

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN
Monday, the 27th day of June 2022 / 6th Ashadha, 1944

BAIL APPL. NO. 4421 OF 2022

CRIME NO. 628/2018 KOIPURAM POLICE STATION ,PATHANAMTHITTA.

PETITIONER:

ANU MATHEW AGED 37 YEARS W/O. BINU PUNNAYIL THOMAS, THAYYIL HOUSE,
VENNIKULAM, THELLIYOOR P.O., THIRUVALLA VIA, PATHANAMTHITTA,PIN -
689544 WORKING AS A TEACHER IN KUWAIT.

RESPONDENT:

STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF
KERALA, PIN - 682031

This Bail application coming on for orders upon perusing the
petition and upon hearing the arguments of M/S E.D.GEORGE, LINU G. NATH
Advocates for the petitioner, and PUBLIC PROSECUTOR for the respondent,
the court passed the following:



P.V.KUNHIKRISHNAN, J.

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Dated this the 27th day of June, 2022

REFERENCE ORDER

Petitioner is the accused in Crime No.628/2018 of Koipuram Police Station, Pathanamthitta. She is the 1st accused. This case is registered against the petitioner and another alleging offences punishable under Sections 11 and 12 of the Protection of Children from Sexual Offence Act, 2012, Section 3 of the Indecent Representation of Women (Prohibition) Act, 1986, Section 354A, 354D, 292A, 290, 507, 503, 465, 466, 500, 509 IPC and Section 67, 66(A) and 66(E) of the Information Technology Act, 2000.

2. This is the second bail application filed by the petitioner under Section 438 Cr.P.C. The earlier bail application was dismissed by this Court as per Annexure-A12 order. When this bail application came up for consideration on 22.06.2022, it was submitted that as on that day the petitioner is not available in India. Therefore this Court dictated an order in open court dismissing the bail application as not maintainable in the light of the judgment of this Court in **Shafi S.M. v. State of Kerala and Anther [2020 (4) KHC 510]**. After dictating the judgment and before even typing the judgment by my Personal Assistant, it is

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bring to the notice of this Court about a judgment of this Court delivered on the same day in which the judgment in **Shafi's case** (supra) is distinguished. That was a judgment delivered in **Vijay Babu v. State of Kerala**. (Order dated 22.06.2022 in B.A.No.3475 of 2022). Hence this case was posted as "to be spoken" on 24.06.2022. Heard the counsel for the petitioner and the Additional Director General of Prosecution.

3. Admittedly the petitioner was in Kuwait at the time when this bail application was filed and when the matter came up for consideration on 22.06.2022. Therefore this Court was not inclined to entertain this bail application in the light of the judgment in **Shafi's case** (supra). It will be better to extract the relevant portion of that judgment in **Shafi's case** (supra):

"6. It is clear from the above averments in the bail application that this Bail Application under S.438 is filed when the petitioner was in Riyadh, Saudi Arabia. Counsel for the petitioner conceded that the petitioner is even now in Riyad, Saudi Arabia. Nothing is mentioned in the Bail Application to show that on which date the petitioner is coming back to India. A vague averment is made to the effect that he wants to visit the native place and for which, he wanted an order under S.438 of the Cr.P.C. A person

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sitting in another country cannot file an application under S.438 of the Cr.P.C. before the Court apprehending arrest. There are no averments in the Bail Application that there is an apprehension of arrest to the petitioner in the country where he is now residing based on the accusation in this case. **Even in such a situation, an application under S.438 Cr.P.C. cannot be entertained by this court. A bail application under S.438 Cr.P.C. cannot be filed before this Court by the petitioner sitting in an armchair in a foreign country. He is not entitled an order under S.438 Cr.P.C. in such a situation. Jurisdiction of this Court under S.438 Cr.P.C. is discretionary**".
(Emphasis supplied)

4. This Court clearly stated that a bail application under Section 438 Cr.P.C. need not be entertained by this Court when the petitioner is sitting in an armchair in a foreign country. But in **Vijay Babu's case** (supra) this Court distinguished the above judgment. Originally an interim order was passed in this case on 31.05.2022 restraining arrest of Mr.Vijay Babu. The following observations were made by this court while granting an interim protection of arrest:

"7. On a consideration of the aforesaid contentions solely for the purpose of interim protection, I notice the decision in **Sushila Aggarwal and Others v.**

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State (NCT of Delhi) and another [(2020) 5 SCC 1], wherein a Constitution Bench of the Supreme Court had considered various principles relating to the grant of anticipatory bail. It was observed that the paramount right of every individual protected under Article 21 of the Constitution of India, can be deprived only by procedure established by law and that Section 438 is one such procedure which the legislature has enacted and that courts should lean against imposition of unnecessary restrictions on the scope of section 438, especially when not imposed by the legislature.

8. Bearing in mind the aforesaid principles laid down by the Supreme Court, I am of the view that, for the present, merely because the petitioner is outside the country, the same by itself cannot deprive him of his right to have his application for anticipatory bail considered by this Court. The decision referred to in Souda Beevi's case (supra) can be said to be impliedly overruled and decision in *S.M.Shaffi's* case (supra) did not take notice of the judgment in *Sushila Agarwal's* case and therefore, could be regarded as judgment *sub silentio*. However, I clarify that the above observations are made only for considering the grant of interim protection from arrest.”(underline supplied)

5. Thereafter the petitioner in the above case came back to India and thereafter the bail application was allowed by a separate order. In that order also *S.M.Shaffi's case* and

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Souda Beevi's case are considered. It will be better to extract Paragraph 12 to 16 of the bail order dated 22.06.2022 In B.A.No. 3475 of 2022(Vijay Babu's case):

12. Since the question regarding the maintainability of an application for pre-arrest bail while the applicant is residing outside the country, arises quite often, the said issue is considered. On the basis of decisions in *Souda Beevi and Another v. S.I. of Police and Others* (2011 (3) KHC 795) and *Shafi S.M. v. State of Kerala and Another* (2020 (4) KHC 510) it was argued that the presence of the petitioner outside the country disentitles the applicant to seek pre-arrest bail.

13. A reading of the aforementioned two decisions shows that such an absolute restriction has not been laid down by this Court. On the other hand, all that those two decisions say is that, at least before the final hearing, the Court must be convinced that the applicant is within the jurisdiction of the Court so that the conditions if any imposed, could be effectively enforced.

14. Section 438 Cr.P.C does not contain a restrictive mandate that a person residing outside the country cannot file an application for anticipatory bail. It is possible that a

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person can apprehend arrest even outside the country for an offence that occurred in India. With the advancement in investigative technology and communication, the various agencies of investigation could even be deployed to arrest a person outside the country. An apprehension of arrest can arise even while the applicant is residing outside the country. Thus, when a bonafide apprehension exists, the statute confers power on such a person to seek protection from arrest. In the absence of any restrictive clauses in S.438, restricting the right of a person residing outside the country from filing an application for pre-arrest bail, court cannot read into the provision such a restriction which the legislature did not incorporate.

15. In the decisions in *Sushila Aggarwal and Others v. State (NCT of Delhi) and Another* [(2020) 5 SCC 1], as well as *Shri Gurbaksh Singh Sibbia and Others v. State of Punjab* [(1980) 2 SCC 565], it was held that courts cannot read into section 438 Cr.P.C. a restriction, which the legislature had not thought it fit to impose. In fact, the Court deprecated the practice of an over-generous infusion of constraints into section 438 and even observed that such restrictions can make the provision itself constitutionally

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vulnerable. Therefore, I am of the considered view that an application for pre-arrest bail can be filed even by a person residing outside the country. However, the only limitation is that prior to the final hearing, the applicant must be inside the country to enable the court to impose and enforce conditions contemplated under the statutory provisions.

16. Section 438 Cr.P.C has conferred a discretionary right on the higher courts to consider whether a pre-arrest bail ought to be granted under the particular circumstances of the case. The discretion conferred upon the superior courts of law, though not controlled by any specific guidelines, the same is not to be exercised arbitrarily. Law adjures such courts to utilize their trained discretion while considering an application for pre-arrest bail.”

I am in respectful disagreement with the above observation of the learned Judge. When in **Shafi's case** (supra) this Court clearly stated that an application under Section 438 Cr.P.C. cannot be filed before this Court by an accused sitting in a foreign country, the learned Single Judge ought not have decided the matter without referring the same to the Division Bench. A Full Bench of this Court in **Peter v. Sara [2006**

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“5. Adherence to precedents is a matter of judicial discipline. It is the linchpin of justice system. It is intended to secure uniformity and certainty on legal positions, based on the principle of judicial comity, otherwise it brings law as well as the system to disrepute, if not the Court. Thus ordinarily, a court of coordinate jurisdiction is expected to follow the decision of a coequal Bench. Refusal is only exception and to be exercised in exceptional circumstances, not merely because a different view is possible, but because the view expressed by the court of coordinate jurisdiction is not merely wrong, but so clearly and seriously wrong that it cannot logically exist or when it is productive of public hardships or inconvenience, as observed by the Supreme Court in *M. Chhagganlal v. Greater Bombay Municipality* (AIR 1974 SC 2009). Thus where a precedent is not followed and another decision rendered, in view of the conflicting position, the legal antinomy must be resolved by a Division Bench, Full Bench, Larger Bench, as the case may be, where one view would have to be formally overruled. Reversal occurs when the same decision is taken on appeal and is reversed by the appellate court. Overruling occurs when the appellate court/larger Bench declares in another case that the precedent case was wrongly decided and hence not to be followed. A decision is confirmed by the appellate court in the

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same case and a principle is affirmed when the same is referred before the appellate court or before a court consisting of larger strength in another case. Decisions of co-equal bench are either followed or distinguished. A decision is distinguished when a precedent is obnoxious or when the same is inapplicable to the fact situation arising in the case. Thus by distinguishing, the precedential value of the decision distinguished is not lost. However, as cautioned by Prof. P.J. Fitzgerald in the IVth edition of Salmond on Jurisprudence, "Over-subtle distinguishing itself leads to uncertainty and brings the law into disrepute." Decisions of other courts with persuasive force are either followed, or not followed for reasons to be noted in the judgment. Dissenting is an expression and process of disagreement with the view/reasoning in the same judgment either by the Bench partner or the minority."

6. In **Vijay Babu's case** (supra), this Court, in the light of the judgment of the Apex Court in **Sushila Aggarwal and Others v. State (NCT of Delhi) and Another [2020 (5) SCC 1]**, observed that Section 438 Cr.P.C. is a procedure which the legislature has enacted and that courts should not lean against imposition of unnecessary restrictions on the scope of Section 438, especially when not imposed by the

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legislature. It is also stated in the order dated 31.05.2022 that *S.M.Shaffi's case*(supra) can be regarded as judgement in Sub Silento for not taking note of *Sushila Aggarwal's case* (Supra). I do not think that the direction not to entertain a bail application in a situation where the accused filed a bail application sitting in a foreign country and that also absconding after the registration of the case against him and further openly challenging the law of the land, with the knowledge of the registration of the case against him is against the dictum laid down in *Sushla Aggarwal's case* (Supra). In such situation, this Court has got ample powers to refuse bail because the power under Section 438 Cr.P.C itself is a discretionary jurisdiction. Such persons need not be invited to the country by a court of law invoking the powers of interim bail under section 438 Cr.P.C is my considered opinion. It is the duty of the prosecuting agency to book him. Since a different view is taken by the learned Judge in **Vijay Babu's case** (supra), I think the matter has to be decided by a Division Bench of this Court.

7. Moreover, on a reading of the order dated 31.05.2022 of the learned Single Judge in *Vijay Babus' case*, it

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is clear that when the accused was abroad, this Court passed order not to arrest him till he reach India.

8. A reading of Section 438 Cr.P.C. will show that there is no power to the court to restrict the arrest of an accused during investigation. If the court feels that an accused deserve pre-arrest bail, an interim bail can be granted under Section 438(1) Cr.P.C. If the principle in **Sushila Aggarwal's case** (supra) is applied, the court has no jurisdiction to restrain the Police in arresting a person except to order interim bail because no such power is there in Section 438 Cr.P.C. Moreover, as per the first proviso to Section 438 Cr.P.C, the Police is allowed to arrest a person if there is no interim bail granted by the court even if a bail application is filed. If an accused in a case left India after knowing that a case with grievous offences is registered against him and filing a bail application before the High Court after leaving India is not entitled an order not to arrest especially when there is no such power as per Section 438 Cr.P.C. Even interim bail is not deserving to such persons because the jurisdiction under Section 438 Cr.P.C. is discretionary. In Rashmi Rekha Thatoi and another V State of

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Orissa and others, (2012 KHC 4264) the apex court observed that court cannot issue blanket order restraining arrest. According to me, the dictum laid down in **Vijay Babu's case** (supra) requires reconsideration. Therefore the following points emerge for consideration:

1. If a person who is an accused in a case absconded from India and went abroad after fully knowing about the registration of a nonbailable offence against him, and thereafter if he file bail application under Section 438 Cr.P.C, whether the bail court should entertain such a bail application?
2. When an accused went abroad, after knowing that he is an accused in a nonbailable offence, and thereafter filing a bail application before this Court, whether he is entitled interim bail as per Section 438(1) Cr.P.C?
3. Whether the bail court has jurisdiction to pass orders restraining the Police in arresting accused without passing interim bail orders as per Section 438(1) Cr.P.C?

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9. As far as the present case is concerned, it is reported that as on today, the petitioner is in India. Since this bail application is adjourning for the consideration of a Division Bench, I think interim bail can be granted to the petitioner till the disposal of the bail application. Petitioner is a woman. It is true that that the allegation against the petitioner is serious. The bail application is to be heard in detail. But there is no allegation in this case that the petitioner left India after knowing about the registration of this case. Moreover ADGP also has not seriously opposed in granting interim bail to the petitioner. Therefore considering the facts and circumstances of the case, I think there can be an interim order granting anticipatory bail to the petitioner till the disposal of this bail application invoking the powers under Section 438(1) Cr. P.C. Therefore, in the event of arrest of the petitioner in connection with the accusation alleged in this petition, the petitioner shall be released on bail on executing a bond of Rs.25,000/-(Rupees Twenty Five Thousand only) with two solvent sureties each for the like sum to the satisfaction of the arresting officer. The Investigating officer is free to interrogate the petitioner for the purpose of

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investigation.

The Registry is directed to place this bail application before the Hon'ble Chief Justice for passing appropriate orders. Since this a bail application Registry will do the needful immediately.

Sd/-

**P.V.KUNHIKRISHNAN
JUDGE**

JV



Annexure-A12

TRUE COPY OF THE ORDER DATED 10/8/2020 IN BAIL
APPL.NO.1377/2020.

