* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 21.02.2024
Pronounced on: 06.03.2024

\+ **BAIL APPLN. 3414/2022 & CRL.M.A. 23677/2022**
\+ **BAIL APPLN. 3739/2022 & CRL.M.A. 26317/2022, CRL.M.A. 26318/2022**
\+ **BAIL APPLN. 3741/2022 & CRL.M.(BAIL) 1521/2022, CRL.M.A. 26323/2022**

ABRAHAM GEORGE ..... Applicant
YOGESH SUDHANSHU KUMAR ..... Applicant
MAHENDRA GAMBHIR ..... Applicant

Through: Mr.Siddharth Aggarwal, Sr. Adv. with Mr.Arun Sri Kumar, Mr.Harsh Yadav, Mr.Abhyudaya Shishodia and Mr.Vishwajeet Singh Bhati, Advs. in BAIL APPLN. 3414/2022
Mr.Shiv Chopra, Ms.Aadhyaa Khanna and Mr.Siddharth Arora, Advs. in BAIL APPLN. 3739/2022
Mr.Aditya Wadhwa, Mr.Ayush Shrivastava and Mr.Siddharth Sunil, Advs. in BAIL APPLN. 3741/2022

versus

SERIOUS FRAUD INVESTIGATION OFFICE
..... Respondent

Through: Mr.Amit Tiwari, SPC with Mr.Pankaj Mohan, Sr. Prosecutor and Ms.Chetanya Puri, Ms.Parul Chutani,

Mr.Kartikey Yadav and Mr.Lakshay Singh, Advs. in BAIL APPLN. 3414/2022 & BAIL APPLN. 3739/2022
Mr.Rajesh Gogna, CGSC with Mr.Pankaj Mohan, Sr. Prosecutor and Ms.Priya Singh, Ms.Parul Chutani, Mr.Kartikey Yadav and Mr.Lakshay Singh, Advs. in BAIL APPLN. 3741/2022 Mr.Akshay Kumar Singh, Adv. (through VC)

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. These applications have been filed under Section 438 of the Code of Criminal Procedure, 1973 (in short, 'Cr.P.C.') seeking grant of Anticipatory Bail in CC No. 272/2022 titled ***Serious Fraud Investigation Office v. Dura Line India Pvt. Ltd. (DIPL) & Ors.*** pending before the Court of the learned Additional Sessions Judge-03, Special Court (Companies Act), South-West District, Dwarka Courts, New Delhi (hereinafter referred to as the 'Trial Court'). As almost similar submissions have been made by the learned counsels for the Applicants, these applications are being disposed of by this common judgment.

2. The above complaint has been filed by the respondent herein under Section 439(2) read with Section 436 (1)(a), (d) and Section 436 (2) read with Section 212 (6) and Section 212(15) of the Companies Act, 2013 (hereinafter referred to as the 'Act') read with

Section 193 of the Cr.P.C., on which, by an Order dated 16.07.2022 passed by the learned Trial Court, the Applicant(s) herein has been summoned as an accused for offence under Sections 447 and 448 read with Sections 447, 449, 96 read with Section 99; Section 135 read with Section 450 of the Act as far as Applicants Abraham George and Mahendra Gambhir are concerned, and Sections 447 and 448 read with Section 447 of the Act as far as the Applicant Yogesh Sudhanshu is concerned.

Submissions of the Learned Counsel for the Respondent:

3. The learned counsel for the respondent raised a preliminary objection on the maintainability of the present applications. He submits that as the Applicant(s) has been summoned on a complaint filed by the respondent before the learned Trial Court, an application under Section 438 of the Cr.P.C. by the Applicant(s) would no longer be maintainable; the only remedy available to the Applicant(s) is to apply for Bail under Section 439 of the Cr.P.C..

4. The learned counsel for the respondent submits that an application under Section 438 of the Cr.P.C. is maintainable only where the person has reason to believe or an apprehension that he may get arrested on the accusation of having committed a non-bailable offence. He submits that, admittedly, the Applicant(s) was not arrested before the filing of the complaint. Once a complaint has been filed, the learned Trial Court, after looking into the nature of the accusations that have been made in the complaint and upon hearing the Applicant(s), may take the Applicant into '*custody*'. He submits that

there is a difference in the legal meaning and implications of the terms '*arrest*' and '*custody*', as has been explained by the Supreme Court in its judgments in ***Directorate of Enforcement v. Deepak Mahajan***, (1994) 3 SCC 440 and ***Sundeep Kumar Bafna v. State of Maharashtra & Anr.***, (2014) 16 SCC 623.

5. Placing reliance on the judgment of the Supreme Court in ***Satender Kumar Antil v. Central Bureau of Investigation & Anr.*** (2022) 10 SCC 51, he submits that the grant of bail in case of a complaint under Section 212 (6) of the Act, is circumscribed by the special conditions prescribed therein and the general rules for consideration of an application for bail cannot be applied.

6. Placing reliance on the judgment of the Supreme Court in ***Gurbaksh Singh Sibbia v. State of Punjab*** (1980) 2 SCC 565, he submits that for granting anticipatory bail to any person, it is necessary for him to show that he has reasons to believe that he may get arrested. He submit that, in the present case, as the applicant was not arrested during the course of the investigation by the respondent, he does not have any reason to believe that he may get arrested once he appears before the learned Trial Court in answer to the summons issued to him.

7. He submits that merely because the learned Trial Court, in a few cases, has rejected the application filed by the accused therein for being released on Bail, it cannot also give rise to such a belief in the Applicant(s) that if they apply for Bail before the learned Trial Court, the same shall be rejected and they shall be taken into custody.

8. He further submits that the grant of Anticipatory Bail to the

Applicant(s) would, in fact, tantamount to an injunction against the learned Trial Court from exercising its jurisdiction under Section 212 (6) of the Act and, therefore, the present applications are liable to be dismissed.

Submissions of the Learned Counsel(s) for the Applicant(s):

9. On the other hand, the learned counsel(s) for the Applicant(s), placing reliance on the judgments of the Supreme Court in ***Bharat Chaudhary & Anr. v. State of Bihar & Anr.,*** (2003) 8 SCC 77; ***Ravindra Saxena v. State of Rajasthan,*** (2010) 1 SCC 684; and of the Division Bench of this Court in ***P.V. Narsimha Rao v. State (CBI),*** ILR (1997) I Del 507; and of the Coordinate Benches of this Court in ***P.V. Narsimha Rao v. State (CBI),*** 1997 SCC OnLine Del 19, and ***Deepak Anand v. State & Anr.*** 2018 SCC OnLine Del 11875; and of the High Court of Uttrakhand in ***Saubhagya Bhagat v. State of Uttarakhand & Anr.***, (Judgment dated 24.08.2023 passed in Anticipatory Bail Application No. 76/2021) submit that, merely because a complaint/charge-sheet has been filed, it cannot be said that an application under Section 438 of the Cr.P.C. will no longer be maintainable or that there will be no reasonable basis for an apprehension in the accused that he shall be arrested or taken into custody once he appears before the learned Trial Court in compliance with the summons issued to him.

10. They further submit that the submission of the learned counsel for the respondent that the Applicants, on their appearance before the learned Trial Court in answer to the summons, will be taken into

'*custody*' and not '*arrested*', is fallacious, inasmuch as '*custody*' follows '*arrest*', as has also been explained in the judgment of the Supreme Court in ***Deepak Mahajan*** (Supra), relied upon by the learned counsel for the respondent.

11. On the special conditions to be met for being released on bail under Section 212(6) of the Act, the learned counsel(s) for the Applicant(s) submits that, as in the present case, the Applicants were not arrested during the course of investigation by the respondent, in terms of the judgment of the Supreme Court in ***Satender Kumar Antil*** (Supra) read along with Order dated 21.03.2023 in the same proceedings, reported as 2023 SCC OnLine SC 452, the general principles governing Bail are to be equally applied to the grant of Anticipatory Bail and, therefore, as the Applicant(s) were not arrested during the period of investigation, they are entitled to grant of Anticipatory Bail from this Court.

12. On the reason for the apprehension of the Applicant(s) that they may be taken into custody if they appear before the learned Trial Court, the learned counsel(s) for the Applicant(s) have placed reliance on the judgments of this Court in ***Suman Chadha v. Serious Fraud Investigation Office,*** 2023 SCC OnLine Del 4174; ***Dr. Bindu Rana v. Serious Fraud Investigation Office,*** 2023 SCC OnLine Del 276; and, ***Taranjeet Singh Bagga v. Serious Fraud Investigation Office,*** 2023 SCC OnLine Del 893, to submit that persons against whom similar complaints were filed by the respondent before the same learned Trial Court, they were taken into custody, in spite of them not being arrested during the course of investigation by the respondent, and they

could obtain Bail only from this Court after a prolonged period of incarceration.

13. They submit that, therefore, the apprehension of the Applicants, that they may be arrested once they appear before the learned Trial Court in answer to the summons, cannot be said to be fanciful or without any basis.

14. They further submit that there are no allegations of the Applicant(s) being a flight risk or likely to tamper with evidence or influence witnesses.

15. The learned counsel for the Applicant in Bail Appln. 3739/2022-Sh. Yogesh Sudhanshu Kumar further submits that the Applicant has joined the investigation, the trial is likely to take long, the Applicant has clean antecedents, is a senior citizen and is a resident of Pune, Maharashtra, having multiple ailments. He submits that the Applicant was granted *interim* protection vide Order dated 15.12.2022. There is no allegation of him misusing the relief so granted by this Court. He submits that the material allegations in the complaint pertain to period after the Applicant had resigned.

ANALYSIS & FINDINDS:

16. I have considered the submissions made by the learned counsels for the parties.

17. The provision as to the grant of Bail in cases of non-bailable offences are contained in Sections 437, 438 and 439 of the Cr.P.C. The said provisions are reproduced hereinbelow:

437. When bail may be taken in case of non-bailable offence.—*(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but—*

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds

for further inquiry into his guilt, the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abatement of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court shall impose the conditions,—

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such 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 or tamper with the evidence,

and may also impose, in the interests of justice, such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under sub-section (1) or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time, after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

438. Direction for grant of bail to person apprehending arrest.*—(1) When any person has reason to believe that he may be arrested on an 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 cognisable 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 incharge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(1A) 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.

(1B) 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 thinks 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 sub-section (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 376AB or section 376DA or section 376DB of the Indian Penal Code (45 of 1860).

***439. Special powers of High Court or Court of Session regarding bail.**—(1) A High Court or Court of*

Session may direct—

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code (45 of 1860), give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.

(1A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of section 376 or section 376AB or section 376DA or section DB of the Indian Penal Code (45 of 1860).

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

18. Section 437 and Section 439 of the Cr.P.C. relate to grant of Bail to any person who has been '*arrested*' or is in '*custody*'. Section 438 of the Cr.P.C., on the other hand, gives a power to the Court to grant Anticipatory Bail to a person who is yet to be '*arrested*' or taken

into '*custody*'. Explaining the powers under Section 438 of the Cr.P.C., so far as is relevant to the present controversy, the Supreme Court in ***Gurbaksh Singh Sibbia*** (Supra) has held as under:

> ***"7.*** *The facility which Section 438 affords is generally referred to as 'anticipatory bail', an expression which was used by the Law Commission in its 41st Report. Neither the section nor its marginal note so describes it but, the expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in Wharton's LAW LEXICON, is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognisance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure which deals*

with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". A direction under Section 438 is intended to confer conditional immunity from this 'touch' or confinement.

xxx

12. *We find ourselves unable to accept, in their totality, the submissions of the learned Additional Solicitor-General or the constraints which the Full Bench of the High Court has engrafted on the power conferred by Section 438. Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence. Though the right to apply for anticipatory bail was conferred for the first time by Section 438, while enacting that provision the legislature was not writing on a clean slate in the sense of taking an unprecedented step, insofar as the right to apply for bail is concerned. It had before it two cognate provisions of the Code : Section 437 which deals with the power of courts other than the Court of Session and the High Court to grant bail in non-bailable cases and Section 439 which deals with the "special powers" of the High Court and the Court of Session regarding bail. The whole of Section 437 is riddled and hedged in by restrictions on the power of certain courts to grant bail….*

…The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to

refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully : Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in para 39.9 that it had "considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in clauses (i) to (iv) of sub-section (2). The proof of legislative intent can best be found in the language which the legislature uses. Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of

innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non- bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail if generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437.

13. *This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of Section 438. Though sub-section (1) of that section says that the court "may, if it thinks fit" issue the necessary direction for bail, sub-section (2) confers on the court the power to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in clauses (i) to (iv) of that sub-section. The controversy therefore is not whether the court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor-General. Our answer, clearly and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and*

circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code.

xxxx

20. *It is unnecessary to consider the third proposition of the High Court in any great details because we have already indicated that there is no justification for reading into Section 438 the limitations mentioned in Section 437. The High Court says that such limitations are implicit in Section 438 but, with respect, no such implications arise or can be read into that section. The plenitude of the section must be given its full play.*

xxxx

35. *Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.*

> ***36.*** *Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned under Section 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438."*

19. In ***Bharat Chaudhary*** (Supra), the Supreme Court has held that the power under Section 438 of the Cr.P.C. is available to the High Court and the Court of Sessions, even when cognizance is taken or a chargesheet has been filed. I may quote from the judgment as under:

> ***"4.*** *Shri B.B. Singh, learned counsel appearing for the respondent State, however, raised a legal objection. His contention was that since the court of first instance has taken cognizance of the offence in question, Section 438 of CrPC cannot be used for granting anticipatory bail even by this Court and the only remedy available to the appellants is to approach the trial court and surrender, thereafter apply for regular bail under Section 439 of CrPC. In support of this contention the learned counsel relied on the judgment of this Court in the case of Salauddin Abdulsamad Shaikh v. State of Maharashtra (1996) 1 SCC 667.*
>
> ***5.*** *If the arguments of the learned counsel for the respondent State are to be accepted then in each and every case, where a complaint is made of a non-bailable offence and cognizance is taken by the competent court then every court under the Code including this Court would be denuded of its power to grant anticipatory bail under Section 438 of CrPC.*
>
> ***6.*** *We do not think that was the intention of the legislature when it incorporated Section 438 in CrPC which reads thus:*
>
> > *"438. (1) When any person has reason to believe that he may be arrested on an 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; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail."

7. *From the perusal of this part of Section 438 of CrPC, we find no restriction in regard to exercise of this power in a suitable case either by the Court of Session, High Court or this Court even when cognizance is taken or a charge-sheet is filed. The object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself, in our opinion, prevent the courts concerned from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the courts concerned while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of a charge-sheet cannot by itself be construed as a prohibition against the grant of anticipatory bail. In our opinion, the courts i.e. the Court of Session, High Court or this Court has the necessary power vested in them to grant anticipatory bail in non-bailable offences under Section 438 of CrPC even when cognizance is taken or a charge-sheet is filed provided the facts of the case require the court to do so.*

xxxx

10. *From the above observations, we are unable to read any restriction on the power of the courts empowered to grant anticipatory bail under Section 438 of CrPC.*

11. *We respectfully agree with the observations of this Court in the said case that the duration of anticipatory bail should be normally limited till the trial court has the necessary material before it to pass such orders and it thinks fit on the material available before it. That is only a restriction in regard to blanket anticipatory bail for an unspecified period. This judgment in our opinion*

> *does not support the extreme argument addressed on behalf of the learned counsel for the respondent State that the courts specified in Section 438 of CrPC are denuded of their power under the said section where either the cognizance is taken by the court concerned or a charge-sheet is filed before the appropriate court. As stated above, this would only amount to defeat the very object for which Section 438 was introduced in CrPC in the year 1973."*

20. In ***Ravindra Saxena*** (Supra), the Supreme Court reiterated that Anticipatory Bail can be granted to an accused at any time, so long as the accused has not been arrested. The High Court or the Court of Sessions cannot refuse to exercise its powers under Section 438 of the Cr.P.C. and leave the matter to the Magistrate only on the ground that the *challan* has now been presented.

21. The Division Bench of this Court also, on a reference made by a learned Single Judge, in ***P.V. Narsimha Rao*** (Supra), has held that an application under Section 438 of the Cr.P.C. shall be maintainable even where summons have been issued by the Court for the appearance of the accused. I may quote from the judgment as under:

> ***"3.*** *It is manifest from above that the only short point which arises for adjudication before this Bench is as to whether an application for grant of anticipatory bail under Section 438 of the Code of Criminal Procedure ("Cr.P.C." for short) would be maintainable even in a case where the Court has chosen to issue summons only for the appearance of the accused?*
>
> *xxxx*
>
> ***20.*** *Learned Public Prosecutor, Mr. Dutt, has vehemently contended that since summons have been issued against the accused person in the instant case hence the application under Section 438 Cr. P.C. would not be maintainable. We are sorry we are unable to agree with the contention of the learned counsel.*

21. *We have already observed above that the Courts while dealing with an application under Section 438 Cr. P.C. enjoy very wide powers, unlike the powers of a subordinate Court which is riddled and hedged in by restrictions. Thus the learned Public Prosecutor, argues that the present application would not be maintainable in view of the fact that the Court has itself not chosen to issue a warrant of arrest; instead the learned Special Judge has issued a process in the form of summons to secure the appearance of the petitioner. Hence it cannot be called by any stretch of imagination that there is an apprehension of arrest. While putting forward the said contention the learned Public Prosecutor is oblivious of the fact that a charge sheet has already been filed before the learned Special Judge against the petitioners. They have been summoned to appear before the Court. Thus can it be said in the above circumstances that there is no apprehension in the mind of the accused persons that they would not be arrested? We feel the apprehension in the above circumstances is very much genuine and real and not a figment of the imagination of the petitioners. The petitioners admittedly have been accused of committing of a cognizable offence. Thus they can be arrested at any time by any officer of the police. They can also be arrested at the instance of the Court. Section 438(3) Cr. P.C. contemplates such a situation and provides for such an eventuality. We are inclined to reproduce it over again in order to substantiate our point. It lays down:*

> *"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 sub-section (1)."*

22. *Thus if the petitioners in the instant case have been without the interim protection, which this Court granted them, they could have been arrested by the*

police or even at the instance of the Court.

xxxx

28. *In the above circumstances, we hold the applications to be maintainable. The Reference is answered accordingly."*

22. When the above matter was listed before the learned Single Judge on the answer to the above question by the Division Bench of this Court, learned Single Judge in his judgment dated 03.01.1997 ***P.V. Narsimha Rao*** (Supra) reiterated as under:

*"**14.** While exercising jurisdiction under Section 438 of the Code, the governing factor which is kept in mind by the Court is that there is apprehension of arrest by a person accused of non-bailable offence either at the hands of the police or at the instance of the Magistrate. A person who is yet to be loose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which taking into consideration the facts and circumstances of each case, it is imperative to protect his freedom."*

23. In ***Deepak Anand*** (Supra), another learned Single Judge of this Court, placing reliance on the abovementioned judgment in ***P.V. Narsimha Rao*** (Supra) and the other judgments referred hereinabove, again held that a provision under Section 438 of the Cr.P.C. would be maintainable even if summons have been issued, on a complaint, by the Magistrate. It was held has under:

*"**6.** The question as to whether the court vested with the power to grant anticipatory bail in terms of Section 438 Cr. P.C. can exercise such jurisdiction against the backdrop of order of the court of cognizance issuing process is not res integra. A division bench of this court, as far back as in November, 1996 by its judgment reported as P.V. Narsimha Rao v. State*

(CBI), 1997 SCC OnLine Del 19 had answered a reference on precisely the same question of law contrary to what is being canvassed by the petitioner. Pertinent to note that in that case also the petitioner had come up to this Court for grant of anticipatory bail in the wake of summons issued by court of Magistrate against him. The division bench, answering the reference made by a learned single judge had, inter alia, observed that a person against whom accusations of cognizable and non-bailable offence have been made may apprehend arrest by the police or arrest even at the hands of the court. It was noted that the language used in Section 438 Cr. P.C. is clear and unambiguous namely "reason to believe that he may be arrested on accusation". The court while considering the prayer under Section 438 Cr. P.C. goes by the merits of the case and not by the nature of order passed by the Magistrate choosing to summon the accused through bailable or non-bailable warrant. It was also noted that Section 438(3) Cr. P.C. contemplates a situation where the arrest may be apprehended at the instance of the court and, thus, mandates that if such order of cognizance is passed and the Magistrate decides that a warrant should be issued at his instance, such warrant would have to be a bailable warrant in conformity with the direction of the court under Section 438(1) Cr. P.C.

***7.** The rulings of the Supreme Court in Bharat Chaudhary v. State of Bihar, (2003) 8 SCC 77 and Ravindra Saxena v. State of Rajasthan, (2010) 1 SCC 684 are sufficient to be quoted as illustration of the law being settled contrary to what is being argued by the petitioner."*

24. The fine distinction which the learned counsel for the respondent sought to bring about between '*arrest*' and '*custody*' cannot also denude from the above position of law. Though, the learned counsel for the respondent stated that arrest for purposes of Section 438 of the Cr.P.C. can only be done by an executive or by a police officer, the above referred judgments clearly point to the

contrary. Arrest of an accused and taking him into custody can also be on his appearance before the Court taking cognizance of a complaint/final report and issuing summons to the accused; reliance in this regard can be made to the judgments of this Court in ***P.V. Narsimha Rao*** (Supra) and ***Deepak Anand*** (Supra).

25. In ***Deepak Mahajan*** (Supra), the Supreme Court observed that arrest of a person is a condition precedent for taking him into judicial custody. Taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on his appearance or surrender.

26. The learned counsel for the respondent has submitted that the Applicant(s) can apply for bail once they appear before the learned Trial Court in answer to the summons. However, such application would be maintainable only when first, the Applicants are '*arrested*' or taken into '*custody*' by the learned Trial Court. For Section 439 of the Cr.P.C. to apply, the '*arrest*' or '*custody*' of the accused is a pre condition. Therefore, to put it differently, it is the case of the respondent that once the charge-sheet is filed or a complaint is filed of which cognizance is taken, the provisions of Section 438 of the Cr.P.C. will no longer be available and the accused must suffer the ignominy of arrest, even though during the entire course of investigation he had not been arrested by the investigating agency. This would be contrary to the above referred judgments of the Supreme Court and of this Court, which have clearly held that the power under Section 438 of the Cr.P.C. would be available even where the charge-sheet has been filed or cognizance on a complaint

has been taken by the Magistrate.

27. Coming to the principles that would be applicable while considering the application of the Applicant(s) for grant of Anticipatory Bail, there is no gainsay that the Applicant(s) would have to show that they have '*reason to believe*' that they may be arrested. As held by the Supreme Court in ***Gurbaksh Singh Sibbia*** (Supra), the belief that the Applicant(s) may be so arrested must be founded on reasonable grounds and not on mere '*fear*' or a '*vague apprehension*'. In the present case, in my view, the applicant(s) have met the above test. The learned counsel(s) for the Applicant(s) have placed reliance on various judgments of this Court wherein the accused, who had been similarly summoned by the same Magistrate, were taken into custody and had to suffer the ignominy of being in jail for a long period of time before they were granted Bail by this Court.

28. As has been held by this Court in ***P.V. Narsimha Rao*** (Supra) and ***Deepak Anand*** (Supra), merely because summons have been issued to the Applicant(s), it cannot be said that there is no reason for them to believe that they shall be arrested/taken into custody once they appear before the learned Trial Court in answer to such summons.

29. As far as merit is concerned, in ***Satender Kumar Antil*** (Supra), the Supreme Court had placed cases where additional conditions of compliance of provisions of Bail are to be met, including Section 212 (6) of the Act, in 'Category C'. It was held that where the accused has not been arrested consciously by the prosecution, there is no need for further arrest of the accused at the instance of the Court. I may quote from the judgment as under:

> *"**89.** We may clarify on one aspect which is on the interpretation of Section 170 of the Code. Our discussion made for the other offences would apply to these cases also. To clarify this position, we may hold that if an accused is already under incarceration, then the same would continue, and therefore, it is needless to say that the provision of the Special Act would get applied thereafter. It is only in a case where the accused is either not arrested consciously by the prosecution or arrested and enlarged on bail, there is no need for further arrest at the instance of the court. Similarly, we would also add that the existence of a pari materia or a similar provision like Section 167(2) of the Code available under the Special Act would have the same effect entitling the accused for a default bail. Even here the court will have to consider the satisfaction under Section 440 of the Code."*

30. In a follow up Order dated 21.03.2023 in ***Satender Kumar Antil*** (Supra), the Supreme Court, taking note of the earlier judgment in ***Mahdoom Bava v. CBI***, 2023 SCC OnLine SC 299, clarified that similar principles would also apply in cases of consideration of an application seeking Anticipatory Bail. In ***Mahdoom Bava*** (Supra) it was held as under:

> *"**10.** More importantly, the appellants apprehend arrest, not at the behest of the CBI but at the behest of the Trial Court. This is for the reason that in some parts of the country, there seems to be a practice followed by Courts to remand the accused to custody, the moment they appear in response to the summoning order. The correctness of such a practice has to be tested in an appropriate case. Suffice for the present to note that it is not the CBI which is seeking their custody, but the appellants apprehend that they may be remanded to custody by the Trial Court and this is why they seek protection. We must keep this in mind while deciding the fate of these appeals.*

> ***11.*** *In the case of the prime accused, namely Shri Mahdoom Bava, an additional argument advanced by the learned Additional Solicitor General is that he was involved in eleven other cases. But the tabulation of those eleven cases would show that seven out of those eleven cases are complaints under Section 138 of the Negotiable Instruments Act, 1881 and three out of those seven cases are actually inter-parties and not at the instance of the Bank. The eighth case is a complaint filed by the Income Tax Officer and it relates to the non- payment of TDS amount. The remaining three cases are the cases filed by CBI, one of which is the subject matter out of which the above appeals arise."*

31. In ***Sundeep Kumar Bafna*** (Supra), the Court was, in fact, considering the powers of the High Court and the Court of Sessions under Section 439 of the Cr.P.C.. The same would have no relevance to the facts of the present case.

32. The submission of the learned counsel for the respondent that an Order granting Anticipatory Bail would, in fact, amount to an injunction against the learned Trial Court exercising its powers, is also fallacious. This Court is merely exercising the power which is vested in it under Section 438 of the Cr.P.C., and the same, in no manner, denudes the power of the learned Trial Court.

33. Now coming to the facts of the present case, the above criminal complaint arises out of Order dated 05.12.2018 issued by the Ministry of Corporate Affairs, Government of India (in short, 'MCA') under Section 212 (1) (c) of the Act directing an investigation by the respondent into the affairs of accused company, that is, M/s Dura Line India Pvt. Ltd. (DIPL). On the completion of the investigation, the respondent submitted the Investigation Report dated 25.03.2020 to the MCA along with a corrigendum dated 19.07.2021. The MCA vide

Order dated 19.03.2021, passed under Section 212 (14) of the Act, issued necessary instructions and directions to the respondent to file and initiate the complaint against the accused persons, including the Applicant(s) herein, pursuant to which, the complaint in question has been filed.

34. In the entire process of investigation leading to the filing of the complaint, the Applicant(s) were never arrested by the respondent and it is not disputed that the Applicant(s) have cooperated in the investigation. Applying the test as laid down by the Supreme Court in ***Satender Kumar Antil*** (Supra), therefore, in my view, the Applicant(s) are entitled to grant of Anticipatory Bail.

35. Needless to state, that nothing in this judgment should be taken to detract from the position that economic offences are serious in nature, and the allegations against the applicant and other co-accused, if proved at the trial, must be met with requisite punishment. However, that punishment must follow conviction, and the severity of the allegations, by itself cannot be a justification for pre-trial incarceration.

36. It is, therefore, ordered that in case of arrest, the Applicant(s) be released on bail in CC No. 272/2022 titled ***Serious Fraud Investigation Office v. Dura Line India Pvt. Ltd. (DIPL) & Ors.*** pending before the learned Trial Court, subject to furnishing a personal bond in the sum of Rs.50,000/- each, with one local surety each of the like amount to the satisfaction of the learned Trial Court, and further subject to the following conditions:

i. The Applicant(s) shall appear in the trial unless otherwise exempted from personal appearance by the learned Trial Court.

ii. The Applicant(s) shall not contact, nor visit, nor offer any inducement, threat or promise to any of the prosecution witnesses or other persons acquainted with the facts of case. The Applicant(s) shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial;

iii. In addition to the above conditions, it is specifically directed that the Applicant(s) shall also not, whether directly or indirectly, contact or visit, or have any transaction with any of the officials/employees of the banks or financial institutions, companies, entities, etc., who are concerned with the subject matter of the case, whether in India or abroad;

37. The Bail Applications are disposed of in the above terms. The pending applications are disposed of as infructuous.

NAVIN CHAWLA, J

MARCH 06, 2024/ns/**AS**

Click here to check corrigendum, if any