

A.F.R.

Court No. - 77

**Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION
U/S 438 CR.P.C. No. - 10800 of 2022**

Applicant :- Akhlakh Ahmad

Opposite Party :- State of U.P.

Counsel for Applicant :- Tawvab Ahmed Khan

Counsel for Opposite Party :- G.A.

Hon'ble Mrs. Manju Rani Chauhan, J.

1. Heard Mr. Tawvab Ahmed Khan, learned counsel for the applicant, Mr. K.P. Pathak, learned A.G.A. for the State and perused the record.

2. The present application has been moved seeking anticipatory bail in **Case Crime No. 408 of 2022, under Sections 365, 342, 420 IPC and Section 3, 5(1) of Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act 2021, P.S.-Kotwali, District-Fatehpur**, with the prayer that in the event of arrest, applicant may be released on bail.

3. As per contents of first information report, the complainant has alleged that he was promised employment by co-accused Arman Ali whereafter he was taken to a Madarssa and a mosque and pressure was exerted upon him to convert his religion but somehow he managed to escape.

4. Learned counsel for the applicant submits that the applicant is innocent and he has an apprehension that he may be arrested in the above-mentioned case, whereas there is no credible evidence against him. He further submits that the applicant has been falsely implicated in the present case due to ulterior motive. The applicant has franchisee of M/s Glaze Trading India Pvt. Ltd. and one of the agent of the company, i.e. Arman Ali was entrusted the work of increasing the number of agents for which Arman Ali informed that he has

deposited an amount of Rs.10,000/- for fooding and lodging to one Irshad and another agent, however, as they never wanted to continue as agent of the aforesaid company and demanded the money back, when the same was not returned, a false and frivolous case has been made out against the applicant including the other accused persons. He further submits that the applicant has criminal history of two cases, which has satisfactorily been explained in para 19 of the affidavit in support of bail application. The applicant undertakes to co-operate during investigation and trial and he would appear as and when required by the investigating agency or Court. It has been stated that in case, the applicant is granted anticipatory bail, he shall not misuse the liberty of bail and will co-operate during investigation and would obey all conditions of bail.

5. *Per contra*, learned AGA opposed the prayer for granted anticipatory bail to the applicant by contending that the applicant is named in the FIR. He further submits that a notice under Section 41A of Cr.P.C. was sent by the investigating officer of the present case on 21.09.2022, but the applicant failed to appear before the Investigating Officer and as such had not co-operated with the investigation. He further submits that the case does not fall under the category of section 438 Cr.P.C. Therefore, the relief as prayed cannot be granted.

6. Considering the submissions made by learned counsel for the parties and perused the record, this Court finds that from the allegations made in the FIR, *prima facie* offence is made out against the applicant. Having regard to nature of allegations and stage of investigation, held, investigating agency must be given sufficient freedom in process of investigation.

7. Object of section 438 of the Code of Criminal Procedure, is that a person should not be unnecessarily harassed or humiliated in order to satisfy personal vendetta or grudge of complainant or any other person operating the things directly or from behind the curtains. It is well

settled that discretionary power conferred by the legislature on this court can-not be put in a straitjacket formula, but such discretionary power either grant or refusal of anticipatory bail has to be exercised carefully in appropriate cases with circumspection on the basis of the available material after evaluating the facts of the particular case and considering other relevant factors (nature and gravity of accusation, role attributed to accused, conduct of accused, criminal antecedents, possibility of the applicant to flee from Justice , apprehension of tampering of the witnesses or threat to the complainant, impact of grant of anticipatory bail in investigation, trial or society, etc.) with meticulous precision maintaining balance between the conflicting interest, namely, sanctity of individual liberty and interest of society.

8. Grant of anticipatory bail may hamper the custodial interrogation and will lead to nondisclosure of useful information and material facts and information. In the case of **P. Chidambaram vs. Directorate of Enforcement, reported in (2019) 9 SCC 24**, the Apex Court held as under:-

"74. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information.

In State Rep. By The CBI v. Anil Sharma (1997) 7 SCC 187, the Supreme Court held as under:-

"6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in

disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

81. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court."

9. In another judgment of Apex Court in case of ***Sadhna Chaudhary Vs. State of Rajasthan & Anr., reported in 2022 (237) AIC 205 (SC)***, the Apex Court had held as under:-

"14. Law on the applicability or grant of anticipatory bail under section 438 Cr.P.C. may be briefly summarised as under:

14.1. In Shri Gurbaksh Singh Sibia and Others v. State of Punjab1, a Constitution Bench of this Court, Chief Justice Y.V. Chandrachud, speaking for the Court dealt with in detail on the considerations for grant of anticipatory bail.

14.2. In Siddharam Satlingappa Mhetre vs. State of Maharashtra and Others2; this Court relying upon the Constitution Bench judgment in Shri Gurbaksh Singh Sibia laid down in paragraph 112 of the report the following factors and parameters to be considered while dealing with an application for anticipatory bail:

"(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

- (ii) *The antecedents of the applicant including the fact as to whether the accused 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;*
- (iv) *The possibility of the accused's likelihood to repeat similar or other offences;*
- (v) *Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;*
- (vi) *Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;*
- (vii) *The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;*
- (viii) *While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;*
- (ix) *The court to consider reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant;*
- (x) *Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."*

14.3. *In yet another recent Constitution Bench judgment in the case of Sushila Aggarwal and Others vs. State (NCT of Delhi) and Another³, in paragraph 85 of the report Justice Ravindra Bhatt laid down the guiding principles in dealing with applications under Section 438. Justice M.R. Shah had authored a separate*

opinion. Justice Arun Misra, Justice Indira Banerjee and Justice Vineet Saran agreed with both the opinions. The concluding guiding factors stated in paragraphs 92, 92.1 to 92.9 are reproduced hereunder:

"92. This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438 CrPC.

92.1. Consistent with the judgment in Shri Gurbaksh Singh Sibia and others v. State of Punjab⁴, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

92.2. It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the public prosecutor and obtain facts, even while granting limited interim anticipatory bail.

92.3. Nothing in Section 438 Cr. PC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc.

The courts would be justified - and ought to impose conditions spelt out in Section 437 (3), Cr.P.C. [by virtue of Section 438 (2)]. The need to impose other restrictive conditions, would have to be judged on a casebycase basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

92.4. Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

92.5. Anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the chargesheet till end of trial.

92.6. An order of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

92.7. An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted prearrest bail.

92.8. The observations in Sibbia regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative

authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibia (*supra*) had observed that "if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in *State of U.P. v Deoman Upadhyaya*."

92.9. *It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439 (2) to arrest the accused, in the event of violation of any term, such as absconding, non cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc."*

10. In the case of ***Sushila Aggarwal and others Vs. State (NCT OF Delhi) and another (supra)***, the Hon'ble Supreme Court has observed as under:-

"At this stage, it would be essential to clear the air on the observations made in some of the later cases about whether Section 438 is an essential element of Article 21. Some judgments, notably Ram Kishna Balothia, (1995) 3 SCC 221 and Jai Prakash Singh, (2012) 4 SCC 379 held that the provision for anticipatory bail is not an essential ingredient of Article 21, particularly in the context of imposition of limitations on the discretion of the courts while granting anticipatory bail, either limiting the relief in point of time, or some other restriction in respect of the nature of the offence, or the happening of an event. Such obsevations are contrary to the broad terms of the power declared by the Constitution Bench in Sibia case. The larger Bench had specifically held that an "overgenerous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal

freedom cannot be made to depend on compliance with unreasonable restrictions.(Para 54)"

"The reason for enactment of Section 438 CrPC was parliamentary acceptance of the crucial underpinning of personal liberty in a free and democratic country. Parliament wished to foster respect for personal liberty and accord primacy to a fundamental tenet of criminal jurisprudence, that everyone is presumed to be innocent till he or she is found guilty. Life and liberty are the cherished attributes of every individual. The urge for freedom is natural to each human being. Section 438 is procedural provision concerned with the personal liberty of each individual, who is entitled to the benefit of the presumption of innocence. As denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when not imposed by the legislature. (Para 56)"

"Application for anticipatory bail:

Consistent with the judgment in Gurbaksh Singh Sibia, (1980) 2 SCC 565, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest. (Paras 92.1 and 85.1)"

11. Whether to grant anticipatory bail or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the Court. Further, anticipatory bail would depend on the conduct and behaviour of the accused, continue after

filling of the chargesheet till end of trial and order of anticipatory bail does not in any matter limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

12. From perusal of the records, it appears that the applicant is the named accused and the allegation against the applicant relates to Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, which is a serious offence punishable upto ten years imprisonment and fine of Rs.50,000/-. The Act said that "no person shall convert, either directly or otherwise, any other person from one religion to another by use or practice of misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means. No person shall abet, convince or conspire such conversion". From the allegations made in the FIR, the applicant is involved in forcing people to convert their religion. *Prima Facie*, offence is made out against the applicant. The other co-accused persons, namely, Alim, Mohsin, Yaseen, Yaseen Mansoori @ Gulam Yaseen Mansoori and Arman Ali have already been granted regular bail by the Co-ordinate Bench of this Court.

13. In the light of above, looking to the facts and circumstances of this case, submissions of learned counsel for the parties, taking into consideration the role assigned to the applicant as per prosecution case, gravity and nature of accusation as well as reasons mentioned above, this Court is of the view that no case for exercising its discretionary power under section 438 Code of Criminal Procedure is made out in favour of applicant.

14. Accordingly this application under section 438 Cr.P.C. is **rejected** with liberty to avail appropriate remedy as provided under the law.

15. It is clarified that observations made in this order at this stage is limited for the purpose of determination of this anticipatory bail

application and will in no way be construed as an expression on the merits of the case. The investigating officer of this case shall be absolutely free to arrive at its independent conclusions according to law on the basis of materials/evidences on record.

Order Date :- 6.1.2023

Jitendra/-