

A.F.R.

Reserved on : 02.03.2022

Delivered on : 08.03.2022

Court No. - 71 WWW.LIVELAW.IN

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S
438 CR.P.C. No. - 19059 of 2021

Applicant :- M/S V.K. Traders

Opposite Party :- Union Of India And 3 Others

Counsel for Applicant :- Atiqur Rahman Siddiqui, Vishakha Pande

Counsel for Opposite Party :- Krishna Agarawal, Dileep Chandra
Mathur

Hon'ble Samit Gopal,J.

1. This anticipatory bail application under Section 438 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") has been filed by the applicants M/s V.K. Traders/ applicant No. 1 and Vipin Kumar/ applicant No. 2 (added as an applicant in pursuance of order dated 25.11.2021 of the court) before this Court directly without approaching the Sessions Judge with the following prayer:

“It is, therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to allow this application and grant anticipatory bail to the applicant under Section 132(1)(a)(b)(c)(d)(i) of the Central Goods and Service Tax Act, otherwise applicant shall suffer irreparable loss and injury.

And/or pass such other further order which this Hon'ble Court may deem fit and proper in the circumstances of the case.”

2. Heard Sri Rakesh Pande, learned Senior Advocate assisted by Ms. Vishakha Pande, learned counsel for the applicants, Sri Dileep Chandra Mathur, learned counsel for the opposite party no. 3/ Directorate General, Goods and Services Tax Intelligence, Meerut Zonal Unit, Meerut through its Senior Intelligence Officer, Sri Suresh Kumar Maurya, Advocate holding brief of Sri Krishna Agarawal, learned counsel for the opposite party nos. 2/ Chief Commissioner, CGST, Meerut Zone, Meerut and 4/ Assisstant

Commissioner, CGST, Meerut and perused the material on record.

3. No one appears on behalf of the opposite Party No.1/ Union of India.
4. Sri S.B. Maurya, learned State counsel is also present.
5. Learned counsel for the applicants states that he does not intend to file any rejoinder affidavit to the counter affidavit filed on behalf the opposite party no. 3 for which he was granted time on 12.2.2022.

The Court thus proceeds to hear the matter.

6. At the very outset, learned counsel for the applicants has stated that the dispute in the present matter relates to an amount of Rs.1,80,86,343/- which is stated to be prima facie availed by M/s V.K. Traders the applicant no. 1 as an inadmissible Input Tax Credit (ITC). It is argued that the applicant no. 1 is the proprietorship firm of which the applicant no. 2 is the sole proprietor. It is argued that since in para- 28 of the counter affidavit it has specifically been mentioned that all the offences in which tax evasion is less than Rs. 5 crore remain bailable and only most grave offences involving tax evasion above Rs. 5 crore have been made non-bailable and cognizable offences and, as such, the amount in the present dispute is much less than Rs. 5 crore, and, hence the offences are bailable. It is argued that as such the applicant is entitled to be granted anticipatory bail.

7. Per contra, learned counsel appearing for the opposite party no. 3 opposed the prayer for anticipatory bail and argued that the present anticipatory bail application under Section 438 Cr.P.C. is not maintainable inasmuch as the amount involved, which has been availed by M/s V.K. Traders the applicant no. 1 and is an inadmissible Input Tax Credit is Rs.1,80,86,343/- which is much less than the amount which would make the offence non - bailable and cognizable.

8. This Court without going into the merits of the case proceeds to examine the following question which arises before it for its adjudication :

“Whether an application under Section 438 Cr.P.C. would lie and is maintainable for an offence which has

been declared by the concerned statute as a bailable offence ?”

9. Section 438 of the Code of Criminal Procedure, 1973 as introduced in the State of Uttar Pradesh on 06.06.2019 reads as follows :-

“438. Direction for grant of bail to person apprehending arrest. -

(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:—

- (i) the nature and gravity of the accusation;
 - (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
 - (iii) the possibility of the applicant to flee from justice; and
 - (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested;
- either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

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

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, and if the Court passes any order

granting anticipatory bail, such order shall include inter alia the following conditions, namely:—

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant 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) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub - section (3) of section 437, as if the bail were granted under that section.

Explanation: The final order made on an application for direction under sub - section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) 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.

(4) On the date indicated in the interim order under sub - section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application.

(6) Provisions of this section shall not be applicable,—

(a) to the offences arising out of, —

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."

10. The provision of anticipatory bail as per its scheme can be invoked by a person who has a "reason to believe that he may be arrested" for committing a "non - bailable offence".

11. For entertaining an application under Section 438 Cr.P.C., there are two requirements as contemplated in its Clause (1), which are as follows:

(i) There must be an accusation of the petitioner having committed a non-bailable offence. Obviously, this accusation must be an existing one or in any case stemming from the facts already in existence.

(ii) There must be reasonable apprehension or belief in the mind of the petitioner that he would be arrested on the basis of such an accusation.

The simultaneous existence of both these conditions is a sine qua non for invoking courts jurisdiction. When the said two requirements are fulfilled, the High Court or the Court of Sessions could entertain an application for anticipatory bail and then consider it on its own merit.

12. In the case **Onkar Nath Agrawal v. State : 1976 SCC OnLine All 11 : 1976 Cr. L.J. 1142 (All.)** it was held that the power under section 438 Cr.P.C. is not to be exercised in vacuum but only on the satisfaction of the conditions spelled out in the section itself. The court further held in following terms:

"5. It is obvious that the provision comprises of two parts. The first part envisages of the conditions under which a person is entitled to make an

application for anticipatory bail in the court of Sessions or in the High Court. There are only two conditions which must exist before he can move such an application. In the first place there must exist a ground to believe that he may be arrested and secondly there must be an accusation of his having committed a non-bailable offence. The language is plain and unambiguous....."

13. In the case of **Joginder @ Jindi vs. State of Haryana : (2008) 10 SCC 138** the Apex Court has also held that Section 438 Cr.P.C. relates to non - bailable offences and a petition under Section 438 Cr.P.C. in relation to bailable offences is misconceived.

14. In the case of **R. K. Krishna Kumar Vs. State of Assam : (1998) 1 SCC 474** it has been held by the Apex Court that anticipatory bail cannot be granted in offences which are bailable.

15. It is thus concluded that the conditions prerequisite for the court's exercise of its discretion under Section 438 Cr.P.C. is that the person seeking such relief must have a reasonable apprehension of his arrest on an accusation of having committed a non-bailable offence.

16. The question thus gets answered by the above mentioned discussion that an application under Section 438 Cr.P.C. is only maintainable by a person who has apprehension of his arrest on accusation of having committed a non - bailable offence.

17. Section 132 of The Central Goods and Services Tax Act, 2017 (hereinafter referred as the 'Act') is as follows:

“Section 132 : Punishment for certain offences

(1) Whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences, namely:-

(a) supplies any goods or services or both without issue of any invoice, in violation of the provisions of this Act or the rules made thereunder, with the intention to evade tax;

(b) issues any invoice or bill without supply of goods or services

or both in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax;

(c) avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill;

(d) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

(e) evades tax, or fraudulently obtains refund and where such offence is not covered under clauses (a) to (d);

(f) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information with an intention to evade payment of tax due under this Act;

(g) obstructs or prevents any officer in the discharge of his duties under this Act;

(h) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing, supplying, or purchasing or in any other manner deals with, any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(i) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(j) tampers with or destroys any material evidence or documents;

(k) fails to supply any information which he is required to supply under this Act or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or

(l) attempts to commit, or abets the commission of any of the offences mentioned in clauses (a) to (k) of this section,

shall be punishable -

(i) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;

(ii) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;

(iii) in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilised or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

(iv) in cases where he commits or abets the commission of an offence specified in clause (f) or clause (g) or clause (j), he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where any person convicted of an offence under this section is again convicted of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to five years and with fine.

(3) The imprisonment referred to in clauses (i), (ii) and (iii) of sub-section (1) and sub-section (2) shall, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court, be for a term not less than six months.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

(5) The offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) of that sub-section shall be cognizable and non-bailable.

(6) A person shall not be prosecuted for any offence under this section except with the previous sanction of the Commissioner.”

18. Section 132 of the Act lists 12 offences that are punishable with imprisonment and/or a fine. The terms of imprisonment and the amount of fine, is dependent on the amount involved in the offence, or in some cases, the act committed by the offender. The provision further categorises certain offences as cognizable and non-bailable, if the amount involved exceeds Rs. 500 lakhs, as stated in clause-5 of the Section. These offences relate to person who supply goods or services without issuing invoices, or issue invoices without supplying goods or services and thus wrongfully avail Input Tax Credit, or to persons who collect tax but fails to pay it to the Government beyond a period of three months from the date on which payment becomes due. All other offences listed under the Act have been categorized as non-cognizable and bailable, as per clause-4 of the Section.

19. In the present case, it is a common ground between the applicants and

the opposite party No. 3 that the offences are bailable. Even para-28 of the counter affidavit to the said effect stands unrebutted.

20. Resultantly, the question thus being answered by holding that granting of anticipatory bail does not arise for an offence which is bailable and a direction for the same can be issued only in respect of non-bailable and cognizable offences, the present anticipatory bail application deserves rejection and, accordingly, it is rejected.

21. Interim order dated 2.3.2022 is hereby vacated.

(Samit Gopal, J.)

Order Date :- 08.03.2022

Naresh