[2021] 6 S.C.R. 599

NATHU SINGH
v.
STATE OF UTTAR PRADESH & ORS.

(Criminal Appeal No. 522 of 2021)

MAY 28, 2021

[N. V. RAMANA,* CJI, SURYA KANT AND ANIRUDDHA BOSE, JJ.]

Code of Criminal Procedure, 1973: s.438 – Anticipatory bail – Propriety of protective order after dismissal of anticipatory bail application – High Court while dismissing anticipatory bail application of the respondents-accused granted them 90 days to surrender before trial court to seek regular bail and granted them protection from coercive action for the said period – Aggrieved by such relief, instant appeal filed by the complainant – Held: A Court, be it a Sessions Court or a High Court, in certain special facts and circumstances may decide to grant anticipatory bail for a limited period of time – The Court must indicate its reasons for doing so, which would be assailable before a superior Court – In granting the relief for a period of 90 days, the Court has seemingly not considered the concerns of the investigating agency, complainant or the proviso under s.438(1) which necessitates that the Court pass such an exceptional discretionary protection order for the shortest duration that is reasonably required – A period of 90 days, or three months, cannot in any way be considered to be a reasonable one in the instant facts and circumstances – The resultant effect of the High Court's orders is that neither are the respondents found entitled to pre-arrest bail, nor can they be arrested for a long duration – During the said duration, they can roam freely without being apprehensive of coercive action – Thus, High Court committed a grave error in passing such protection to the respondents-accused – Such a direction by the High Court exceeded its judicial discretion and would amount to judicial largesse, which the Courts do not possess.

Allowing the appeals, the Court Held:

1. **The Constitution Bench in *Sushila Aggarwal* has authoritatively held that when a Court grants anticipatory bail under Section**

* Author

438, Cr.P.C., the same is ordinarily not limited to a fixed period and would subsist till the end of the trial. However, it was clarified by the Court that if the facts and circumstances so warranted, the Court could impose special conditions, including limiting the relief to a certain period. However, in these appeals, the High Court, after considering the facts and circumstances of the case, particularly the gravity and severity of the accusations against the respondents, rejected the application of the respondents-accused. It is after rejecting the application that the High Court chose fit to grant some relief to the respondents while directing them to surrender before the Trial Court to file a regular bail application within 90 days, by protecting them from any coercive action during that period. [Paras 14, 16]

Sushila Aggarwal v. State (NCT of Delhi) **(2020) 5 SCC 1 : [2020] 2 SCR 1 – relied on.**

2.1 The focus of Section 438, Cr.P.C., when read in its entirety, clearly relates to the grant of anticipatory bail by the Court. Section 438(1) explicitly lays down certain factors that need to be considered by the Court before granting the relief sought. Section 438(2) lays down the conditions that may be imposed by the Court while granting the relief. Section 438(3) dictates the consequences of the grant of relief under the Section. The only guidance relating to what is to take place once an application under Section 438, Cr.P.C. is rejected is found in the proviso to Section 438(1), Cr.P.C., which specifically provides that once an application is rejected, or the Court seized with the matter refuses to issue an interim order, it is open to the police to arrest the applicant. [Paras 18, 19]

2.2 Any interpretation of the provisions of Section 438, Cr.P.C. has to take into consideration the fact that the grant or rejection of an application under Section 438, Cr.P.C. has a direct bearing on the fundamental right to life and liberty of an individual. The genesis of this jurisdiction lies in Article 21 of the Constitution, as an effective medium to protect the life and liberty of an individual. The provision therefore needs to be read liberally, and considering its beneficial nature, the Courts must not read in limitations or restrictions that the legislature have not explicitly provided for. Any ambiguity in the language must be resolved in favour of the applicant seeking relief.The

proviso does not create any rights or restrictions. Rather, the sole purpose of the proviso appears to be clarificatory in nature. It only restates, *inter alia*, the obvious proposition that unless an individual has obtained some protection from the Court, the police may arrest them. If the proviso to Section 438(1), Cr.P.C. does not act as a bar to the grant of additional protection to the applicant, the question still remains as to under what provision of law the Court may issue relief to an applicant after dismissing their anticipatory bail application. [Paras 20, 21, 22]

3. Section 482, Cr.P.C explicitly recognizes the High Court's inherent power to pass orders to secure the ends of justice. This provision reflects the reality that no law or rule can possibly account for the complexities of life, and the infinite range of circumstances that may arise in the future.Even when the Court is not inclined to grant anticipatory bail to an accused, there may be circumstances where the High Court is of the opinion that it is necessary to protect the person apprehending arrest for some time, due to exceptional circumstances, until they surrender before the Trial Court. For example, the applicant may plead protection for some time as he/she is the primary caregiver or breadwinner of his/her family members, and needs to make arrangements for them. In such extraordinary circumstances, when a strict case for grant of anticipatory bail is not made out, and rather the investigating authority has made out a case for custodial investigation, it cannot be stated that the High Court has no power to ensure justice. The Supreme Court may also exercise its powers under Article 142 of the Constitution to pass such an order. However, such discretionary power cannot be exercised in an untrammeled manner. The Court must take into account the statutory scheme under Section 438, Cr.P.C., particularly, the proviso to Section 438(1), Cr.P.C., and balance the concerns of the investigating agency, complainant and the society at large with the concerns/interest of the applicant. Therefore, such an order must necessarily be narrowly tailored to protect the interests of the applicant while taking into consideration the concerns of the investigating authority. Such an order must be a reasoned one. [Paras 23, 24, 25]

***Gurbaksh Singh Sibbia v. State of Punjab* (1980) 2 SCC 565 : [1980] 3 SCR 383 – relied on.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 522 of 2021.

From the Judgment and Order dated 08.02.2021 of the High Court of Judicature at Allahabad in Criminal Misc. Anticipatory Bail Application No. 2219 of 2021.

Dhruv Gautam, Devashish Chauhan, Shashwat Dhyani, Ms. Charu Ambwani, Sarvesh Singh Baghel, Mukhtar Alam, Ms. Pooja Singh, Amir Khan, Ms. Shivranjani Ralawata, Advs. for the appellant.

M. S. Yadav, Ashok Kr. Tobaria, S. Y. Usmani, Jugul Kishor Gupta, K. R. Faridi, Advs. for the respondents.

The Judgment of the Court was delivered by

N. V. RAMANA, CJI

1. Leave granted.

2. The present Criminal Appeals, by way of Special Leave, raise common question of law and are therefore being disposed of together.

3. In both the impugned orders, the High Court of Judicature at Allahabad, while dismissing the anticipatory bail application of the respondents-accused, granted them 90 days to surrender before the Trial Court to seek regular bail and granted them protection from coercive action for the said period. Aggrieved by the grant of such relief, the complainants in both the matters are currently in appeal before us.

4. As only a question of law is being raised, it is not necessary for this Court to advert to the facts of both the matters extensively. It is sufficient to point out that in the first case, pertaining to Nathu Singh, the appellant's daughter was married to respondent no. 2 in that case on 14.02.2014. As she died under suspicious circumstances in her matrimonial home on 02.01.2021, the complainant registered FIR No. 07/2021 at police station Masuri, Ghaziabad under Sections 304B and 498A, IPC read with Sections 3 and 4 of the Dowry Prohibition Act against the respondents nos. 2 to 5.

5. In the second case, the allegations are that the appellant's brother and the latter's two sons were attacked by the respondents in that case, due to a dispute between the parties relating to encroachment

of land. The two sons were attacked on their vital parts, with one of them suffering a skull fracture as a result of which he was in a coma for one week. The other had lacerations on his head. The complainant registered FIR No. 371/20 at police station Thana Bhawan, Shamili under Sections 307, 504 and 34, IPC.

6. The respondents in both the cases approached the High Court under Section 438, Cr.P.C., during ongoing investigation, and sought protection from arrest. *Vide* the impugned orders dated 08.02.2021 and 28.01.2021, the High Court dismissed the applications of the respondents but granted them the aforementioned relief in identically worded orders. The relevant portion of the order, as extracted from the impugned order dated 08.02.2021, is as follows:

"…. Having heard learned counsel for the parties and upon perusal of material brought on record as well as complicity of accused and also judgement of the Apex Court in the case of ***P. Chidambaram v. Directorate of Enforcement*****,** AIR 2019 SC 4198, this Court does not find any exceptional ground to exercise its discretionary jurisdiction under Section 438 Cr.P.C.

However, in view of the entirety of facts and circumstances of the case and on the request of learned counsel for the applicants, it is directed that in case the applicants appear and surrender before the court below within 90 days from today and apply for bail, their prayer for bail shall be considered and decided as per the settled law laid by this Court in the case of ***Amrawati and another v. State of U.P****. r*eported in 2004 (57) ALR 290 as well as judgement passed by Hon'ble Apex Court in the case of ***Lal Kamlendra Pratap Singh v. State of U.P.*** reported in 2009 (3) ADJ 322 (SC).

Till then, no coercive action shall be taken against the applicants...."

(*emphasis supplied*)

7. Aggrieved by the impugned orders, the complainants-appellants have filed the present appeals by way of special leave.

8. Heard the learned counsel for the appellants, the respondent-State and the respondents-accused at length.

9. The learned counsel for the appellants, supported by the learned State counsel, urged that once the High Court declined the final relief of pre-arrest to the respondents, it could not grant them any

further protection. The learned counsel submitted that Section 438, Cr.P.C. does not contemplate the grant of any such protection on the dismissal of the application filed by an accused. Rather, the proviso to Setion 438(1), Cr.P.C. specifically provides for the arrest of the accused on a rejection of the relief sought in their application. The impugned orders, wherein the High Court granted protection to the respondents subsequent to the dismissal of their application, was therefore passed in excess of the High Court's jurisdiction under Section 438, Cr.P.C. The learned State counsel further submitted that the High Court's orders have hampered the ongoing investigation as the police have been denied custodial interrogation of the accused, notwithstanding the fact that the nature of offences in both cases is grave and heinous.

10. On the contrary, learned counsel for the respondents-accused justified the discretion exercised by the High Court and submitted that the High Court has the power to pass such orders, in the interest of justice.

11. The sole question to be answered by the Court in the present appeals relates to whether the High Court, while dismissing the anticipatory bail applications of the respondents, could have granted them protection from arrest.

12. The considerations on the basis of which the Court is to exercise its discretion to grant relief under Section 438, Cr.P.C. have been decided by this Court in a catena of judgments and needs no restatement.

13. A recent Constitution Bench judgment of this Court, in ***Sushila Aggarwal v. State (NCT of Delhi)*****, (2020) 5 SCC 1** has clarified the extent of power exercisable by Courts under Section 438, Cr.P.C. The Court ultimately held as follows:

"**91.1.** Regarding Question 1, this Court holds that the protection granted to a person under Section 438 CrPC should not invariably be limited to a fixed period; it should enure in favour of the accused without any restriction on time. Normal conditions under Section 437(3) read with Section 438(2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event), etc.

91.2. As regards the second question referred to this Court, it is held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so."

(*emphasis supplied*)

14. The Constitution Bench in ***Sushila Aggarwal*** (*supra*) has authoritatively held that when a Court grants anticipatory bail under Section 438, Cr.P.C., the same is ordinarily not limited to a fixed period and would subsist till the end of the trial. However, it was clarified by the Court that if the facts and circumstances so warranted, the Court could impose special conditions, including limiting the relief to a certain period.

15. It is therefore clear that a Court, be it a Sessions Court or a High Court, in certain special facts and circumstances may decide to grant anticipatory bail for a limited period of time. The Court must indicate its reasons for doing so, which would be assailable before a superior Court. To do so without giving reasons, would be contrary to the pronouncement of this Court in ***Sushila Aggarwal*** (*supra*). If the High Court had therefore decided to allow the anticipatory bail application of the respondents-accused herein, albeit for a limited period of 90 days, the task before this Court would have been somewhat easier. We would only have had to assess the reasons assigned by the Court, if any, for the imposition of such special condition in terms of the judgment in ***Sushila Aggarwal*** (*supra*).

16. However, in the present appeals, the High Court, after considering the facts and circumstances of the case, particularly the gravity and severity of the accusations against the respondents, rejected the application of the respondents-accused. It is after rejecting the application that the High Court chose fit to grant some relief to the respondents while directing them to surrender before the Trial Court to file a regular bail application within 90 days, by protecting them from any coercive action during that period. The appellants-complainants are aggrieved by the same and are challenging the power of the Court to pass such a protective order after the dismissal of the anticipatory bail application.

17. To determine whether the Court can pass such orders, it is necessary to first analyze the relevant provision, *viz.*, Section 438, Cr.P.C. The relevant portion of Section 438, Cr.P.C. is extracted below:

438. Direction for grant of bail to person apprehending arrest

(1) Where 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:-

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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.

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(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 think fit, including -

xxx

(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).

(*emphasis supplied*)

18. The focus of Section 438, Cr.P.C., when read in its entirety, clearly relates to the grant of anticipatory bail by the Court. Section 438(1) explicitly lays down certain factors that need to be considered by the Court before granting the relief sought. Section 438(2) lays down the conditions that may be imposed by the Court while granting the relief. Section 438(3) dictates the consequences of the grant of relief under the Section.

19. The only guidance relating to what is to take place once an application under Section 438, Cr.P.C. is rejected is found in the proviso to Section 438(1), Cr.P.C., which specifically provides that once an application is rejected, or the Court seized with the matter refuses to issue an interim order, it is open to the police to arrest the applicant. It is this proviso that the present appellants have relied upon to argue that the High Court, once it rejected the anticipatory bail applications of the respondents-accused, did not have the power to grant any further relief.

20. At first blush, while this submission appears to be attractive, we are of the opinion that such an analysis of the provision is incomplete. It is no longer *res integra* that any interpretation of the provisions of Section 438, Cr.P.C. has to take into consideration the fact that the grant or rejection of an application under Section 438, Cr.P.C. has a direct bearing on the fundamental right to life and liberty of an individual. The genesis of this jurisdiction lies in Article 21 of the Constitution, as an effective medium to protect the life and liberty of an individual. The provision therefore needs to be read liberally, and considering its beneficial nature, the Courts must not read in limitations or restrictions that the legislature have not explicitly provided for. Any ambiguity in the language must be resolved in favour of the applicant seeking relief. In this context, this Court, in the Constitution Bench decision of this Court in ***Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565**, which was recently upheld and followed by this Court in ***Sushila Aggarwal*** (*supra*), held as follows:

> "26. We find a great deal of substance in Mr Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section.

Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned…"

(*emphasis supplied*)

21. When the proviso to Section 438(1), Cr.P.C. is analyzed in line with the above dictum, it is clear that the proviso does not create any rights or restrictions. Rather, the sole purpose of the proviso appears to be clarificatory in nature. It only restates, *inter alia*, the obvious proposition that unless an individual has obtained some protection from the Court, the police may arrest them. In line with the ruling in ***Gurbaksh Singh Sibbia*** (*supra*), the proviso cannot be read as constituting a bar on the power of the Court.

22. If the proviso to Section 438(1), Cr.P.C. does not act as a bar to the grant of additional protection to the applicant, the question still remains as to under what provision of law the Court may issue relief to an applicant after dismissing their anticipatory bail application

23. Without going into the question of whether Section 438, Cr.P.C. itself allows for such a power, as it is not necessary to undertake such an exercise in the present case, it is clear that when it comes to the High Court, such a power does exist. Section 482, Cr.P.C explicitly recognizes the High Court's inherent power to pass orders to secure the ends of justice. This provision reflects the reality that no law or rule can possibly account for the complexities of life, and the infinite range of circumstances that may arise in the future.

24. We cannot be oblivious to the circumstances that Courts are faced with day in and day out, while dealing with anticipatory bail applications. Even when the Court is not inclined to grant anticipatory bail to an accused, there may be circumstances where the High Court is of the opinion that it is necessary to protect the person apprehending arrest for some time, due to exceptional circumstances, until they

surrender before the Trial Court. For example, the applicant may plead protection for some time as he/she is the primary caregiver or breadwinner of his/her family members, and needs to make arrangements for them. In such extraordinary circumstances, when a strict case for grant of anticipatory bail is not made out, and rather the investigating authority has made out a case for custodial investigation, it cannot be stated that the High Court has no power to ensure justice. It needs no mentioning, but this Court may also exercise its powers under Article 142 of the Constitution to pass such an order.

25. However, such discretionary power cannot be exercised in an untrammeled manner. The Court must take into account the statutory scheme under Section 438, Cr.P.C., particularly, the proviso to Section 438(1), Cr.P.C., and balance the concerns of the investigating agency, complainant and the society at large with the concerns/interest of the applicant. Therefore, such an order must necessarily be narrowly tailored to protect the interests of the applicant while taking into consideration the concerns of the investigating authority. Such an order must be a reasoned one.

26. The impugned orders passed by the High Court, in the present appeals, do not meet any of the standards as laid out above.We say so for the following reasons: *firstly*, after the dismissal of the anticipatory bail application, on the basis of the nature and gravity of the offence, the High Court has granted the impugned relief to the respondents without assigning any reasons. *Secondly,* in granting the relief for a period of 90 days, the Court has seemingly not considered the concerns of the investigating agency, complainant or the proviso under Section 438(1), Cr.P.C., which necessitates that the Court pass such an exceptional discretionary protection order for the shortest duration that is reasonably required. A period of 90 days, or three months, cannot in any way be considered to be a reasonable one in the present facts and circumstances.

27. The impugned orders therefore do not withstand legal scrutiny. The resultant effect of the High Court's orders is that neither are the respondents found entitled to pre-arrest bail, nor can they be arrested for a long duration. During the said duration they can roam freely without being apprehensive of coercive action. We are thus of the view that the High Court committed a grave error in passing such

protection to the respondents-accused. Such a direction by the High Court exceeds its judicial discretion and amounts to judicial largesse, which the Courts do not possess.

28. For the aforestated reasons, the present appeals are allowed. The impugned order of the High Court dated 08.02.2021 in Criminal Miscellaneous Anticipatory Bail Application No. 2219 of 2021, and order dated 28.01.2021 in Criminal Miscellaneous Anticipatory Bail Application No. 1700 of 2021, to the extent of granting protection for 90 days to the respondents-accused are set aside, leaving it open to the Investigating Agency to proceed in the matters in accordance with law and complete the investigation. If the respondents-accused have been meanwhile sent to judicial custody, their application(s) for regular bail or any request for their police remand made by the Investigating Officer shall be decided by the competent Court, uninfluenced by the observations made hereinabove.

29. Ordered accordingly.

Headnotes prepared by: Devika Gujral

Result of the case: Appeals allowed