Padam Narain Aggarwal (2008) 13 SCC 305** the order of grant of notice prior to arrest is not warranted as also laid down in **SUSHILA AGGARWAL v. STATE (NCT OF DELHI) (supra)** in view of the final conclusions in the said verdict in paragraphs 91 to 93 thereof which read to the effect...

26. Though it is advisable for the Court as directed thereby vide conclusions in paragraphs 92.2 on a Court being approached with an application under Section 438 of the Cr.P.C., 1973 depending on the seriousness of threat of arrest to issue notice to the Public Prosecutor and obtain facts even whilst granting even interim anticipatory bail and thus for the period to which the Court renotifies the matter on calling for a response from the Public Prosecutor after issuance of notice, **it would be open to the Court seized of an application under Section 438 of the Cr.P.C., 1973 in terms of the conclusion in para 92.2 in SUSHILA AGGARWAL v. STATE (NCT OF DELHI) (Supra) to grant limited interim anticipatory till the said date which is the appropriate course of action in terms of the verdict SUSHILA AGGARWAL v. STATE (NCT OF DELHI) (supra) rather than of directions being issued to the Investigating Officer to issue notice prior to arrest, even if they be limited to the FIR and the offences in question**



qua which the application has been filed.”

(emphasis supplied)



11. This Court in the case of ***Narendra Surana v. State of NCT of Delhi and Anr. : 2024 : DHC : 7170***, while dealing with a similar issue, had set aside the impugned bail order and observed as under:

“13. In the present case, the direction to give a prior intimation of three days mechanically protects the accused against any untoward action for a period of three days and erroneously interferes and curtails the statutory power of arrest of the investigating agency. In exercise of discretion under Section 482 of the BNSS, it is only open to the learned Trial Court to grant or reject pre-arrest bail. It is not open to the learned Trial Court to further issue a direction to give prior intimation to the accused as the same is in the nature of a blanket protection, which is impermissible.”

12. Consequently, the learned ASJ could have only exercised discretion under Section 438 of the CrPC to either grant or refuse the relief of pre-arrest bail.

13. In view of the above, the present petition is allowed and the order dated 18.11.2022 is set aside.

14. It is made clear that this Court has not made any observation on the merits of the present case.

AMIT MAHAJAN, J

DECEMBER 9, 2024

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