

**IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD
(ALLAHABAD)**

**CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438
CR.P.C. No. - 4633 of 2022**

Rajesh Kumar SharmaApplicant

Through:- Mr. Alok Saxena, Indra Raj, Advocates

Vs.

C.B.I.Respondents

Through:- Gyan Prakash Sr. Adv./Dy. S.G.I., Sanjay Kumar
Yadav

CORAM : HON'BLE SAMIT GOPAL, JUDGE

ORDER

SAMIT GOPAL,J.

1. Heard Sri Alok Saxena, Sri Indra Raj, learned counsels for the applicant, Sri Gyan Prakash, learned Senior Advocate/Deputy Solicitor General of India, assisted by Sri Sanjay Kumar Yadav, learned counsel for the C.B.I. and perused the record.
2. This anticipatory bail application under Section 438 Cr.P.C. has been filed by the applicant Rajesh Kumar Sharma, seeking anticipatory bail, in the event of arrest in Special Case No. 01 of 2022, RC No. 2192019 E 006, registered at Police Station CBI/EO-1, New Delhi, under Sections 120B r/w 420, 467, 468, 471 I.P.C. and Section 13(2) r/w 13(1) (d) Prevention of Corruption Act, 1988.
3. At the very outset, learned counsel for the C.B.I. raises a preliminary objection regarding maintainability of the present anticipatory bail application under Section 438 Cr.P.C. by arguing that on the own showing of the applicant as per supplementary affidavit dated 11.10.2022,

para-2 (2), it is stated that the applicant has been arrested in September 2022 in Case Crime No. 33 of 2022, under Sections 384, 420, 468, 471, 509 and 120B I.P.C., Police Station-Cyber Crime, Chandigarh, and as such the present anticipatory bail application is not maintainable in view of the judgement rendered by the Rajasthan High Court in the case of ***Sunil Kallani vs. State of Rajasthan : 2021 SCC OnLine Raj 1654 : SB Criminal Misc. Bail Application No. 9155 of 2019, decided on 25.10.2021***, wherein while dealing with the issue as to whether an application of anticipatory bail under Section 438 Cr.P.C. is maintainable if the said accused is in jail in connection with another criminal case for the similar offences or for different offences, it has been held that the same would not be maintainable.

4. In reply, learned counsel for the applicant argued that although the applicant is in jail in another case in Chandigarh, but the same would not bar grant of anticipatory bail to him as he apprehends that he would be taken into custody in the present case also.

5. The facts in brief of the present case are that a First Information Report was lodged on 29.6.2019 by Ms. Beena Vaheed, Dy. General Manager & Zonal Head, Corporation Bank, Delhi (North) as Case Crime No. RC 219 2019 E 0006 of 2019, Police Station CBI/EO-I, New Delhi, under Sections 120B r/w 420, 467, 468, 471 I.P.C. and substantive offences thereof, against nine persons namely (1) M/s Naftogaz India Pvt. Ltd., (2) Mahadom Bawa, (3) Deepak Gupta, (4) Seema Gupta, (5) Ram Murti Devi, (6) Vijay Kumar, (7) Vyas Dev, (8) Ravinder Pandita and (9) K Gangadharan.

The case related to fraud committed by M/s Naftogaz India Pvt. Ltd. in Noida-Mid Corporate Branch of the bank. Copy of the F.I.R. is annexure no. 2 in the bunch of documents filed collectively and stands at page-164 of the paper book.

The matter was investigated and a charge sheet no. 35 of 2021, dated 31.12.2021 was filed against 16 persons namely (1) M/s Nafto Gaz India Pvt. Ltd., (2) Mahdooom Bava, (3) Deepak Gupta, (4) Ravinder Pandita, (5) K. Gangadharan, (6) M/s Boom Buying Pvt. Ltd., (7) Rakesh Singh, (8) M/s CCL International Ltd., (9) Anil Kumar, (10) Akash Gupta, (11) M/s HM Informatics Pvt. Ltd., (12) Manoj Koul, (13) Rajesh Kumar Sharma, (14) Yatish Sharma, (15) Ramesha JS. and (16) M/s A B Petro Service Pvt. Ltd. in which the name of the applicant appears as accused

no. 13 in the list of accused persons. The said charge sheet is at page-23 of the paper book (Annexure No. 2).

On the said charge sheet cognizance was taken by the Special Judge (Prevention of Corruption) C.B.I., Ghaziabad vide order 17.2.2022 against the accused persons named therein and they were summoned to face trial. In so far as the accused no. 15/Ramesha JS in the charge sheet is concerned, sanction for prosecution under Section 19 (1) (c) of Prevention of Corruption Act, 1988, was taken since he was a public servant and he was also summoned to face trial.

6. This Court proceeds to decide the preliminary objection as raised by learned counsel for the C.B.I.

7. A supplementary affidavit dated 11.10.2022 has been filed on behalf of the applicant of which para-2 reads as follows:-

"(2) That the applicant is also involved/accused in two other following cases:

(1) The first case is Case No. UNCR/19700 UR of 2019 registered at Police Station of Directorate General of GST (Intelligence), Bhopal (M.P.) for the offence under Section 132(1)(b) and 132(1) (c) of CGST Act 2017. In this case the applicant is on bail.

(2) The second case is crime no. 33 of 2022 registered at Police Station -Cyber Crime, Chandigarh for the offences under Section 384, 420, 468, 471, 509 and 120B of the Indian Penal Code. In this case the applicant has been arrested only in the last days of September, 2022."

8. From perusal of para-2(2) of the said supplementary affidavit it is clear that the applicant has been arrested in a case in Chandigarh in September 2022 and is in jail.

9. The issue as to whether an application for anticipatory bail under Section 438 Cr.P.C. of an accused who has already been arrested, is maintainable or not came up in the case of **Sunil Kallani** (supra) wherein the question which arose has been stated in para-1 of the said judgement. The same is as follows :-

"1. While hearing this anticipatory bail application, the question of law arose whether an anticipatory bail application would be maintainable by an accused who is already arrested and is in judicial custody in relation to another FIR registered against him for the offences mentioned therein."

10. The discussion on the said question has been dealt with in paras-11 to 25 of the said judgement. The same are as follows :-

“11. In *Gurbaksh Singh Sibbia etc. : AIR 1980 SC 1632*, the Supreme Court observed as under:

7. The facility which Section 438 affords is generally referred to as anticipatory bail an expression which was used by the Law Commission in its 41st report. Neither the section nor its marginal note so describes it but the expression anticipatory bail is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because to grant bail, as stated in *Wharton's Law Lexicon* is to set at liberty a person arrested or imprisoned, on security being taken for his appearance. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognisance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes so to say an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action. A direction under section 438 is intended to confer conditional immunity from this touch or confinement.

12. Again the Supreme Court in *Gurbaksh Singh Sibbia etc.*, (supra), further observed as under:

“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 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.

Secondly 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. Such a course will defeat the very object of Sec. 438.

Thirdly, the filing of a First Information Report is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F.I.R. is not yet filed.

Fourthly, anticipatory bail can be granted even after an F.I.R. is filed, so long as the applicant has not been arrested.

Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of “anticipatory bail” to an accused who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

13. Thus, where the accused has already been arrested, the anticipatory bail application would not lie in the said case. However, the question still remains that if a person is to be arrested in another case other than for which he had already been arrested whether anticipatory bail would lie. In

Sushila Aggarwal and others Vs. State (NCT of Delhi) and another : (2020) 5 SCC 1 the Constitution Bench was examining the following questions referred to it:

(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.”

14. The Constitution Bench speaking through M.R. Shah, J. observed as under:

“7.1 At the outset, it is required to be noted that as such the expression anticipatory bail has not been defined in the Code. As observed by this Court in Balchand Jain anticipatory bail means bail in anticipation of arrest. As held by this Court, the expression anticipatory bail is a misnomer inasmuch as it is not as if bail is presently granted by the Court in anticipation of arrest. An application for anticipatory bail in anticipation of arrest could be moved by the accused at a stage before an FIR is filed or at a stage when FIR is registered but the charge sheet has not been filed and the investigation is in progress or at a stage after the investigation is concluded. Power to grant anticipatory bail under Section 438 Cr.P.C. vests only with the Court of Sessions, or the High Court. Therefore ultimately it is for the court concerned to consider the application for anticipatory bail and while granting the anticipatory bail it is ultimately for the court concerned to impose conditions including the limited period of anticipatory bail depends upon the stages at which the application for anticipatory bail is moved. A person in whose favour a pre-arrest bail order is made under Section 438 Cr.P.C. has to be arrested. However, once there is an order of prearrest bail/anticipatory bail, as and when he is arrested he has to be released on bail. Otherwise, there is no distinction or difference between the pre-arrest bail order under Section 438 and the bail order under Sections 437 & 439 Cr.P.C. The only difference between the prearrest bail order under Section 438 and the bail, order under Sections 437 and 439 is the stages at which the bail order is passed. The bail order under Section 438 Cr.P.C. is prior to his arrest and in anticipation of his arrest and the order of bail under Sections 437 and 439 is after a person is arrested. A bare reading of Section 438 Cr.P.C. shows that there is nothing in the language of the Section which goes to show that the pre-arrest bail granted under Section 438 has to be time bound. The position is the same as in Sec. 437 and Sec. 439 Cr.P.C.

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*, (supra) is required to be referred to and considered in detail. The matter before the Constitution Bench in the case of *Gurbaksh Singh Sibbia*, (supra) was arising 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,

(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.

15. In the concurring judgment delivered by Ravindra Bhat, J., the Supreme Court observed as under:

47. Section 438 Cr. PC. provides for the issuance of directions for the grant of bail to a person apprehending arrest. The Criminal Procedure Code, 1973 replaced the old code of 1898. The old code did not provide for any corresponding provision to Section 438 of the code of 1973. Under the old code there was a sharp difference of opinion amongst the various High Courts on the question as to whether courts had the inherent power to pass an order of bail in anticipation of arrest. The predominant position was that courts did not have such a power. Subsequently the need for various amendments to make the code more comprehensive resulted in the enactment of the Code of Criminal Procedure in 1973. Interestingly Section 438 does not expressly use the term anticipatory bail its language instead empowers the court concerned to issue directions for grant of bail.

56. The reason for enactment of Section 438 in the Code 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 a 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. In *Sibbia*, it was observed that:

35..... Anticipatory bail 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.

57. The interpretation of Section 438 that it does not encapsulate 'Article 21, is erroneous. This court is of the opinion that the issue is not whether Section 438 is an intrinsic element of Article 21 it is rather whether that provision is part of fair procedure. As to that there can be no doubt that the provision for anticipatory bail is proliberty and enables one anticipating arrest a facility of approaching the court for a direction that he or she not be arrested it was specifically enacted as a measure of protection against arbitrary arrests and humiliation by the police which Parliament itself recognized as a widespread malaise on the part of the police.

16. Thus the court answered the question raised before it that there is no time limit required to be laid down in the order of granting anticipatory bail.

17. The Scheme of Code of Criminal Procedure does not define the word arrest. In Chapter V of Code of Criminal Procedure, Section 41 lays down when police may arrest without warrant. Section 41B lays down procedure of arrest and duties of officer. Section 46 mentions how arrest is to be made.

18. Upon reading Section 46 Cr.P.C. (supra), it is apparent that arrest would mean to actually touch or confine the body of the person to custody of the police officer. Section 167 Cr.P.C. lays down that the custody may be given to the police for the purpose of investigation (called as remand) or be sent to jail (called as judicial custody). Thus the essential part of arrest is placing the corpus, body of the person in custody of the police authorities whether of a police station or before him or in a concerned jail.

19. The natural corollary is therefore that a person who is already in custody cannot have reasons to believe that he shall be arrested as he stands already arrested. In view thereof, the precondition of bail application to be moved under Section 438 Cr.P.C. i.e. reasons to believe that he may be arrested” do not survive since a person is already arrested in another case and is in custody whether before the police or in jail.

20. In order to meet out such provisions, Section 105 Cr.P.C. read with Sections 68 and 81 would apply.

21. In *Narinderjit Singh Sahni and another Vs. Union of India : (2002) 2 SCC 210* the Apex Court did examine somewhat a similar issue though not completely. In the said case, writ petitions were filed under Article 32 of the Constitution of India before the Supreme Court and the Apex Court was confronted with twin issues - firstly pertaining to the maintainability of the petition under Article 32 and secondly that an order in the nature of anticipatory bail ought to be made available to the petitioners therein with regard to all the cases which were registered against them under Sections 407, 409, 420 and 120B IPC in various cases.

22. Examining the aforesaid aspects, the Apex Court in *Narinderjit Singh Sahni*, (supra) observed as under:

49. Let us therefore, analyse the situation in totality and consider the plea as emphasised by the petitioners herein. The records depict that thousands of innocent persons have fallen a prey in the methodology of working of finance companies and firms but does that mean and imply a denial of an opportunity of being heard or considered - the answer however cannot possibly be in the affirmative. Doctrine of natural justice warrants a fair opportunity we do not wish even to adumbrate

the issue of natural justice here but the fact remains that the writ petitioners herein have come up with a petition on the ground that they have not been able to obtain benefit of the justice delivery system, reasons of which need not be dealt with presently but the factum of not being able to obtain the benefit and thereby it has been alleged that Article 21 stands violated : In our view judicial review or in other words maintainability of the petition under Article 32 cannot possibly be doubted in any way and as such we are unable to record our concurrence with the submissions of the respondents in the matter.

50. Let us however, try and analyse the grievance of the petitioners and consider as to whether there is any substance in such a grievance. Shortly put the petitioners' grievance which stands identical in all the writ petitions stands out to be that though the petitioners were favoured with an order of bail in one case but are being detained by reason of production warrant in another matter and resultantly the petitioners are languishing in the jails being deprived of the order of grant of bail this aspect of the matter has been stated to be violative of Article 21. In our view however the situation as noticed above does not ipso facto render it violative of Article 21. Article 21 of the Constitution postulates deprivation of life or personal liberty except according to the procedure established by law. Admittedly the protection of personal liberty stands expanded to make the right to life under Article 21 more meaningful, the language of the Article itself records an exception indicating thereby that a person may be deprived of his liberty in accordance with the procedure established by law and it is in this sphere the courts will scrupulously, observe, as to whether the same stands differently and contra as regards the procedure established by law and in the event it is not so done it would be a plain exercise of judicial power to grant redress to the petitioner. While there is no difficulty in appreciating the grievance and grant of relief in a given case but facts are too insufficient however to come to a conclusion as regards the infraction of Article 21. Production warrants have been spoken of without any details whatsoever therefor the reason offered is that the petitioners, in fact are not in the know of things being behind the prison bars and it starts pouring in from all parts of the country and in the factual backdrop, as noticed above it is well nigh impossible to come to a finding as regards the infraction of Article 21 and since in the factual matrix no infraction can be identified and thus question of sustaining the plea of infringement of Article 21 would not arise. In any event

the liberty of the petitioners cannot be said to have been trifled within the absence of due process of law. Deprivation if any cannot be claimed to be not in accordance with due process of law.

51. On the score of anticipatory bail it is trite knowledge that Section 438 Cr.P.C. is made applicable only in the event of there being an apprehension of arrest. The petitioners in the writ petitions herein are all inside the prison bars upon arrest against all cognizable offences, and in the wake of the aforesaid question relieving the petitioners from unnecessary disgrace and harassment would not arise.

52. In that view of the matter and since no infraction can be identified, the petition also cannot be sustained as regards the issue of anticipatory bail under Section 438.

23. As pointed out by learned counsel for the petitioner that there may be cases where a person who has already been arrested in a particular case may be faced with registering of several FIRs by the persons who do not want him to be released from jail and in the said circumstances only option available is to take anticipatory bail in other FIRs as the police would seek his arrest in all the cases. It may be subsequently registered against him for non-bailable Offences and in such an event, there would be infraction of his personal liberty. However this Court does not agree to the submissions noticed as above. Once the FIR has been registered in relation to an offence committed against any person by an accused he cannot claim to be protected from offences which he may have committed with other persons who have their individual right of registering an FIR against such an accused. The accused will have to face investigation and subsequent trial in relation to each and every case individually. The question whether he may be punished separately or jointly for other cases is a completely different question altogether and need not be gone into the present case.

24. However, keeping in view observations in *Narinderjit Singh Sahni*, (supra) and considering that the purpose of preventive arrest by a direction of the court on an application under Section 438 Cr.P.C. would be an order in vacuum. As a person is already in custody with the police this Court is of the view that such an anticipatory bail application under Section 438 Cr.P.C. would not lie and would be nothing but travesty of justice in allowing anticipatory bail to such an accused who is already in custody.

25. Examining the issue from another angle if such an application is held to be maintainable the result would be that if an accused is arrested say for an offence committed of abduction and another case is registered against him for having committed murder and third case is- registered against him for having stolen the car which was used for abduction in a different police station and the said accused is granted anticipatory bail in respect to

the offence of stealing of the car or in respect to the offence of having committed murder the concerned Police Investigating Agency where FIRs have been registered would be prevented from conducting individual investigation and making recoveries as anticipatory bail once granted would continue to operate without limitation as laid down by the Apex Court in *Sushila Aggarwal*, (supra). The concept of anticipatory bail, as envisaged under-Section 438 Cr.P.C. would stand frustrated. The provisions of grant of anticipatory bail are essentially to prevent the concerned person from litigation initiated with the object of injuring and humiliating the applicant by having him so arrested and for a person who stands already arrested, such a factor does not remain available.”

11. Finally the conclusion as arrived therein is in paragraph nos. 26 and 28 of it. The same are as follows :-

“26. In view of above discussion, this Court holds that the anticipatory bail would not lie and would not be maintainable if a person is already arrested and is in custody of police or judicial custody in relation to another criminal case which may be for similar offence or for different offences.

(emphasis supplied)

28. In the present case as the petitioner stands already arrested in another case, the present bail application moved under Section 438 Cr.P.C. would not lie and is accordingly dismissed.”

12. This Court in view of the law laid down in the case of *Sunil Kallani (supra)* upholds the preliminary objection taken by the learned counsels for the C.B.I. and holds that since the applicant is in custody in connection with another case, the present anticipatory bail application under Section 438 Cr.P.C. would not lie and would not be maintainable. The same is accordingly **dismissed**.

(Samit Gopal,J.)
Judge

Allahabad
December 09, 2022
Naresh

Whether the order is speaking : Yes
Whether the order is reportable : Yes