

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT
SRINAGAR

Reserved on: 05.07.2022
Pronounced on 15.07.2022

Bail App No.78/2022

ZUBAIR AHMAD WANI ... PETITIONER(S)

Through: - Mr. Shafqat Nazir, Advocate.

Vs.

GOVERNMENT OF J&K ...RESPONDENT(S)

Through: - Mr. Sajad Ashraf, GA.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner has sought bail in anticipation of his arrest in FIR No.31/2021 for offence under Section 489-C of IPC registered with Police Station, Kralgund.

2) As per the allegations made in the FIR, on 01.06.2021, when the police had laid Naka, the petitioner upon spotting the police tried to run away. He was apprehended by the police and from his possession, counterfeit currency worth Rs.94000/ comprising 47 notes of Rs.2000 denomination, was recovered.

3) It appears that vide order dated 29.06.2021 passed by Judicial Magistrate, 1st Class, Handwara, the petitioner, after his arrest, was released on interim bail up to 07.07.2021. The aforesaid order has been

withdrawn by the learned Judicial Magistrate, 1st Class, Handwara, on 01.07.2021, by observing that the offence under Section 489-D of IPC is of special nature, as such, the said Magistrate does not have jurisdiction to entertain the bail application.

4) The aforesaid order of Judicial Magistrate, 1st Class, was challenged by the petitioner through the medium of a revision petition bearing CrI R No.12/2021. On 28.07.2021, while disposing of this petition, this Court observed that offence under Section 489-D of IPC is triable by the Sessions Court, therefore, Judicial Magistrate, 1st Class, Handwara, has erroneously held that the said offence is a special offence triable by a Special Court. The petitioner was given liberty to move an application for grant of bail before the Sessions Court where the challan against him had been laid.

5) The petitioner and the co-accused accordingly filed an application for grant of anticipatory bail before the Principal Sessions Judge, Kupwara. The learned Sessions Judge vide his order dated 01.06.2022 dismissed the anticipatory bail application of the petitioner and co-accused by observing as under:

4. This Court would most humbly opine that the petitioners cannot maintain the instant petition for the grant of anticipatory bail. This court has two reasons to reach that conclusion. One, the accused/petitioners have already suffered incarceration and the learned Judicial Magistrate Handwara had admitted them to interim regular bail and thus brought them under the constructive custody of law. The subsequent cancellation of their interim regular bail would require them to come back to custody. This Court finds guidance to reach to such conclusion in the judgment of the honorable Supreme

Court announced in Special leave Appeal (Criminal) No.5385/2020 titled as Manish Jain vs Haryana State Pollution Control Board decided on 20/11/2020. In that case the petitioner had sought anticipatory bail pursuant to cancellation of regular bail granted to him under Section 15 of the Environment Protection Act, 1986 because of his non-appearance. The honorable Supreme Court has held that a person released on bail is already in the constructive custody of the law. If the law requires him to come back to custody for specified reasons, we are afraid that an application for anticipatory bail apprehending arrest will not lie. There cannot be an apprehension of arrest by a person already in constructive custody of the law. We, therefore, reject the prayer for anticipatory bail.

5. The second reason is that the petitioners have misconstrued or misinterpreted the foresaid order of the honorable High Court by which it had granted the accused/petitioners the liberty to move an application for grant of bail before the concerned Sessions Court. The honorable High Court had granted liberty to move an application for grant of bail but they have wrongly construed or wrongly interpreted it to mean the application for anticipatory bail.

6) After passing of the aforesaid order, the petitioner has moved the instant application for grant of anticipatory bail on the ground that the bail application has not been considered by the learned Sessions Judge on its merits and that the petitioner cannot be put behind the bars when the charge sheet has already been filed before the learned Sessions Judge.

7) I have heard learned counsel for the parties and perused the material on record.

8) Learned counsel for the respondent has raised a preliminary objection as regards the maintainability of the instant bail application on the ground that once the petitioner was arrested and granted interim bail in an application filed for grant of regular bail, it is not open to him to approach this Court for grant of bail in anticipation of his arrest.

9) Learned counsel for the petitioner on the other hand has contended that because the petitioner at the present moment is not in custody but is apprehending his arrest after cancellation of his bail, as such, the instant bail application under Section 438 of the Cr. P. C is maintainable.

10) It emerges from the facts narrated hereinbefore that the petitioner was arrested during the investigation of the case and he was admitted to interim regular bail by the learned Judicial Magistrate, 1st Class, Handwara, vide his order dated 29.06.2021. The said order was withdrawn by the learned Magistrate although erroneously, by passing order dated 01.07.2021 and observing that the offence alleged to have been committed by the petitioner is of special nature and, as such, triable by a Special Court. However, the fact remains that bail of the petitioner has not been extended beyond 01.07.2021. The only consequence of cancellation of bail is that the petitioner should have surrendered before the court that had granted bail to him and thereafter he should have availed the legal remedy available to him. The order passed by the learned Magistrate on 01.07.2021 has, no doubt, been set aside by this Court vide order dated 28.07.2021 passed in CrI R No.12/2021 but while doing so, this Court had given liberty to the petitioner to approach the Sessions Court for grant of bail. The said order nowhere gives a right to the petitioner to file an application for anticipatory bail. The proper course for the petitioner was to surrender before the Sessions Court and apply for grant of regular bail because he had already been arrested and pursuant to grant of interim regular bail, he was in constructive custody of the law.

11) In **Manish Jain vs. Haryana State Pollution Control Board**, (2020) 20 SCC 123, it has been clearly laid down that a person released on bail is already in constructive custody and if the law requires him to come back to custody for specified reasons, the application for anticipatory bail will not lie. The Court further observed that there cannot be an apprehension of arrest by a person already in the constructive custody of law. The learned Sessions Judge has rightly relied upon the ratio laid down by the Supreme Court in the aforesaid case while declining to enlarge the petitioner on bail in anticipation of his arrest. The said order is perfectly in accordance with law and there is no ground to take a different view of the matter.

12) For the forgoing reasons, the instant bail application is held to be not maintainable and is dismissed as such. The petitioner is at liberty to surrender before the learned Sessions Judge and to move an application for grant of regular bail.

(SANJAYDHAR)
JUDGE

Srinagar,
15.07.2022
"Bhat Altaf, PS"

Whether the order is speaking: *Yes/No*
Whether the order is reportable: *Yes/No*