

Vidya amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL ANTICIPATORY BAIL APPLICATION NO. 492 OF 2014

Himanshu @ Hemant Rajendra Bhatt	...	Applicant
vs.		
The State of Maharashtra	...	Respondent

Mr. Subhash Jha i/b. Law Global, Advocate for applicant.
Smt. A.A. Mane, APP for the State.

CORAM : MRS. MRIDULA BHATKAR, J.
RESERVED ON : 15th April, 2014.
PRONOUNCED ON: 30th April, 2014.

P.C.

The applicant/accused has moved an application for anticipatory bail under section 438 of Cr. P.C. against the order of issuance of non-bailable warrant passed by the Additional Chief Metropolitan Magistrate, 6th Court, Mazgaon, Mumbai in C.C. 1105/S/2005 in the cases where the offence is registered against the applicant/accused under section 138 of N.I. Act, 1881. Earlier the application for anticipatory bail challenging the said order preferred before the learned Sessions Judge, Greater Bombay is rejected on 4th March, 2014 and four weeks time was granted to enable him to approach the Metropolitan Magistrate Court to apply for cancellation of warrant to grant fresh bail.

2. The learned counsel for the applicant/accused has submitted that the applicant/accused is facing charges under section 138 of N.I. Act & though it is bailable, the learned Magistrate has issued non-bailable warrant without ascertaining the genuine reasons of the absence of the

applicant/accused before the Magistrate. He submitted that due to communication gap between the applicant and his advocate, he could not appear before the learned Magistrate and therefore, the trial Court issued a non-bailable warrant and thereafter issued proclamation against the applicant/accused. He submitted that the applicant was arrested by CBI in R.C. No. RC-2/E/2013-EOW, Mumbai on 26th August, 2013 and he was released by CBI Special Court on 19th January, 2014. Therefore, the applicant could not appear before the learned trial Magistrate. The applicant is extremely apprehensive of his arrest if at all he appears before the learned trial Court for seeking cancellation of non-bailable warrant and therefore, he prays that he shall not be arrested on the basis of non-bailable warrant and prays for anticipatory bail. While arguing the case, the learned counsel submitted that though under section 438 of Cr. P.C. bail is granted for non-bailable offence and section 138 of N.I. Act is a bailable offence, yet the Court has power to grant anticipatory bail if non-bailable warrant is issued by the Magistrate as accused apprehends the arrest. In support of his submissions, he relied on the following decisions:

- (i) Judgment of the Single Judge of Madras High Court in the case of **R. Sarathkumar vs. The Inspector of Police, Neelankarai, Chennai reported in 2004(1) MLJ (Cri) 421.**
- (ii) Judgment of Single Judge of this Court in the case of **Akhlaq Ahmed F. Patel vs. State of Maharashtra reported in**

1998 Cri. L.J. 3969.

(iii) Judgment of the Single Judge of Madras High Court in the case of **Ragupathi vs. Govindan reported in 2006(2) MLJ (Cri) 336.**

He submitted that the Single Judges of this Court have granted anticipatory bails earlier in the cases which are registered under the provisions of Section 138 of N.I. Act.

3. Learned APP opposed the application. She submitted that anticipatory bail cannot be granted in this case where the Magistrate has issued non-bailable warrant against the applicant/accused. She submitted that many cases are pending against the applicant/accused before the learned trial Magistrate. As the applicant did not appear before the learned trial Magistrate, non-bailable warrant was issued and further proclamation against the applicant/accused is also issued. She submitted that the applicant/accused is deliberately avoiding to appear before the learned Magistrate and seeking protection before this Court bypassing a proper procedure of appearance before the learned Magistrate. She argued that in view of section 70(2) of Cr. P.C., a warrant of arrest remains in force unless is cancelled by the Court which issued it or until it is executed. The order of issuance of non-bailable warrant or order of proclamation undoubtedly can be challenged before the High Court and it can be cancelled, if found illegal under section

482 of the Cr. P.C. or under writ jurisdiction. It is necessary for the High Court to ascertain the legality of the order passed by the learned Magistrate on the basis of law as well as the facts of each case. The order can be challenged under section 482 of Cr. P.C. The Magistrate has passed an order of arrest of the accused under section 70 of Cr. P.C. which comes under Chapter VI i.e. 'Processes To Compel Appearance'. The present application is not filed under section 482 of Cr. P.C. which confers inherent power to the High Court to pass directory orders to give effect to any order under this Code and also to prevent abuse of the process of any Court and also to secure the ends of justice. Therefore, the Application is not maintainable and hence rejected

4. Thus, a question before me is limited as to whether this Court can invoke its power under section 438 of Cr. P.C. to grant anticipatory bail when the Magistrate has issued non-bailable warrant in the case filed under section 138 of N.I. Act. Under section 438 of Cr. P.C., the Sessions Court and High Court has power to grant bail to a person apprehending arrest in non-bailable offence. If a person is arrested in the bailable offence, then he has right to be released on bail by giving surety either before the police or before the learned Magistrate. When a person is arrested in non-bailable offence, then it is a discretion of a Court depending on the gravity of a matter to grant bail or not. Therefore, Section 438 provides a special provision to protect liberty against the

arrest in non-bailable offence and get pre-arrest bail. The section unequivocally states that the power to grant pre-arrest bail can be used by the Court only in respect of reasonable apprehension of an arrest in non-bailable offence. An offence under section 138 of N.I. Act is a bailable offence, hence a Magistrate issues warrant of arrest in the proceedings under section 138 of N.I. Act, then it being not in non-bailable offence; I am of the view that this Court or Sessions Court cannot use the powers of anticipatory bail under section 438 of Cr. P.C. The learned Sessions Court has hence rightly rejected the application for anticipatory bail.

5. Chapter VI of the Cr. P.C. provides various powers to the Courts to procure the presence of an accused or a witness or any person. If an accused is not appearing before the Court, then in the absence of coercive and deterrent powers, the Court is like a paper tiger. The Court cannot be helpless or powerless if the law is to be implemented. Therefore, the processes to compel the appearance under Chapter VI are provided by the legislature. The Court is required to first issue summons, thereafter a bailable warrant and if a person is not appearing before the Court then to issue non-bailable warrant. Issuance of warrant of arrest without issuing summons or bailable warrant is always deprecated. However, after taking proper steps for procuring the appearance of the person, if he remains absent without good cause,

then Magistrate if issues warrant of arrest during the trial, it is the duty of the police to arrest the person and produce him before the said Court. A Magistrate is a master of his Court and a learned Magistrate knows that an accused/a witness is avoiding to appear in the Court deliberately, therefore, he issues a non-bailable warrant. Thus, there are different stages when order directing the police to produce a particular person before the Magistrate are issued.

6. Under Section 70(1) of the Code of Criminal Procedure, warrant of arrest can be issued.

7. Section 70(2) reads as follows:

“Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. (*emphasis supplied*)

Therefore the Court, who has issued the warrant, has power and discretion to cancel the warrant. After issuance of non-bailable warrant, the accused/witness has to appear before the Court and he may file an application explaining the reasons for his non-appearance, then it is upto the trial Court to consider the application to release him on bail or to take him in custody. Such order cannot be considered as an order passed in non-bailable offence.

8. The offences are categorized in two groups in the schedule in the

Cr. P.C., i.e. bailable and non-bailable depending on the gravity and the seriousness of the offence and therefore a bail is a right of the accused in all bailable offences. If a person is made an accused in non-bailable offence, then his liberty is in jeopardy, so valuable provision under section 438 for grant of anticipatory bail is made in the Code

9. Section 438 of Cr. P.C. reads as under:

“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.

(i) the nature and gravity or seriousness of the accusation as apprehended by the applicant;

(ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a court previously undergone imprisonment for a term in respect of any cognizable offence;

(iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested, and

(iv) the possibility of the applicant, if granted anticipatory bail, fleeing from justice,

either reject the application forth with or issue an interim order for the grant of anticipatory bail:

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

(2) Where the High Court or, as the case may be, the Court of Session, consider it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the court shall indicate therein the date, on which the application for grant

of, anticipatory bail shall be finally heard for passing an order thereon, as the court may deem fit; and if the court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely:-

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

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him from disclosing such facts to the court or to any police officer;

(iii) That the applicant shall not leave India without the previous permission of the court: and

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

(3) Where the court grants an interim order under sub-section (1), it shall forthwith cause a notice, being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Commissioner of Police, or as the case may be, the concerned Superintendent of police. With a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the court.

(4) 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.

(5) On the date indicated in the interim order under sub-section (2), the court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order made under subsection (1).”

10. Chapter VI is classified in sub-chapter A, B and C. Sub-chapter A is about 'Summons', sub-chapter B covers 'Warrant of Arrest' and sub-chapter C is regarding 'Proclamation and attachment'. In sub-chapter B, the warrant of arrest is issued under section 70 of the Code by the Court

and Section 71 states that the Court has discretion while issuing the warrant of arrest to direct the police by endorsement on the warrant that, if such person executes a bond with sufficient securities and attend the Court at specified time then he may be released from custody after execution of such security. The details of the surety may be mentioned in the order. Thus, under section 71 the Court authorizes the police officer to release the person on surety depending on the circumstances of the facts and issues bailable warrant. The Court may not use that discretion available under section 71 but may simply issue warrant of arrest. The police in execution of the said warrant under section 70 of Cr.P.C. shall without unnecessary delay produce the person before the Court. Under section 76 of Cr. P.C. it is obligatory on the police officer or a person executing the warrant of arrest to produce the person before the Court subject to section 71. Section 76 reads as follows:

“The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person.

Provided that such delay shall not, in any case, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.”

Section 76 refers to the provisions of Section 71 as a rider to the production before the Magistrate by the police. Thus, it is clear on plain reading of Section 76 that if a Magistrate has used the discretion under section 71 and directed the police to release the person on surety, then

it is not obligatory on the police officer to produce that person before the Magistrate and he is entitled to be released on the said surety mentioned in the warrant of arrest and shall remain present in the court on the specified date. It is to be noted that under sub-chapter B the legislature did not use a word as “bailable” or “non-bailable”. Warrant is always a warrant of arrest with direction empowering the police to release the accused on some surety or the warrant of arrest is without such orders. Therefore, the word “non-bailable offence” which is used under section 438 of Cr. P.C. cannot be borrowed while interpreting the provisions of warrant of arrest under Chapter VI of Cr. P.C. Under sub-chapter B, the offence is referred as non-bailable, however, warrants are not classified and worded as non-bailable and bailable warrant though this nomenclature is coined routinely and rightly so as it conveys exact meaning. However, legislature did not use the said terminology “bailable or non-bailable warrant” in said sub-chapter, therefore, the meaning of non-bailable offence cannot be borrowed, transferred or substituted while understanding the meaning of Warrant of Arrest under Chapter VI.

11. In the case of **Akhalaq Ahmed F. Patel** (*supra*), the offence was registered under section 498A, 302 r/w. 34 of IPC against the petitioner who was released on bail on 24th January, 1996. Nearly after 2 years private complaint was presented before the Additional Chief

Metropolitan Magistrate, Borivili, Mumbai. On the basis of the complaint, the learned Magistrate issued non-bailable warrant. Against that order, the petitioner moved an application for anticipatory bail under section 438 of Cr.P.C, which was rejected by the Additional Sessions Judge. The Single Judge of this Court turned down the order of Sessions Judge and relied on number of cases especially (i) Full Bench decision of Andhra Pradesh High Court in the case of **Smt. Sheik Khasim vs. State reported in AIR 1986 AP 345**; (ii) Full Bench decision of Madhya Pradesh High Court in the case of **Nirbhay Singh vs. State of Madhya Pradesh reported in MANU/MP/0316/1994**; and (iii) Division Bench judgment of Punjab and Haryana High Court in the case of **Puran Singh vs. Ajit Singh reported in MANU/PH/0351/1984**. In the case of **Akhalaq Ahmed F. Patel** (*supra*) in the last portion of paragraph 3, the learned Single Judge has held as under:

“In view of the aforesaid enunciation of law by various Courts of this country, it is not possible to hold as a proposition of law that Sessions Court or the High Court will have no power to entertain the application for anticipatory bail where either summons or warrants have been issued against the accused. The Court has the jurisdiction to grant anticipatory bail on being satisfied that the accused apprehends arrest in a non-bailable offence. It is difficult, therefore, to appreciate the reasoning of the learned Additional Sessions Judge to the effect that the application for anticipatory bail is inconceivable because the applicant is liable to be arrested on the basis of the directions issued by the Magistrate rather than the police. This reasoning, in my view, does not conform with the provisions of Section 438 of the Criminal Procedure Code.”

12. I have gone through the decisions of the Full Bench of Madhya Pradesh High Court in **Nirbhay Singh** (*supra*), Andhra Pradesh High Court in **Smt. Sheik Khasim** (*supra*) and Punjab and Haryana High Court in **Puran Singh** (*supra*). In all these cases, the offences in which warrant of arrest were issued were all non-bailable. In the case of **Akhalaq Ahmed F. Patel** (*supra*), the learned Single Judge of this Court was dealing with the warrant of arrest issued in the case of the offence of murder under section 302 of IPC. This warrant of arrest was issued by the Court at the time of issuance of process under section 204 of the Cr. P.C. and not like the present case which is distinguishable on two counts, one the offence under section 138 of N.I. Act is a bailable offence and secondly, warrant of arrest was issued by the learned Magistrate not while issuing the process under section 204 but using its powers under section 70 to procure his presence as he failed to attend the Court on number of occasions. Thus, the case of **Akhalaq Ahmed F. Patel** (*supra*) is on the different issue and is distinguishable.

13. In **R. Sarathkumar** (*supra*) decided by the Single Judge of Madras High Court, the warrant was issued by the Metropolitan Magistrate in a complaint under section 138 of N.I. Act. In the said case it was informed to the Magistrate that the matter was compromised. On 24th March, 2003 the complainant agreed to withdraw the complaint. So, summons in that case was not served on the petitioner and the

petitioner/accused did not remain present. Therefore, the Magistrate issued non-bailable warrant and so he approached the High Court for anticipatory bail. Thus, the Magistrate issued non-bailable warrant for the bailable offences under section 138 of N.I.Act. It was held that though the offence is bailable, the warrant issued is non-bailable, therefore, anticipatory bail can be granted. The Court held that the power of issuance of warrant cannot be exercised mechanically. It was held that High Court has inherent power under section 482 of Cr. P.C., however, since it was not argued, orders cannot be passed exercising the power under section 482 of Cr. P.C. and therefore, the High Court has exercised the powers under section 482 r/w. 438 of Cr. P.C. With respect I cannot subscribe the view taken by the learned Single Judge of Madras High Court for the reasons given above.

14. In the case of **Ragupathi** (*supra*) the learned Single Judge of Madras High Court has relied on earlier ratio laid down in **R. Sarathkumar** (*supra*).

15. Thus, in all the cases discussed above except the decision of the Single Judge of Madras High Court, the respective Magistrates have issued non-bailable warrants in non-bailable offences. As per section 438 of Cr. P.C., a person should have reason to believe that he may be arrested on accusation of having committed a non-bailable offence. The

Section itself specifies and limits that powers under section 438 can be invoked by the Courts in respect of non-bailable offences only. When the offence is bailable, as a rule, an applicant is bound to get bail.

16. Another crucial question required to be answered is whether powers under section 438 can be invoked by a Court in all the instances of issuance of non-bailable warrant by the Magistrate when non-bailable offences are pending before the Magistrate or not? In **Nirbhay Singh** (*supra*) and **Akhalaq Ahmed F. Patel** (*supra*), non-bailable warrant was issued by the learned Magistrates while issuing process under section 204 of Cr. P.C. i.e. immediately after taking the cognizance of the matter. In **Puran Singh** (*supra*) the Division Bench of Punjab and Haryana High Court held that that the power to grant anticipatory bail cannot be restricted only till the time and order is passed by the Magistrate under section 204 of Cr. P.C. against the accused. Section 438 is to be used liberally as it vests wider power to the Court to achieve the object to protect the individuals' liberty. Relying on sub-section (1) and (3) of Section 438 in **Puran Singh** (*supra*) it was held that it was an intention of the legislature that the power conferred under section 438 can be exercised till the order regarding bailable warrant had been issued by the Magistrate. However, in all the judgments referred above, the learned Judges of the respective High Courts have unanimously laid down the ratio that to grant a bail under section 438(1) of Cr. P.C.

depends on the merit of a particular case.

17. Section 70 empowers the Magistrate to issue warrant of arrest to procure the appearance of the person. This statutory power has deterrent force compelling a person to obey the orders of the Court. It is a very valuable provision in the Criminal Procedure Code. On number of occasions the Court is required to issue warrant of arrest, either bailable or non-bailable. The order of warrant of arrest while issuing process under section 204 of the Code is one of such circumstances when a Court may issue warrant. Non-bailable warrant issued under section 204 in non-bailable offences as per the settled position can be challenged under section 438 of Cr. P.C. and the person against whom such warrant is issued may seek a pre-arrest protection under section 438 of the Code. However, considering the object and spirit of power of warrant conferred upon the Magistrate, I am of the view that in all the orders of non-bailable warrant even in non-bailable offences anticipatory bail under section 438 of the Cr. P.C. cannot be granted. If a person once granted a regular bail in non-bailable offence and thereafter he fails to appear before the Court either on the specific dates or during the trial, then the Magistrate after considering his conduct may issue warrant of arrest, i.e., non-bailable warrant to procure his appearance. Under such circumstances, the only proper remedy available to the said person as contemplated under section

70(2) of Cr. P.C. is to go before the same Court for cancellation of the said warrant.

18. A Magistrate who issues a warrant knows fully why the accused is avoiding to remain present before the Court and non-appearance causes obstruction in the smooth working of the Court. It is a hurdle in speedy disposal of the matter and therefore the Magistrate issues non-bailable or bailable warrant. On number of occasions, a Magistrate is constrained to issue non-bailable warrant to compel a person to appear before the Court as the trial is at a standstill for want of appearance. To remove this stagnation, the appearance is a must. Though pre-arrest bail can be granted under section 438, however, it cannot be granted in any or each and every impending arrest in non-bailable offence, which is pursuant to a warrant of arrest issued by the learned Magistrate for any other purpose but not under section 204 of Cr. P.C. Thus, anticipatory bail cannot be sought when warrant is issued during the trial due to non-attendance of the accused. If all the sub-sections of Section 438 are taken into account, the very language of the statute compels this construction. While granting anticipatory bail, the Court has to consider the four factors including the antecedents of the applicant. There is a provision of interim bail, so also it is obligatory for the Court to give notice to the Public Prosecutor and hear the prosecutor. However, if the warrant of arrest is issued by the Judicial

Magistrate for non-attendance of a particular person, then it is not obligatory on the said Magistrate to hear the prosecution. There is no such provision of interim bail available while cancelling the warrant issued under section 70 of Cr. P.C. Moreover, while granting anticipatory bail, the Court has to see that the applicant shall be available for interrogation by the police officer as and when required. Thus, it is amply clear that the anticipatory bail, which is an extraordinary provision which protects the liberty of an individual can be used before he is taken into custody by the police first time after the registration of an offence against him. Once he is taken in custody, this power is not available to the Court and also cannot be invoked. Thus, within the purport of Section 438 of Cr. P.C. grant of pre-arrest bail is not available to the Sessions Court or the High Court when warrant of arrest issued is by the Magistrate except warrant of arrest issued under section 204 of Cr. P.C. Under section 204 of Cr. P.C. the Magistrate takes cognizance and thereafter issues the warrant, so this is the first instance that the person is booked for some offence, which may be either by the police or by the Magistrate.

19. Thus, arrest pursuant to warrant of arrest issued under section 70 of the Code has wider import than the arrest apprehended under section 438 of the Code. It needs to be clarified that such order of issuance of warrant of arrest by the Magistrate can be challenged before the High

court under section 482 of the Code or by filing Writ under Article 226/227 of the Constitution, but not under section 438 of the Cr. P.C.

20. In the present case, the learned APP has pointed out that this applicant/accused has been deliberately avoiding to appear before the learned Magistrate. The order passed by the Sessions Court is absolutely legal and the learned Sessions Judge is fair enough to provide four weeks breathing time to the applicant/accused to go before the learned Magistrate and get his warrant cancelled. I maintain the said order, hence the Application is dismissed.

(MRS. MRIDULA BHATKAR, J.)