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**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
AHSANUDDIN AMANULLAH; J., S.V.N. BHATTI; J.**

AUGUST 29, 2023

CRIMINAL APPEAL NO. 2635 OF 2023 (@ OUT OF SLP (Crl.) No.2256/2022)

STATE OF HARYANA versus DHARAMRAJ

Code of Criminal Procedure, 1973; Section 438 - Anticipatory bail can be granted to a person to a proclaimed offender only in an exceptional and rare case. (Para 16)

(Arising out of Impugned Final Judgment and Order dated 03-12-2021 in CRM-M No.49115/2021 passed by the High Court of Punjab & Haryana at Chandigarh)

For Appellant(s) Dr. Hemant Gupta, A.A.G. Mr. Samar Vijay Singh, AOR Ms. Monica Anand Kumar, Adv. Ms. Payal Gupta, Adv. Mr. Shivang Jain, Adv. Mr. Keshav Mittal, Adv. Ms. Sabarni Som, Adv.

For Respondent(s) Mr. Rakesh Khatana, Adv. Mr. Sandeep Jindal, AOR Mr. Om Prakash Vyas, Adv.

J U D G M E N T

AHSANUDDIN AMANULLAH, J.

Heard learned counsel appearing for the parties.

2. Leave granted.

3. The present appeal filed by the State of Haryana seeks cancellation of anticipatory bail granted to the sole respondent *vide* Order dated 03.12.2021 (hereinafter referred to as the “Impugned Order”) passed in CRM-M No.49115/2021 by a learned Single Judge of the High Court of Punjab and Haryana at Chandigarh. The respondent is accused in First Information Report No.0239 dated 31.07.2020 at Police Station Badshahpur, Gurugram lodged under Sections 147, 148, 149, 323, 325, 341, 342 and 427 of the Indian Penal Code, 1860 (hereinafter referred to as the “IPC”). Later, Sections 186, 353 and 364 of the IPC were also included.

4. Learned counsel appearing for the appellant submits that in the background of the nature of the allegations and the materials collected as well as the respondent having been declared a proclaimed offender¹, grant of indulgence under Section 438² of the Code

¹ 82. Proclamation for person absconding.—(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows:—

(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court House;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

(4) Where a proclamation published under sub-section (1) is in respect of a person accused of an offence punishable under Sections 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1).

² 438. 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

of Criminal Procedure, 1973 (hereinafter referred to as the “CrPC”) was erroneous and misplaced. It was submitted that there is enough evidence to show the complicity of the appellant and further, based on this very order, other co-accused persons have been granted the benefit of anticipatory bail, which does not serve larger public interest.

5. *Per contra*, the learned counsel for the respondent, supporting the Impugned Order, submitted that the Investigating Agency has tried to unnecessarily harass and implicate the respondent which would be clear from various manipulations done in the record in the course of investigation. Further, it is submitted that the State is trying to show the respondent as the culprit only on the ground that he shares common name with one accused.

6. Learned counsel for the State disputes that fact and submits that the respondent is the person who has been duly identified and against him the allegations levelled are found true, per the Investigation Agency.

7. A foray, albeit brief, into relevant precedents is warranted. This Court considered the factors to guide grant of bail in *Ram Govind Upadhyay v Sudarshan Singh*, (2002) 3 SCC 598 and *Kalyan Chandra Sarkar v Rajesh Ranjan*, (2004) 7 SCC 528. In *Prasanta Kumar Sarkar v Ashis Chatterjee*, (2010) 14 SCC 496, the relevant principles were restated thus:

‘9. ... It is trite that this Court does not, normally, interfere with an order passed by the High Court granting or rejecting bail to the accused. However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles

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
- (iii) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer incharge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including—

- (i) a condition that the person shall make himself available for interrogation by a police officer as and when required;
- (ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
- (iii) a condition that the person shall not leave India without the previous permission of the court;
- (iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

(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 subsection (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).

laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

- (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
- (ii) nature and gravity of the accusation;
- (iii) severity of the punishment in the event of conviction;
- (iv) danger of the accused absconding or fleeing, if released on bail;
- (v) character, behaviour, means, position and standing of the accused;
- (vi) likelihood of the offence being repeated;
- (vii) reasonable apprehension of the witnesses being influenced; and
- (viii) danger, of course, of justice being thwarted by grant of bail.'

8. In *Mahipal v Rajesh Kumar alias Polia*, (2020) 2 SCC 118, this Court opined as under:

'16. The considerations that guide the power of an appellate court in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for the cancellation of bail. The correctness of an order granting bail is tested on the anvil of whether there was an improper or arbitrary exercise of the discretion in the grant of bail. The test is whether the order granting bail is perverse, illegal or unjustified. On the other hand, an application for cancellation of bail is generally examined on the anvil of the existence of supervening circumstances or violations of the conditions of bail by a person to whom bail has been granted. ...'

9. In *Bhagwan Singh v Dilip Kumar @ Deepu @ Depak*, 2023 INSC 761³, this Court, in view of *Dolat Ram v State of Haryana*, (1995) 1 SCC 349; *Kashmira Singh v Duman Singh*, (1996) 4 SCC 693 and *X v State of Telangana*, (2018) 16 SCC 511, held as follows:

'13. It is also required to be borne in mind that when a prayer is made for the cancellation of grant of bail cogent and overwhelming circumstances must be present and bail once granted cannot be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it in conducting to allow fair trial. This proposition draws support from the Judgment of this Court in *Daulat Ram and others v. State of Haryana* reported in (1995) 1 SCC 349, *Kashmira Singh v. Duman Singh* (1996) 4 SCC 693 and *xxx v. State of Telangana* (2018) 16 SCC 511.'

10. In *XXX v Union Territory of Andaman & Nicobar Islands*, 2023 INSC 767⁴, this Court noted that the principles in *Prasanta Kumar Sarkar (supra)* stood reiterated in *Jagjeet Singh v Ashish Mishra*, (2022) 9 SCC 321.

11. The contours of anticipatory bail have been elaborately dealt with by 5-Judge Benches in *Gurbaksh Singh Sibbia v State of Punjab*, (1980) 2 SCC 565 and *Sushila Aggarwal v State (NCT of Delhi)*, (2020) 5 SCC 1. *Siddharam Satlingappa Mhetre v State of Maharashtra*, (2011) 1 SCC 694 is worthy of mention in this context, despite its partial overruling in *Sushila Aggarwal (supra)*. We are cognizant that liberty is not to be interfered with easily. More so, when an order of prearrest bail already stands granted by the High Court.

12. Yet, much like bail, the grant of anticipatory bail is to be exercised with judicial discretion. The factors illustrated by this Court through its pronouncements are illustrative, and not exhaustive. Undoubtedly, the fate of each case turns on its own facts and merits.

³ 2023 SCC OnLine SC 1059

⁴ 2023 SCC OnLine SC 1062

In *Vipan Kumar Dhir v State of Punjab*, (2021) 15 SCC 518, taking note of *Dolat Ram (supra)* and *X v State of Telangana (supra)*, the Court cancelled the anticipatory bail granted to the accused therein. Keeping all the aforesaid in mind, we turn our attention to the facts *in praesenti*.

13. Having considered the matter, this Court finds that, in the facts and circumstances of the present case, it was not proper for the High Court to have granted anticipatory bail to the respondent.

14. As would be manifest from the Impugned Order, the reasoning thereof is contained in Paragraphs 7-12. Closer perusal reveals what weighed with the High Court:

(a) That the maximum sentence for the offences in the First Information Report did not exceed 7 years.

(b) That the possibility of the respondent influencing the investigation, tampering with evidence *et al*, could be taken care of by imposing stringent conditions.

(c) That the respondent's declaration as a proclaimed offender was not on account of him deliberately avoiding court.

(d) That the respondent was a first-time offender and deserved a chance to '*reform and course correct*'.

15. The logic of the High Court does not commend itself to us. The High Court placed reliance on *Arnesh Kumar v State of Bihar*, (2014) 8 SCC 273 to the effect that where the offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whether with or without fine, there is to be no automatic arrest. Having gone through the said judgment as also its most recent reiteration in *Md. Asfak Alam v State of Jharkhand*, 2023 INSC 660⁵, we are in full agreement with the propositions enunciated therein. However, Section 364, IPC carries a term of imprisonment for life or rigorous imprisonment of ten years and fine. We are a bit perplexed as to how, despite addition of Section 364, IPC, the High Court took the view that *Arnesh Kumar (supra)* would aid the respondent in his quest for pre-arrest bail.

16. What the High Court (also) lost sight of was that the respondent was a declared proclaimed offender. The High Court notes, at Paragraph 28, that it was not dealing with the prayer seeking quashing of the proclamation proceedings as the same were not made part of the petition before it. As things were, the respondent was declared a proclaimed offender on 05.02.2021, and sought anticipatory bail from the High Court only in October, 2021. As such, it was not correct for the High Court to brush aside such factum, on the basis of averments alone, purporting to explain the backdrop of such declaration by mere advertence to a similar-sounding name, in the petition before it, as recorded at Paragraphs 9 and 10 of the Impugned Order. The declaration of the respondent as a proclaimed offender, and such declaration subsisting on the date of the Impugned Order, we are unable to agree with the High Court that the respondent was entitled to '*reform and course correct*'.

16. The respondent, without first successfully assailing the order declaring him as a proclaimed offender, could not have proceeded to seek anticipatory bail. Looking to the factual prism, we are clear that the respondent's application under Section 438, CrPC should not have been entertained, as he was a proclaimed offender. We may note that in *Lavesh v State (NCT of Delhi)*, (2012) 8 SCC 730, this Court was categorical against grant of anticipatory bail to a proclaimed offender. In the same vein, following *Lavesh (supra)* is

⁵ 2023 SCC OnLine SC 892

the decision in *State of Madhya Pradesh v Pradeep Sharma*, (2014) 2 SCC 171, where this Court emphasised that a proclaimed offender would not be entitled to anticipatory bail. Of course, in an exceptional and rare case, this Court or the High Courts can consider a plea seeking anticipatory bail, despite the applicant being a proclaimed offender, given that the Supreme Court and High Courts are Constitutional Courts. However, no exceptional situation arises in the case at hand. Following *Pradeep Sharma (supra)*, in *Prem Shankar Prasad v State of Bihar*, 2021 SCC OnLine SC 955, this Court was unequivocal that the High Court therein erred in granting anticipatory bail ignoring proceedings under Sections 82 and 83, CrPC. In *Abhishek v State of Maharashtra*, (2022) 8 SCC 282, this Court concluded:

'68. As regards the implication of proclamation having been issued against the appellant, we have no hesitation in making it clear that any person, who is declared as an "absconder" and remains out of reach of the investigating agency and thereby stands directly at conflict with law, ordinarily, deserves no concession or indulgence. By way of reference, we may observe that in relation to the indulgence of pre-arrest bail in terms of Section 438 CrPC, this Court has repeatedly said that when an accused is absconding and is declared as proclaimed offender, there is no question of giving him the benefit of Section 438 CrPC. [For example, Prem Shankar Prasad v. State of Bihar, (2022) 14 SCC 529: 2021 SCC OnLine SC 955] ...'

17. Accordingly, in view of the discussions made hereinabove, the Impugned Order granting anticipatory bail to the respondent is set aside. The respondent shall surrender before the Court concerned within four weeks from today and may seek regular bail which will be considered on its own merits without being prejudiced by the present judgment.

18. The appeal stands allowed in the aforesaid terms. Pending applications stand consigned to records. As far as the submission of the State is that the Impugned Order is the basis for co-accused to obtain anticipatory bail, it is for the State to take steps, if so advised, in accordance with law, in that behalf.

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