

IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD
SITTING AT LUCKNOW

Neutral Citation No. - 2024:AHC-LKO:70686

A.F.R.

Court No. - 29

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION
U/S 438 CR.P.C. No. - 2090 of 2024

Applicant :- Ankur Agarwal

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home, Lucknow
And Another

Counsel for Applicant :- Awadhesh Kumar Singh, Akhilesh Kumar
Kalra, Rajesh Chandra Mishra

Counsel for Opposite Party :- G.A.

Hon'ble Subhash Vidyarathi J.

1. Heard Sri Akhilesh Kumar Kalra, the learned counsel for the applicant as well as Sri Punit Kumar Yadav, the learned counsel appearing on behalf of the State and perused the records.
2. The instant application has been filed by the applicant seeking anticipatory bail in F.I.R. No.817 of 2023, under Sections 419, 420, 467, 468, 471 & 129-B I.P.C., registered at Police Station Kotwali Nagar, District Gonda.
3. The aforesaid case has been registered on the basis of an F.I.R. lodged by a Lekhpal on 15.09.2023 against 7 persons, including the applicant, stating that the co-accused Jawahar Lal had executed two registered agreements in favour of co-accused Amit Agarwal to sell a piece of government land which is recorded as banjar in the revenue records. Another co-accused Rajmangal Mishra executed a registered agreement dated 11.03.2022 to sell a part of the aforesaid land to the applicant. The applicant's anticipatory bail application was rejected by the learned Sessions Court by means of an order dated 16.11.2023.

4. In the affidavit filed in support of the anticipatory bail-application it has been contended that the applicant is innocent, he has falsely been implicated in the present case and he has no criminal history. A copy of the plaint dated 03.10.2023 filed in the Court of Civil Judge, Junior Division, Gonda for a decree of cancellation of the agreement dated 11.03.2022 has been annexed with the affidavit filed in support of the application. It has been stated that the co-accused Jawahar Lal has been granted bail in this case and all the other co-accused persons have been granted anticipatory bail.
5. The learned counsel for the State has opposed the anticipatory bail application and on the basis of instructions provided to the learned State Counsel he has submitted that proceedings under Section 82 Cr.P.C. have already been initiated against the applicant on 16.08.2023 and, therefore, the application for anticipatory bail is not maintainable in view of the law laid down by Hon'ble Supreme Court in the case of **Lavesh versus State (NCT of Delhi)**: (2012) 8 SCC 730 and **Srikant Upadhyay and others versus State of Bihar and another**: 2024 SCC OnLine SC 282.
6. In reply to the aforesaid submission, the learned counsel for the applicant submitted that the anticipatory bail applications of co-accused persons were pending and the applicant was waiting for its outcome and that is the reason for the delay in filing this application.
7. In **Lavesh** (supra), the wife of younger brother of the appellant had committed suicide after 1 year and 8 months of her marriage, while she was pregnant. An FIR under Section 304-B, 306 and 498 I.P.C. was lodged in this regard. There were definite allegations against the appellant and other family members that they had subjected the deceased to cruelty with a view to demand dowry right from the date of marriage and also immediately before date of her death. It was stated in the counter affidavit filed before the Supreme Court that "efforts were made to arrest the petitioner but he absconded as such he was got declared a Proclaimed Offender. The case is pending trial". In

this background, a two Judge Bench of the Hon'ble Supreme Court held in **Lavesh** (Supra) that:—

“From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as “absconder”. Normally, when the accused is “absconding” and declared as a “proclaimed offender”, there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail.”

8. Even after making the aforesaid observations in **Lavesh** (Supra), the Hon'ble Supreme Court considered the merits of the case and recorded that another circumstance against the appellant was that even though the Hon'ble Supreme Court had granted interim protection to the appellant, he did not cooperate and visit the said police station. In this factual background, the Hon'ble Supreme Court held that:—

“15. Taking note of all these aspects, in the light of the conditions prescribed in Section 438 of the Code and conduct of the appellant immediately after the incident as well as after the interim protection granted by this Court on 23-1-2012, we are of the view that the appellant has not made out a case for anticipatory bail. Unless free hand is given to the investigating agency, particularly, in the light of the allegations made against the appellant and his family members, the truth will not surface.”

9. Thus it is not that the Hon'ble Supreme Court had rejected the application has not maintainable on the ground that issuance of a proclamation under Section 82 Cr.P.C. without considering the merits of the application.
10. **Srikant Upadhyay** (Supra) was an appeal directed against an order passed by the High Court of Judicature at Patna whereby an application for anticipatory bail in offences under Sections 341, 323, 354, 354-B, 379, 504, 506 and 149 I.P.C. and Section 3/4 of Prevention of Witch (Daain) Practices Act, 1999 had been dismissed. The Hon'ble Supreme Court relied upon the precedents in the case of **Prem Shankar Prasad versus State of**

Bihar: (2022) 14 SCC 516, **State of M.P. v. Pradeep Sharma**, (2014) 2 SCC 171 and **Lavesh versus State (NCT of Delhi):** (2012) 8 SCC 730.

11. **Prem Shankar Prasad** (Supra) was an appeal decided by a Bench consisting of two Hon'ble Judges of the Supreme Court wherein the Hon'ble Supreme Court followed the decision in **Pradeep Sharma** and held that the High Court has committed an error in granting anticipatory bail to Respondent 2-accused ignoring the proceedings under Sections 82/83CrPC.
12. In **Pradeep Sharma** (Supra) the persons accused of offence under Section 302 read with Section 34 IPC had filed an application for anticipatory bail, which was rejected by the High Court of Madhya Pradesh by means of an order dated 01.08.2012 on the ground that custodial interrogation was necessary in the case. The accused persons did not challenge the order dated 01.08.2012 and they did not appear before the Investigating Officer. A charge-sheet was submitted against them on 26.08.2012. Arrest warrants were issued on 21.11.2012 but the same were returned to the court without service. On 29.11.2012, a proclamation under Section 82 Cr.P.C. was issued against them for their appearance to answer the complaint. Pradeep Sharma filed a second application for anticipatory bail, which was allowed by means of an order dated 10.01.2013. Other co-accused persons were also granted anticipatory bail by separate orders, which were challenged before the Supreme Court. In the meantime, the accused persons approached the Chief Judicial Magistrate for the grant of regular bail and they were granted regular bail vide order dated 20.02.2013. The only question for consideration of the Supreme Court was whether the High Court is justified in granting anticipatory bail under Section 438 of the Code to the respondent-accused when the investigation was pending, particularly, when both the accused had been absconding all along and not cooperating with the investigation. The Hon'ble Supreme Court referred to Section 438 Cr.P.C. and held that: -

“The above provision makes it clear that the power exercisable under Section 438 of the Code is somewhat extraordinary in character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty.”

13. Following the decision in **Lavesh** (Supra), the Hon’ble Supreme Court held in **Pradeep Sharma** (Supra) that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail.
14. Following the aforesaid decisions, the two Judge Bench of the Hon’ble Supreme Court held in **Srikant Upadhyay** (Supra) that: -

*“9. It is thus obvious from the catena of decisions dealing with bail that even while clarifying that arrest should be the last option and it should be restricted to cases where arrest is imperative in the facts and circumstances of a case, the consistent view is that the grant of anticipatory bail shall be restricted to exceptional circumstances. In other words, **the position is that the power to grant anticipatory bail under Section 438, Cr. P.C. is an exceptional power and should be exercised only in exceptional cases and not as a matter of course.** Its object is to ensure that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant. [See the decision of this Court in *HDFC Bank Ltd. v. J.J. Mannan* (2010) 1 SCC 679].*

*10. When a Court grants anticipatory bail what it actually does is only to make an order that in the event of arrest, the arrestee shall be released on bail, subject to the terms and conditions. **Taking note of the fact the said power is to be exercised in exceptional circumstances** and that it may cause some hinderance to the normal flow of investigation method when called upon to exercise the power under Section 438, Cr. P.C., courts must keep reminded of the position that law aides only the abiding and certainly not its resistant. By saying so, we mean that a person, having subjected to investigation on a serious offence and upon making out a case, is included in a charge sheet or even after filing of a refer report, later, in accordance with law, the Court issues a summons to a person, he is bound to submit himself to the authority of law. It only means that though he will still be at liberty, rather, in his right, to take recourse to the legal remedies available only in accordance with law, but not in its defiance. We will dilate this discussion with reference to the factual matrix of this case. However, we think that before*

dealing with the same, a small deviation to have a glance at the scope and application of the provisions under Section 82, Cr. P.C. will not be inappropriate.”

15. It appears that it was not placed before the Hon’ble Supreme Court that the judgment in the case of **HDFC Bank** (Supra) has been overruled by a Five Bench judgment in the case of **Sushila Aggarwal v. State (NCT of Delhi)**: (2020) 5 SCC 1 and the relevant passage of the aforesaid judgment is being reproduced below: -

*“76. Therefore, this Court holds that **the view expressed in Salauddin Abdulsamad Shaikh [Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667], K.L. Verma [K.L. Verma v. State, (1998) 9 SCC 348], Nirmal Jeet Kaur [Nirmal Jeet Kaur v. State of M.P., (2004) 7 SCC 558], Satpal Singh [Satpal Singh v. State of Punjab, (2018) 13 SCC 813, Adri Dharan Das [Adri Dharan Das v. State of W.B., (2005) 4 SCC 303, HDFC Bank [HDFC Bank Ltd. v. J.J. Mannan, (2010) 1 SCC 679], and Naresh Kumar Yadav [Naresh Kumar Yadav v. Ravindra Kumar, (2008) 1 SCC 632] about the Court of Session, or the High Court, being obliged to grant anticipatory bail, for a limited duration, or to await the course of investigation, so as the “normal court” not being “bypassed” or that in certain kinds of serious offences, anticipatory bail should not be granted normally — including in economic offences, etc.—are not good law. The observations which indicate that such time related or investigative event related conditions, should invariably be imposed at the time of grant of anticipatory bail are therefore, overruled. Similarly, the observations in Mhetre [Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694] that:***

“105. ... the courts should not impose restrictions on the ambit and scope of Section 438 CrPC which are not envisaged by the legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it.”

is too wide and cannot be considered good law. It is one thing to say that as a matter of law, ordinarily special conditions not mentioned in Section 438(2) read with Section 437(3) should not be imposed; it is an entirely different thing to say that in particular instances, having regard to the nature of the crime, the role of the accused, or some peculiar feature, special conditions should not be imposed. The judgment in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565] itself is an authority that such conditions can be imposed, but not in a routine or ordinary manner and that such conditions then become an inflexible “formula” which the courts would have to follow. Therefore, courts can use their discretion,

having regard to the offence, the peculiar facts, the role of the offender, circumstances relating to him, his likelihood of subverting justice (or a fair investigation), likelihood of evading or fleeing justice — to impose special conditions. Imposing such conditions, would have to be on a case-to-case basis, and upon exercise of discretion by the court seized of the application under Section 438. In conclusion, it is held that imposing conditions such as those stated in Section 437(2) while granting bail, are normal; equally, the condition that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, person released on bail shall be liable to be taken in police custody for facilitating the discovery. Other conditions, which are restrictive, are not mandatory; nor is there any invariable rule that they should necessarily be imposed or that the anticipatory bail order would be for a time duration, or be valid till the filing of the FIR, or the recording of any statement under Section 161 CrPC, etc. Other conditions may be imposed, if the facts of the case so warrant.

16. The conclusion drawn by the Hon'ble Supreme Court in **Sushila Aggarwal** (Supra) are reiterated in para 92 of the judgment, which are as follows:—

*“92. This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that **the following need to be kept in mind by courts, dealing with applications under Section 438 CrPC:***

92.1. Consistent with the judgment in Gurbaksh Singh Sibbia v. State of Punjab [(1980) 2 SCC 565], when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

92.2. It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the Public Prosecutor and obtain facts, even while granting limited interim anticipatory bail.

92.3. *Nothing in Section 438 CrPC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified — and ought to impose conditions spelt out in Section 437(3) CrPC [by virtue of Section 438(2)]. The need to impose other restrictive conditions, would have to be judged on a case-by-case basis, and depending upon the materials produced by the State or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.*

92.4. *Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.*

92.5. *Anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the charge-sheet till end of trial.*

92.6. *An order of anticipatory bail should not be “blanket” in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.*

92.7. *An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.*

92.8. *The observations in Sibbia [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565] regarding “limited custody” or “deemed custody” to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of*

an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. Sibbia had observed that:

“19. ... if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya, AIR 1960 SC 1125.”

92.9. *It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439(2) to arrest the accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc.*

92.10. *The court referred to in para 92.9 above is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.*

92.11. *The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the State or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. [See Prakash Kadam v. Ramprasad Vishwanath Gupta, (2011) 6 SCC 189, Jai Prakash Singh v. State of Bihar, (2012) 4 SCC 379, State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21.] This does not amount to “cancellation” in terms of Section 439(2) CrPC.*

92.12. *The observations in Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 (and other similar judgments) that no restrictive conditions at all can be imposed, while granting anticipatory bail are hereby overruled. Likewise, the decision in Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667 and subsequent decisions which lay down such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.”*

17. In **Dharmapal Gautam v. State of U.P.**, 2023 SCC OnLine All 3648, this Court considered the judgments of the Hon’ble Supreme Court in the cases of **Lavesh v. State (NCT of Delhi)**: (2012) 8 SCC 730, **State of M.P. v. Pradeep Sharma**: (2014) 2 SCC 171, **Vipin**

Kumar Dhir v. State of Punjab: (2021) 15 SCC 518 and **State of Haryana v. Dharamraj:** 2023 SCC OnLine SC 1085 and held that: -

“7. The later judgment rendered by five Hon’ble Judges of the Hon’ble Supreme Court will obviously prevail over the former judgment of two Hon’ble Judges and the law, as it now stands, is that there is no restriction that the discretion of grant of pre-arrest bail under Section 438 Cr. P.C. can be exercised only in exceptional circumstances. The factors to be considered for grant of anticipatory bail to the applicant are somewhat similar to the considerations to be kept in mind for granting bail to an accused person. The only additional consideration to be kept in mind while deciding the application under Section 438 Cr. P.C. is contained in clause (iv) of Sub-section (i) of Section 438, as per which the Court has also to take into consideration whether the accusation has been made with object of injuring or humiliating the applicant by having him so arrested.”

18. Apparently, the judgment in the case of **Srikant Upadhyay** has been passed after following the law laid down in the overruled judgment in the case of **HDFC Bank** (Supra) that anticipatory bail can be granted only in exceptional cases. The law laid down by the five Judge Bench of the Supreme Court in the subsequent judgment in the case of **Sushila Aggarwal** (Supra) will govern the field but it has not been considered in **Srikant Upadhyay** (Supra).

19. However, even in **Srikant Upadhyay**(Supra), the Hon’ble Supreme Court has held as under: -

*“25. We have already held that the power to grant anticipatory bail is an extraordinary power. Though in many cases it was held that bail is said to be a rule, it cannot, by any stretch of imagination, be said that anticipatory bail is the rule. It cannot be the rule and **the question of its grant should be left to the cautious and judicious discretion by the Court depending on the facts and circumstances of each case.** While called upon to exercise the said power, the Court concerned has to be very cautious as the grant of interim protection or protection to the accused in serious cases may lead to miscarriage of justice and may hamper the investigation to a great extent as it may sometimes lead to tampering or distraction of the evidence. We shall not be understood to have held that the Court shall not pass an interim protection pending consideration of such application as the Section is destined to safeguard the freedom of an individual against unwarranted arrest and we say that such*

orders shall be passed in eminently fit cases. At any rate, when warrant of arrest or proclamation is issued, the applicant is not entitled to invoke the extraordinary power. Certainly, this will not deprive the power of the Court to grant pre-arrest bail in extreme, exceptional cases in the interest of justice. But then, person(s) continuously, defying orders and keep absconding is not entitled to such grant.”

20. Therefore, even as per the law laid down by the Hon’ble Supreme Court in the case of **Srikant Upadhyay** (Supra), there is no absolute prohibition against considering an application for anticipatory bail after issuance of warrant of arrest or a proclamation under Section 82 Cr.P.C. and the court is empowered to consider the merits of the case in extreme exceptional cases in the interest of justice.

21. In **Parasa Raja Manikyala Rao v. State of A.P.**, (2003) 12 SCC 306, the Hon’ble Supreme Court held that: -

“9. Each case, more particularly a criminal case, depends on its own facts and a close similarity between one case and another is not enough to warrant like treatment because a significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.”

(Emphasis added)

22. When this court examines the facts of the present case in the light of law laid down by Hon’ble Supreme Court in the above mentioned cases, what comes to light is that the only allegation against the applicant is that a co-accused had executed an agreement dated 11.03.2022 to sell a certain piece of land to the applicant, which is claimed to be government land recorded in the revenue records as banjar. A copy of aforesaid agreement to sell dated 11.03.2022 annexed with the application indicates that out of the agreed sale consideration of Rs.10,00,000/-, the applicant had paid Rs.5,00,000/- to the seller and he had paid stamp duty amounting to Rs.20,000/-. The sale agreement does not state that possession of the land was handed over to the applicant. The applicant has already filed a suit for

cancellation of agreement in the Court of Civil Judge (Junior Division), Gonda, wherein he has stated that after execution of the agreement, the applicant came to know that the seller was not the recorded tenure holder of the land in question and he has executed the agreement in a fraudulent manner. Jawahar Lal, the executant of the agreement dated 11.03.2022, has been granted bail and all the other co-accused persons have been granted anticipatory bail.

23. From the fact that the applicant has parted away with a sum of Rs.5,00,000/- for execution of the agreement and he has not acquired either possession or title in lieu thereof, prima facie it appears that the applicant is a victim of a fraud committed by the executor of the agreement – the co-accused Rajmangal Mishra. Rajmangal Mishra has already been granted anticipatory bail.
24. The agreement in question was executed on 11.03.2022, the FIR was lodged on 15.09.2023, the applicant filed a suit for cancellation of the agreement on 03.10.2023 and he also an application under Section 156 (3) Cr.P.C. against the executant of the agreement – Raj Mangal Mishra on the same date. The anticipatory bail application of the applicant was rejected by the Session Court on 16.11.2023. As per instructions provided to the learned State Counsel, a non-bailable warrant of arrest was issued against the applicant on 15.06.2024 and proceedings under Section 82 Cr.P.C. have been initiated against him on 16.08.2024 when all the co-accused persons had already been granted anticipatory bail.
25. Having considered the aforesaid peculiar facts and circumstances of this case, this court is of the considered opinion that the aforesaid facts make out a case warranting grant of anticipatory bail to the applicant in order to secure the interest of justice.
26. In view of the above, the anticipatory bail application of the applicant is allowed. In the event of arrest/ appearance of **applicant-Ankur Agarwal** before the learned Trial Court in the aforesaid case crime, he shall be released on anticipatory bail on his furnishing personal bond and two solvent sureties, each in the like amount, to the satisfaction of

S.H.O./Court concerned on the following conditions and subject to any other conditions that may be fixed by the Trial Court:

- (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 or tamper with the evidence;
- (iii). that the applicant shall not leave India without the previous permission of the court?
- (iv). that the applicant shall appear before the trial court on each date fixed, unless personal presence is exempted; and
- (v). that the applicant shall not pressurize/ intimidate the prosecution witness.

(Subhash Vidyarthi, J.)

Order Date: 21.10.2024

Ram.