A.F.R.

Court No. - 16

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 1775 of 2023

Applicant :- Somdev Sharma
Opposite Party :- State Of U.P. Thru. Station In Charge Office Lko.
Counsel for Applicant :- Amarjeet Singh Rakhra,Bashisth Muni Mishra
Counsel for Opposite Party :- G.A.

With

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 1777 of 2023

Applicant :- Rama Bandyopadhyay
Opposite Party :- State Of U.P. Thru. Station In Charge Office Lko.
Counsel for Applicant :- Amarjeet Singh Rakhra,Bashisth Muni Mishra
Counsel for Opposite Party :- G.A.

Hon'ble Subhash Vidyarthi J.

1. Heard Sri Amarjeet Singh Rakhra, learned counsel for the applicant, Sri Rao Narendra Singh, learned A.G.A.-I for the State and perused the records.

2. Both the aforesaid applications have been filed seeking anticipatory bail in F.I.R. bearing Case Crime No.0027 of 2021, under Sections 409, 420, 467, 468, 471, 120B I.P.C., registered at Police Station S.I.T., District Lucknow (Rural).

3. At the outset, Sri Rao Narendra Singh, the learned A.G.A. I, has raised preliminary objections against the applications on two grounds – (i) that an application for anticipatory bail should not be entertained ordinarily as a regular application for bail and it can only be

entertained if there are some exceptional circumstances justifying exercise the extraordinary jurisdiction of granting pre-arrest bail and there are no exceptional circumstances in the present case; (ii) that the applicants are not named in the F.I.R. and he has instructions that their names have not surfaced in the investigation carried out till date and, therefore, there is no reasonable apprehension of arrest of the applicants. Sri. Rao Narendra Singh has further submitted that as a matter of practice even if something comes to light against a person, he/she is not arrested without obtaining permission from the State-Government and in case a need is felt for arrest of the applicants, the practice would be followed. He has relied on the Judgments of the Supreme Court in the case of **Sushila Aggarwal & Others versus State (NCT of Delhi) & Another,** (2020) 5 SCC 1 and **Prem Shankar Prasad versus State of Bihar & Others**, 2021 SCC OnLine SC 955**.**

4. In support of the first objection, the learned A.G.A. – I has relied upon the following passages from the judgment of the Hon'ble Supreme Court in **Sushila Aggarwal & Others versus State (NCT of Delhi) & Anr,** (2020) 5 SCC 1: -

> ***"7.2.*** *While considering the issues referred to a larger Bench, referred to hereinabove, the decision of the Constitution Bench of this Court in Gurbaksh Singh Sibbia (1980) 2 SCC 565 is required to be referred to and considered in detail. The matter before the Constitution Bench in Gurbaksh Singh Sibbia arose out of the decision of the Full Bench of the Punjab and Haryana High Court. The High Court rejected the application for bail after summarising, what according to it was the true legal position, thus : (Gurbaksh Singh Sibbia versus State of Punjab, 1977 SCC OnLine P&H 157)*
>
> *"(1)* ***The power under Section 438, Criminal Procedure Code, is of an extraordinary character and must be exercised sparingly in exceptional cases only****;*
>
> *(2) Neither Section 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled.*
>
> *(3) The said power is not unguided or uncanalised but all the limitations imposed in the preceding Section 437, are implicit therein and must be read into Section 438.*
>
> *(4) In addition to the limitations mentioned in Section 437, the petitioner must make out a special case for the exercise of the power to grant anticipatory bail.*

(5) Where a legitimate case for the remand of the offender to the police custody under Section 167(2) can be made out by the investigating agency or a reasonable claim to secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act can be made out, the power under Section 438 should not be exercised.

(6) The discretion under Section 438 cannot be exercised with regard to offences punishable with death or imprisonment for life unless the court at that very stage is satisfied that such a charge appears to be false or groundless.

(7) The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised; and

(8) Mere general allegations of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless."

5. However, Sri. Rao Narendra Singh has omitted to notice that the aforesaid legal position was summarized by the Punjab and Haryana High Court, and the judgment relied upon was passed in an appeal filed against the order passed by the High Court. While allowing the appeal, the Hon'ble Supreme Court held that: -

"12. *We find ourselves unable to accept, in their totality, the submissions of the learned Additional Solicitor General or the constraints which the Full Bench of the High Court has engrafted on the power conferred by Section 438.* ***Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence.*** *Though the right to apply for anticipatory bail was conferred for the first time by Section 438, while enacting that provision the legislature was not writing on a clean slate in the sense of taking an unprecedented step, insofar as the right to apply for bail is concerned. It had before it two cognate provisions of the Code : Section 437 which deals with the power of courts other than the Court of Session and the High Court to grant bail in non-bailable cases and Section 439 which deals with the "special*

powers" of the High Court and the Court of Session regarding bail. The whole of Section 437 is riddled and hedged in by restrictions on the power of certain courts to grant bail. That section reads thus:

*** * ***

The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully : Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in para 39.9 that it had "considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. ***The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail.*** *Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in clauses (i) to (iv) of sub-section (2). The proof of legislative intent can best be found in the language which the legislature uses. Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the*

accusation that the applicant has committed a non- bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail if generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437."

(Emphasis supplied)

6. The Hon'ble Supreme Court disapproved the condition no. 1 imposed by the Full Bench of Punjab and Haryana High Court that the power under Section 438, Criminal Procedure Code, is of an extraordinary character and must be exercised sparingly in exceptional cases only and held that: -

***"22.** By proposition No. 1 the High Court says that the power conferred by Section 438 is "of an extraordinary character and must be exercised sparingly in exceptional cases only". It may perhaps be right to describe the power as of an extraordinary character because ordinarily the bail is applied for under Section 437 or Section 439. These sections deal with the power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for. But this does not justify the conclusion that the power must be exercised in exceptional cases only, because it is of an extraordinary character. We will really be saying once too often that all discretion has to be exercised with care and circumspection, depending on circumstances justifying its exercise. It is unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self-imposed limitations."*

* * *

***33.** We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as*

> *one finds it on the ground that, after all, "the legislature in its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected."*

7. Therefore, the position in law is that an application for grant of anticipatory bail cannot be rejected on the ground that the applicant has failed to make out any exceptional circumstance and the merits of the application have to be examined so as to ascertain whether the applicant is entitled to be granted anticipatory bail or not. Accordingly, the first preliminary objection raised by the learned A.G.A.-I, which is based on a mis-reading of the law laid down by the Hon'ble Supreme Court, is rejected.

8. In support of the second limb of his preliminary objection, that an application for grant of anticipatory bail cannot be entertained unless there is a real apprehension of the applicant's arrest, Sri. Rao Narendra Singh has relied upon the decision in **Sushila Aggarwal v. State (NCT of Delhi)**, (2020) 5 SCC 1, wherein the two questions being decided by the Hon'ble Supreme Court were as follows: -

> *"(1) Whether the protection granted to a person under Section 438 CrPC should be limited to a fixed period so as to enable the person to surrender before the trial court and seek regular bail.*
> *(2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court."*

9. The question whether the anticipatory bail application can only be entertained in 'exceptional circumstances' or 'where there is a serious apprehension of arrest' was not involved in Sushila Aggarwal (supra). However, it was observed in Sushila Aggarwal that: -

> ***"35.*** *Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant 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 so 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 so 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 applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individuals liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely).

10. The analysis of the facts of the case and the submissions advanced before the Hon'ble Supreme Court in Sushila Aggarwal starts from para 45 of the judgment after putting in a heading - "A*nalysis and Conclusions*" and the final conclusions drawn by the Hon'ble Supreme are as follows: -

"FINAL CONCLUSIONS OF THE COURT

91. *In view of the concurring judgments of M.R. Shah, J. and of S. Ravindra Bhat, J. with Arun Mishra, Indira Banerjee and Vineet Saran, JJ. agreeing with them, the following answers to the reference are set out:*

91.1. *Regarding Question 1, this Court holds that the protection granted to a person under Section 438 CrPC should not invariably be limited to a fixed period; it should enure in favour of the accused without any restriction on time. Normal conditions under Section 437(3) read with Section 438(2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event), etc.*

91.2. *As regards the second question referred to this Court, it is held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so."*

11. After giving answer to the two questions that were referred to the larger Bench, the Hon'ble Supreme Court clarified that certain points need to be kept in mind by the Courts dealing with the applications under Section 438 Cr.P.C., the first of which only is relevant for the present case, which is as follows: -

92.1. *Consistent with the judgment in Gurbaksh Singh Sibbia v. State of Punjab, 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."*

12. In **Prem Shankar Prasad versus State of Bihar & Ors**, 2021 SCC OnLine SC 955, the Hon'ble Supreme Court referred to an earlier judgment in the case of **Adri Dharan Das v. State of W.B.**, (2005) 4 SCC 303, wherein it was held as under:-

"*16. Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead innocence, since he is not on the date of application for exercise of power under Section 438 of the Code convicted for the offence in respect of which he seeks bail.* ***The applicant must show that he has 'reason to believe' that he may be arrested in a nonbailable offence. 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 vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief of the applicant is based that he may be arrested in non-bailable offence must be capable of being examined.*** *If an application is made to the High Court or the Court of Session, it is for the court concerned to decide whether a case has been made out for granting of the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. 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. Normally a direction should not issue to the effect that the applicant shall be released on bail 'whenever arrested for whichever offence whatsoever'. Such 'blanket order' should not be passed as it would serve as a*

blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 is a device to secure the individual's liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. On the facts of the case, considered in the background of the legal position set out above, this does not prima facie appear to be a case where any order in terms of Section 438 of the Code can be passed."

(Emphasis supplied)

13. Replying to the aforesaid submission, Sri. Amarjeet Singh Rakhra, the learned counsel for the applicant has submitted that the case has been registered on the basis of an F.I.R. lodged on 20.07.2021 against 14 sets of persons - 12 sets of office bearers of various Educational Institutes, and two government officials and unknown employees of the Institutions and officers of the Government, stating that in furtherance of a complaint dated 19.06.2019, a Special Investigation Team was constituted, which conducted an enquiry and submitted a report to a Committee constituted by the Government and in the meeting of the Committee held on 27.05.2021 further action was directed. Upon a scrutiny of all the documentary evidence collected during enquiry and physical verification of the students it came to light that although there was a complaint of embezzlement of Rs.200 crores in payment of scholarship to students belonging to Schedule Castes and Schedule Tribes categories, merely Rs. 58 crores had been drawn by the concerned Institutes.

14. The first group of accused-persons is "Kapil Garg Registrar, Officers and other employees". The address of the group of persons arrayed as accused No.1 is "B.L.S. Institute of Management, Shahibabad, Ghaziabad, U.P." Regarding the BLS Institute, it is alleged that during enquiry it was found that scholarships were drawn regarding two students, Monica Gautam and Brijendra Kumar, and it transpired that both aforesaid students had not taken admission in the Institution and scholarship in respect of them was claimed in a fraudulent manner. The applicant in Criminal Miscellaneous Anticipatory Bail Application No. 1775 of 2023 is the Chairman of the Society, which manages B.L.S. Institute of Management and the applicant in

Criminal Miscellaneous Anticipatory Bail Application No. 1775 of 2023 is an Office Secretary in B.L.S. Institute of Management.

15. The applicants had filed applications seeking anticipatory bail before the Sessions Court, which have been rejected by means of an orders dated 27.07.2023 passed by Special Judge, C.B.I. (Central), Lucknow by holding that the investigation is still going on and the offence falls in the category of serious economic offences, which has wide impact on the society at large and there is no ground for grant of anticipatory bail to any of the applicants. Anticipatory bail applications have not been rejected on the ground that there is no apprehension of arrest of the applicants.

16. The Proviso appended to sub Section 1 of Section 438 Cr.P.C. provides 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, if there are reasonable grounds for such arrest."*

17. The learned counsel for the applicant has submitted that the Registrar of B.L.S. Institute of Management Kapil Garg has been granted anticipatory bail by means of the order dated 13.07.2023 passed by this Court in Criminal Misc Anticipatory Bail Application No.1566 of 2023. The applicants' applications for grant of anticipatory bail having been rejected by the Court of Session, under the statutory prescription it is open for the police to arrest the applicants without warrant. He has further submitted that the practice pointed out by the learned A.G.A. will not prevail upon and override the statutory prescription.

18. I have considered the rival submissions advanced by the learned Counsel on the point of maintainability of the application. The expression *'any person has reason to believe'* occurring in Section 438 Cr.P.C. has to be interpreted keeping in view whether any reasonable person of ordinary prudence, placed in the situation of the person seeking anticipatory bail, would have reason to believe, that there is an apprehension of arrest in the circumstances of the case.

19. The facts of the case indicate that although ordinarily the accused persons are named individually in the First Information Reports, in the present case the accused persons have been arrayed in sets and the first set of accused persons is "Kapil Garg Registrar, Officers and other employees". The address of the group of persons arrayed as accused No.1 is "B.L.S. Institute of Management, Shahibabad, Ghaziabad, U.P." This leaves the prosecution free with a long rope to include any person working for the Institute.

20. In para 42 of the affidavit filed in support of the applications, the applicants have stated that the Investigating Agency has not only got the applicants' statements recorded on more than one occasions, but has also repetitively sought information from the applicants telephonically. It has specifically been stated that after grant of anticipatory bail to the co-accused Kapil Garg, who is the Registrar of the Institute, the applicants were asked to supply certain information on the same day or to face the consequences. The applicants have pleaded that they apprehend foul play and they may be arrested.

21. Having considered the facts of the case in light of the law laid down by the Hon'ble Supreme Court in **Sushila Aggarwal** and **Prem Shankar Prasad** (Supra) I am of the view that the aforesaid facts give rise to circumstances indicating that the applicant have a reason to believe that they may be arrested. The applicants do not have a vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. The belief of the applicants is founded on reasonable grounds and it is not a mere 'fear'.

22. One more thing is significant, that although the learned A.G.A. has vehemently opposed the maintainability of the application on the preliminary ground that presently there is no apprehension of the applicants being arrested, upon being asked whether he can make a statement that the applicants would not be arrested in future also, he stated that he has no such instructions. He merely stated that in case a need of the applicants' arrest arises in future, the proposal of their

arrest will first be sent to the State Government. However, he could not point out any provision of law mandating this procedure.

23. One of the co-accused persons Kapil Garg having been granted anticipatory bail by this Court and the applicants' applications for grant of anticipatory bail having been rejected, it is open for the police to arrest the applicant without warrant in view of the statutory provision contained in the Proviso appended to sub Section (1) of Section 438 Cr.P.C.

24. Section 46 of the Cr.P.C., which lays down the procedure of arrest of persons, does not contain any provision mandating prior sanction of the State Government and an information of the sanction being sent to the accused, so that he may approach the Court for obtaining an order of pre-arrest bail.

25. Therefore, the second limb of the preliminary objection, that there is no real apprehension of the applicants' arrest, is also rejected.

26. The application requires to be considered on its merits.

27. The learned A.G.A prays for and is grated two weeks' time to file a counter affidavit. One week's time thereafter shall be available to the applicant for filing rejoinder affidavit, if he so desires.

28. List this case in the week commencing 04.09.2023.

29. Having considered the aforesaid facts and circumstances of the case and keeping and view the fact that the complaint lodged in the year 2019 allege embezzlement of Rs. 200 crores; that after enquiry, the S.I.T. found that the total disbursal of scholarship to students of the Institutes in question was Rs. 58 crores; that the FIR alleges wrongful drawl of scholarship in respect of two students to the tune of approximately 2.25 lakhs; that it appears that the amount was actually paid to the students through bank-drafts, and when the students did not continue with their studies in the Institution in question, the amount was repaid to the Department; that as per the averments made in the F.I.R., enquiry has already been completed and all the documentary and other evidence have already been collected, and that the applicants are the Chairman of the Society running the educational

institution and an Office Secretary of the Institution and they have no criminal history and Registrar of the Institution has been granted anticipatory bail by this Court, I am of the view that pending final disposal of the instant anticipatory bail application the applicants are also entitled to be granted interim anticipatory bail. As such, as an interim measure, it is directed that till the next date of listing, in the event of arrest / appearance of applicants before the learned Trial Court, they shall be released on interim anticipatory bail in the aforesaid case crime on furnishing a personal bond and two sureties each in the like amount, to the satisfaction of S.H.O./Court concerned on the following conditions and subject to any other conditions that may be fixed by the Trial Court: -

(i). The applicant will co-operate with the investigation.

(ii) The applicant will 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 or tamper with the evidence;

(iii) That the applicant will not leave India without the previous permission of the court;

(iv) The applicant will appear before the trial court on each date fixed unless personal presence is exempted.

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(Subhash Vidyarthi, J.)

Order Date - 10.8.2023
Prateek