R-87/20

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTIO

SPECIAL LEAVE PETITION (CRIMINAL) NOS.7281-7282/2017

Sushila Aggarwal and others **...Petitioners**

Versus

871685

State (NCT of Delhi) and another **...Respondents**

J U D G M E N T

M.R. SHAH, J.

In the light of the conflicting views of the different Benches of varying strength, more particularly in the cases of *Shri Gurbaksh Singh Sibbia and others v. State of Punjab (1980) 2 SCC 565; Siddharam Satlingappa Mhetre v. State of Maharashtra (2011) 1 SCC 694; Bhadresh Bipinbhai Sheth v. State of Gujarat (2016) 1 SCC 152* on one side and in the cases of *Salauddin Abdulsamad*

Shaikh v. State of Maharashtra (1996) 1 SCC 667, subsequently followed in the case of *K.L. Verma v. State and another (1998) 9 SCC 348; Sunita Devi v. State of Bihar (2005) 1 SCC 608; Nirmal Jeet Kaur v. State of M.P. (2004) 7 SCC 558; HDFC Bank Limited v. J.J. Mannan (2010) 1 SCC 679; and Satpal Singh v. State of Punjab (2018) 4 SCC 303*, the following questions are referred for consideration by a larger Bench:

> "(1) Whether the protection granted to a person under Section 438 Cr.P.C. should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.
>
> (2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court."

2. Shri Harin P. Raval, learned Senior Advocate appearing as Amicus Curiae relying upon the decision of this Court in the case of *Balchand Jain v. State of M.P. (1976) 4 SCC 572* has submitted that though the expression "anticipatory bail" has not been defined in the Code, as observed by this Court in the aforesaid decision, "anticipatory bail" means "bail in anticipation of arrest". It is submitted that in the aforesaid decision, this Court has further observed that the expression "anticipatory bail" is a misnomer inasmuch as it is not as if bail is presently granted by the Court in

anticipation of arrest. It is submitted that when a competent court grants "anticipatory bail", it makes an order that in the event of arrest, a person shall be released on bail. It is submitted that there is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting "anticipatory bail" becomes operative.

2.1. Shri Raval, learned Amicus Curiae has taken us to the historical perspective on the inclusion of Section 438 of the Cr. P.C. It is submitted that on the recommendation of the Law Commission of India in its 41st Report dated 24.09.1969, the Parliament introduced a new provision in the form of "anticipatory bail" under Section 438 of the Cr.P.C. It is submitted that the Law Commission of India in its 41st Report stated in paragraph 39.9 the justification for power to grant "anticipatory bail". It is submitted that as per the Law Commission the necessity for granting "anticipatory bail" arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. It is submitted that the Law Commission further observed that with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where

there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty, while on bail, there seems to be no justification to require him to first submit to custody, remain in prison for some days, and then apply for bail.

2.2 It is further submitted that power to grant "anticipatory bail" vests only in the High Courts or the Courts of Sessions. It is submitted that the "anticipatory bail" can be applied at different stages. It is submitted that even in a case where no FIR is lodged and a person is apprehending his arrest in case the FIR is lodged, in that case, he can apply for "anticipatory bail" and after notice to the Public Prosecutor the Court can grant "anticipatory bail". It is submitted that even in a case where the FIR is lodged but the investigation has not yet begun, i.e., pre investigation stage, the "anticipatory bail" can be applied. It is submitted that "anticipatory bail" can also be applied at post investigation stage. It is submitted that after exercising the discretion judiciously, the High Court or the Sessions Court grants "anticipatory bail" and that too after hearing the Public Prosecutor. It is submitted that therefore once the bail is granted in anticipation of the arrest, there is no reason

to limit the same till the summon is issued by the Court and/or there is no reason to limit the period of bail in anticipation granted.

2.3 Shri Harin P. Raval, learned Senior Advocate appearing as Amicus Curiae has further submitted that in the case of *Gurbaksh Singh Sibbia (supra)*, a Constitution Bench of this Court has observed and held that the facility which Section 438, Cr. P.C. 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. It is submitted that any order of bail can, of course, be effective only from the date 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". It is submitted that thus, bail is basically release from restraint, more particularly, release from the custody of the police. It is submitted that 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. Taking a surety, 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 the offence or offences of which he is charged and for which he was arrested. It is submitted that 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. It is submitted that 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.

2.4 Shri Harin P. Raval, learned Senior Advocate appearing as Amicus Curiae has further submitted that however the core questions before this Court are, (a) what is the life or currency of an anticipatory bail once the same has been granted by the competent court?; (b) once an order granting anticipatory bail has been passed, whether the said anticipatory bail only survives till the stage of filing of charge sheet/challan/final report or whether it subsists during the entire duration of trial?. It is further

submitted by Shri Raval that one another question may arise, namely, in a case where if new incriminating materials are found during the course of investigation, whether they could be relied on by the Court to cancel anticipatory bail which has already been granted?

2.5 It is submitted that, as such, the aforesaid questions are not *res integra* in view of the decision of the Constitution Bench of this Court in the case of *Gurbaksh Singh Sibbia (supra).* It is submitted that in the case of *Gurbaksh Singh Sibbia (supra),* a Constitution Bench of this Court has held that there is no limit to the currency of an order of anticipatory bail. The Court is vested with absolute discretion to direct the duration of the trial which can vary from a few weeks to even such duration until charge sheet has been filed and which may also extend to the entire duration of the trial. It is submitted that it is further observed that the sole consideration must be with a view to balance the two competing interests, viz., protecting the liberty of the accused and the sovereign power of the police to conduct a fair investigation. Shri Raval, learned Amicus Curiae has heavily relied upon the observations made by the Constitution Bench of this Court in paragraphs 42 & 43 of *Gurbaksh Singh Sibbia (supra).*

2.6 It is further submitted by Shri Raval that in the subsequent decision of this Court in the case of *Siddharam Satlingappa Mhetre (supra)*, this Court has taken the view that the order of anticipatory bail once granted ordinarily subsists during the entire duration of the trial. It is submitted that it is further observed that by that the power of the Sessions Court or that of the High Court to re-visit its order granting anticipatory bail is curtailed, in case circumstances exist or new exigencies arise which merit interference. Heavy reliance is placed upon observations made by this Court in the case of *Siddharam Satlingappa Mhetre (supra)* in paragraphs 94, 95, 98, 100, 122 and 123.

It is submitted by Shri Raval that however, the judgment rendered in *Siddharam Satlingappa Mhetre (supra)* particularly in paragraphs 95, 108, 122 and 123 does not take into consideration the observations of the Constitution Bench in *Gurbaksh Singh Sibbia (supra)* in paragraphs 42 & 43, which clearly cull out that the discretion of the Sessions Court or a High Court is wide enough to limit as well as specify the duration of the anticipatory bail taking into account all relevant factors which may persuade the discretion of the Court. It is submitted that *Siddharam Satlingappa Mhetre (supra)* proceeded to hold that the anticipatory bail shall

subsists during the entire currency of the trial and specifically rejected the notion that anticipatory bail could be for a limited time as well, on the expiry of which the accused must surrender and apply for a regular bail. It is submitted that in view of the conflicting approach, the decision rendered in the case of *Siddharam Satlingappa Mhetre (supra)* particularly the observations made in paragraphs 95, 108, 122 & 123 need to be revisited.

2.7 It is further submitted by Shri Raval, learned Amicus Curiae that the discretion of the Sessions Court and the High Court is absolute, and no limitations whatsoever have been imposed by the legislature. It is submitted that the discretion therefore can be exercised to even limit the duration of the anticipatory bail, in order to ensure that the accused also cooperates with the investigation, or that relevant discoveries to secure incriminating material could be made under Section 27 of the Evidence Act, or in view of new incriminating circumstances which establish complicity of the accused. It is submitted that therefore the view taken by this Court in *Siddharam Satlingappa Mhetre (supra)* that the anticipatory bail to subsist for the entire duration of the trial, curtails the discretion of the Sessions Court or the High Court to limit such duration of

anticipatory bail. It is submitted that such an interpretation is in absolute contravention of the law declared by the Constitution Bench in the case of *Gurbaksh Singh Sibia (supra).*

2.8 Making the above submissions and relying upon the aforesaid decisions of the Constitution Bench of this Court, Shri Raval, learned Amicus Curiae has concluded as under:

1) that the power vested by the Parliament on superior criminal courts in the order of hierarchy, such as Sessions Court and High Court, is a power entailing conferment of absolute discretion in deciding whether an application for anticipatory bail may be allowed or rejected, and also inheres in this discretion, the additional power to limit the duration of anticipatory bail to any point in time, or to any stage as the Courts may deem fit in the facts and circumstances of the case, and in view of all the attending circumstances;

2) that the order granting anticipatory bail will not interdict the power of the investigating agency to continue investigation of the case or would prevent the investigating agency to ask for and be granted, respectively, Police Custody of the accused for the purposes of the investigation and where the investigating officer feels that the custody of the accused is necessary.

Further since police custody can be granted only in the first 14 days of the arrest, the decision to restrict the duration of the bail would balance the twin competing interest, viz., the individual liberty and the sovereign power of the police to investigate the case;

3) that the life of the order granting anticipatory bail can be restricted, which may be at a stage till either the FIR is filed in cases where such order is granted on an reasonable apprehension of being arrested in relation to a cognizable case, where the FIR or Complaint is yet not filed; in cases where FIR or complaint is filed, it may be restricted to a period of ten days after arrest (since it leaves a period of 4 days for the investigation agency to get police custody, within the outer limit of 14 days) and then leave it open for the accused so released on anticipatory bail to apply for regular bail under Section 437/439; alternatively such order may endure till filing of charge sheet which has to be filed within 90 days of the arrest. It may be remembered here that non-filing of charge sheet within 90 days of arrest entitles the accused, statutory bail or default bail, as a matter of right, in view of express stipulation contained in Section 167 of the Code of Criminal

Procedure, 1973. Also, in case where an accused is released on anticipatory bail, the investigation authorities may not be subjected to adherence to filing of charge sheet within 90 days as there would be no consequence as the accused is already enlarged on bail. It may therefore be safer to adhere to the earlier practice evolved by judicial precedents to restrict the operation of life of the order granting anticipatory bail for 10 days of arrest, leaving it open to the accused to apply for regular bail under Section 437/439 of the Code and equally leaving it open for the Court to consider such an application without in any way being influenced by the fact of grant of anticipatory bail, as at that stage the considerations are at a very early stage where the investigation itself may be in nascent stage or the materials are yet to be gathered and the accused is yet to be interrogated; and

4) that anticipatory bail once granted can also be cancelled, either in appeal to a superior forum on challenge being made or by the same court on establishment of well accepted and legally enshrined principles relating to cancellation of bail.

3. Shri K.V. Vishwanathan, learned Senior Advocate who was also requested to assist us as an Amicus Curiae has submitted that the exercise of power under Section 438 is exactly like the exercise of power under Sections 437 and 439 of the Cr.P.C. It is submitted therefore, the pre-arrest bail granted in anticipation of arrest under Section 438 ought to operate like any other order granting bail till an order of conviction or till an affirmative direction is passed under Section 439(2) of the Cr.P.C. It is submitted that therefore the law laid down by this Court in the cases of *Gurbaksh Singh Sibbia (supra)* and *Siddharam Satlingappa Mhetre (supra)* lay down the correct law. It is submitted that the exceptions carved out in *Gurbaksh Singh Sibbia (supra)* particularly in paras 19, 42 and 43 are well within the scheme of the Code.

3.1 It is further submitted by Shri Vishwanathan, learned Amicus Curiae that the power of arrest of the police is under Section 41 of the Cr.P.C. It is submitted that this Section has two essential parts. One, relating to offences in which the maximum punishment can extend to imprisonment for seven years. Second, relating to offences in which the maximum punishment can extent to imprisonment above seven years or

death penalty. It is submitted that though they have different conditions and thresholds, in both cases it is clear from a bare reading of the section that the power of arrest cannot be exercised in every FIR that is registered under Section 154 Cr.P.C. It is submitted that this power is circumscribed by the conditions laid down in this Section. Moreover, this principle that the power of arrest is not required to be exercised in every case was recognised in the cases of *Joginder Kumar v. State of U.P. (1994) 4 SCC 260 (para 20); Lalitha Kumari v. State of U.P. (2014) 2 SCC 1 (paras 107-108); and Arnesh Kumar v. State of Bihar (2014) 8 SCC 273 (paras 5 and 6).* It is submitted that, in fact, this Court in the case of *M.C. Abraham v. State of Maharashtra (2003) 2 SCC 649 (para 15)* has held that it was not mandatory for the police to arrest a person only because his/her anticipatory bail had been rejected.

3.2 It is further submitted by Shri Vishwanathan, learned Amicus Curiae that the power of arrest is then further circumscribed by Section 438 Cr.P.C. It is submitted that as recognized by the Law Commission, there are cases where the power of arrest is not required or allowed to be exercised. It is submitted that exercising power of arrest in such cases would

be a grave violation of a person's right and liberty. It is submitted that such exercise of power would amount to misuse of Section 41. It is submitted that the check on the power of arrest and custody provided by Sections 437 or 439 is limited as the check is only *post facto*. It is submitted that by then the person arrested has already suffered the trauma and humiliation of arrest.

3.3 It is further submitted that to safeguard this situation, Section 438 was introduced so as to provide for judicial intervention in necessary cases. It is submitted that this judicial intervention is to ensure that the power of arrest is regulated under the scrutiny of the courts. It is submitted that to strike a further balance between the power of arrest and the rights of the accused, this power was specifically given to the Court of Session and the High Court so as to ensure that this judicial intervention is done at the supervisory level and not at the magisterial level. It is submitted that it is in this light that the two questions raised in the present reference need to be addressed.

3.4 Taking us to the recommendations in the 41st Report of the Law Commission and the observations made in the Report

of the Committee on Reforms of the Criminal Justice system, headed by Dr. Justice V.S. Malimath, it is submitted by Shri Vishwanathan that Section 438 is a check on the power of arrest of the police. It is submitted that as stated in the above Law Commission Report, it is a check not only against false cases, but also in cases where the need to arrest does not arise.

3.5 It is further submitted that even otherwise a bare reading of the Section shows that there is nothing in the language of the Section which goes to show that the pre-arrest bail granted under Section 438 has to be time-bound. It is submitted that the position is the same as in Sections 437 and 439. It is submitted that at this stage Section 438(3) is relevant to be taken into consideration. It is submitted that there are two very important aspects in Section 438(3) Cr.P.C. which are relevant to be considered to understand the scheme of the Code, viz., (a) a person in whose favour a pre-arrest bail order has been made under Section 438 has first to be arrested. Such a person is then released on bail on the basis of the pre-arrest bail order. For such release the person has to comply with the requirement of Section 441 of giving a bond or surety; and (b) where the magistrate taking cognizance under Section

204 is of the view that a warrant is required to be issued at the first instance, such magistrate is only empowered to issue only a bailable warrant and not a non-bailable warrant. This curtailment of power of the magistrate clearly shows the intent of the legislature that a person who has been granted bail under Section 438 ought not to be arrested at the stage of cognizance because of the said pre-arrest bail order. It is submitted that in light of this express provision, no other interpretation is possible to be given to the said section. It is submitted that the second question referred herein is squarely covered by this sub-section.

3.6 It is further submitted by Shri Vishwanathan, learned Amicus Curiae that the order passed under Section 438, which is in the nature of a pre-arrest bail order, is however subject to the power granted to the Court of Session and the High Court under Section 439(2), Cr.P.C., which gives power to the Court of Session or the High Court to direct the arrest of the accused at any time. It is submitted that this ensures that through judicial intervention the balance between the two competing principles can again be revisited if the need arises. It is submitted that the only difference is that the power of arrest