A.F.R.
Reserved

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 144 of 2024
Applicant :- Jitendra Pratap Singh Alias Jeetu
Opposite Party :- State Of U.P Thru. Prin. Secy. Home Civil Secrt. Lko.
Counsel for Applicant :- Murli Manohar Srivastava,Upmanyu Srivastava
Counsel for Opposite Party :- G.A.,Sumit Kumar Srivastava

Hon'ble Vivek Chaudhary,J.
Hon'ble Narendra Kumar Johari,J.

1. Heard Sri Murli Manohar Srivastava, learned counsel for the applicant, Sri Puneet Kumar Yadav, learned A.G.A. for the State, Sri Sumit Kumar Srivastava, learned counsel for the opposite party no.2 and perused the record.

2. A learned Single Judge by order dated 01.04.2024 passed in the instant matter has referred the following question for consideration by a Larger Bench of this Court.

"I. Whether Section 438 (6) (b) Cr.P.C., as it applies to the State of U.P., puts an absolute bar against applicability of Section 438 Cr.P.C to offences, in which death sentence can be awarded or the aforesaid bar would apply only where the Court comes to a conclusion after examining the facts of the case, that the case warrants imposition of the death sentence."

3. The reason of such Reference is contradiction in judgment and order dated on 02.12.2023 passed by a learned Judge in Criminal Misc Anticipatory Bail No.2759 of 2023: ***Vishal Singh Vs State of U.P.*** and the judgment and order dated 01.11.2022 passed by another Single Judge sitting at Allahabad in Criminal Misc. Anticipatory Bail Application No.7286 of 2022: ***Deshraj Singh Vs. State of U.P.*** *(Neutral Citation No.-2022:AHC:183606)*.

4. In the case of ***Deshraj Singh*** (supra), it is held that though

the provision of Section 438(6)(b) of the Cr.P.C. bars granting of anticipatory bail in cases where the offence is punishable by death sentence, however, if no case for death punishment is made out, an anticipatory bail application would be maintainable. Per contra, in the case of ***Vishal Singh*** (supra), a co-ordinate Bench of this Court has held that in case involving commission of an offence under Section 302 I.P.C, which is punishable by death sentence, an anticipatory bail application is not maintainable.

5. Section 438 of the Code provides for grant of anticipatory bail when a person apprehends arrest for a non-bailable offence. The provision, in its original form, vested discretion in the Courts to grant anticipatory bail based on the facts and circumstances of each case, without explicit limitations. However, the provision for anticipatory bail was omitted for State of U.P. by "The Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No. 16 of 1976)." Subsequently it was reinstated, with certain modifications, in the State of Uttar Pradesh through "The Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 2018 (U.P. Act No. 4 of 2019)," which was notified on 06.06.2019. Section 438 of the Cr.P.C., as applicable in Uttar Pradesh, empowers the Courts to grant anticipatory bail, subject to certain specified exceptions and conditions as contained in sub section (6). Section 438(6)(b) in particular bars grant of anticipatory bail in certain cases include case where the offence is punishable by death sentence. Section 438 Cr.P.C. as applicable in State of U.P. is as follows:

"438. (1) Where any person has reason to believe that he may be arrested on 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 cognizable 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 in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended hi such application.

(2) Where the High Court or, as the case may be, the Court of Session,' considers it expedient to issue an interim order to grant anticipatory bail under subsection (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be fmally 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 case 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 were granted under that section.

Explanation:—The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(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 Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be fmally heard by the Court.

(4) 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.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application.

(6) Provisions of this section shall not be applicable,—

(a) to the offences arising out of,-

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any, person to the High Court, no application by the same person shall be entertained by the Court of Session."

6. Learned counsel for the applicant has placed reliance on the judgment of the Supreme Court in ***Subhash Kashinath Mahajan v. State of Maharashtra and another***, ***(2018) 6 SCC 454***, and ***Prithvi Raj Chauhan v. Union of India and others (2020) 4 SCC 727***. Both the aforesaid judgments are in cases arising out of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the 1989 Act'). Sections 18 and 18A of the 1989 Act read as under:

"18. Section 438 of the Code not to apply to persons committing an offence under the Act.—Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.

18-A. No enquiry or approval required.—(1) For the purposes of this Act,-(a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or

(b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.

(2) The provisions of Section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court."

7. Learned counsel for the applicant has heavily relied upon the judgments in ***Subhash Kashinath Mahajan*** (supra) and ***Prithvi Raj Chauhan*** (supra) and submits that if the complaint does not make out a *prima facie* case, for applicability of provisions of 1989 Act, the bar created by Sections 18 and 18-A of the 1989 Act shall not apply. He submits that the Supreme Court has interpreted Section 18 of the 1989 Act in a liberal manner and in the present matter also, the Court should give similar liberal interpretation to Section 438(6)(b) of Cr.P.C. He submits that similarly where the Court is *prima facie* of the opinion that a death sentence cannot be awarded, an anticipatory bail application should be entertained.

8. On the other hand, learned A.G.A. for the State and learned counsel for opposite party no.2, strongly oppose the submissions made by learned counsel for the applicant and submit that the provisions of Section 438 of Cr.P.C., are not *pari materia* to Section 18 of the 1989 Act. The 1989 Act is a special Act and, hence, the interpretation given to the provisions of the said Act cannot be simply picked up and

applied to Section 438 of Cr.P.C.

9. We have considered the submissions of learned counsel for the parties at length and also gone through the case laws submitted by them.

10. The 1989 Act is legislated to give protection to particular communities. The offences under the 1989 Act are committed by making certain statements in certain circumstances. It was found by the Supreme Court that in large number of cases, false and fabricated F.I.Rs. are being lodged, thus, strict provisions of the 1989 Act were being abused by the informants for ulterior purposes.

11. In the said circumstances, to balance the situation, the Supreme Court, in special facts and circumstances of the case, passed judgment in case of ***Subhash Kashinath Mahajan*** (supra). The relevant paragraphs of the said judgment read as under:

> *"63. We have already noted the working of the Act in the last three decades. It has been judicially acknowledged that there are instances of abuse of the Act by vested interests against political opponents in panchayat, municipal or other elections, to settle private civil disputes arising out of property, monetary disputes, employment disputes and seniority disputes. [Dhiren Prafulbhai Shah v. State of Gujarat, 2016 SCC OnLine Guj 2076 : 2016 Cri LJ 2217] It may be noticed that by way of rampant misuse complaints are "largely being filed particularly against public servants/quasi-judicial/judicial officers with oblique motive for satisfaction of vested interests". [Sharad v. State of Maharashtra, (2015) 4 Bom CR (Cri) 545]*
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> *64. Innocent citizens are termed as accused, which is not intended by the legislature. The legislature never intended to use the Atrocities Act as an instrument to blackmail or to wreak personal vengeance. The Act is also not intended to deter public servants from performing their bona fide duties. Thus, unless exclusion of anticipatory bail is limited to genuine cases and inapplicable to cases where there is no prima facie case was made out, there will be no protection available to innocent citizens. Thus, limiting the exclusion of anticipatory bail in such cases is essential for protection of fundamental right of*

life and liberty under Article 21 of the Constitution.

65. Accordingly, we have no hesitation in holding that exclusion of provision for anticipatory bail will not apply when no prima facie case is made out or the case is patently false or mala fide. This may have to be determined by the Court concerned in facts and circumstances of each case in exercise of its judicial discretion. In doing so, we are reiterating a well-established principle of law that protection of innocent against abuse of law is part of inherent jurisdiction of the court being part of access to justice and protection of liberty against any oppressive action such as mala fide arrest. In doing so, we are not diluting the efficacy of Section 18 in deserving cases where court finds a case to be prima facie genuine warranting custodial interrogation and pre-trial arrest and detention.

71. It is thus patent that in cases under the Atrocities Act, exclusion of right of anticipatory bail is applicable only if the case is shown to bona fide and that prima facie it falls under the Atrocities Act and not otherwise. Section 18 does not apply where there is no prima facie case or to cases of patent false implication or when the allegation is motivated for extraneous reasons. We approve the view of the Gujarat High Court in Pankaj D. Suthar [Pankaj D. Suthar v. State of Gujarat, (1992) 1 Guj LR 405] and N.T. Desai [N.T. Desai v. State of Gujarat, (1997) 2 Guj LR 942] . We clarify the judgments in Balothia [State of M.P. v. Ram Kishna Balothia, (1995) 3 SCC 221 : 1995 SCC (Cri) 439] and Manju Devi [Manju Devi v. Onkarjit Singh Ahluwalia, (2017) 13 SCC 439 : (2017) 4 SCC (Cri) 662] to this effect.

76. We are of the view that cases under the Atrocities Act also fall in exceptional category where preliminary inquiry must be held. Such inquiry must be time-bound and should not exceed seven days in view of directions in Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] . Even if preliminary inquiry is held and case is registered, arrest is not a must as we have already noted. In Lalita Kumari [Lalita Kumari v. State of U.P., (2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] it was observed: (SCC p. 57, para 107)

"107. While registration of FIR is mandatory, arrest of the accused immediately on registration of FIR is not at all mandatory. In fact, registration of FIR and arrest of an accused person are two entirely different concepts under the law, and there are several safeguards available against arrest. Moreover, it is also pertinent to mention that an accused person also has a right to apply for "anticipatory bail" under the provisions of Section 438 of the Code if the conditions mentioned therein are satisfied. Thus, in appropriate cases, he

can avoid the arrest under that provision by obtaining an order from the court."

77. Accordingly, we direct that in absence of any other independent offence calling for arrest, in respect of offences under the Atrocities Act, no arrest may be effected, if an accused person is a public servant, without written permission of the appointing authority and if such a person is not a public servant, without written permission of the Senior Superintendent of Police of the District. Such permissions must be granted for recorded reasons which must be served on the person to be arrested and to the court concerned. As and when a person arrested is produced before the Magistrate, the Magistrate must apply his mind to the reasons recorded and further detention should be allowed only if the reasons recorded are found to be valid. To avoid false implication, before FIR is registered, preliminary enquiry may be made whether the case falls in the parameters of the Atrocities Act and is not frivolous or motivated.

79.2. There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. We approve the view taken and approach of the Gujarat High Court in Pankaj D. Suthar [Pankaj D. Suthar v. State of Gujarat, (1992) 1 Guj LR 405] and N.T. Desai [N.T. Desai v. State of Gujarat, (1997) 2 Guj LR 942] and clarify the judgments of this Court in Balothia [State of M.P. v. Ram Kishna Balothia, (1995) 3 SCC 221 : 1995 SCC (Cri) 439] and Manju Devi [Manju Devi v. Onkarjit Singh Ahluwalia, (2017) 13 SCC 439 : (2017) 4 SCC (Cri) 662] ;"

12. The said judgment of ***Subhash Kashinath Mahajan*** (supra) was again visited by the Supreme Court in case of ***Union of India vs. State of Maharashtra and others, (2020) 4 SCC 761***, and thereafter again was revisited by Three Judges' Bench in case of ***Prithvi Raj Chauhan*** (supra). The Supreme Court in case of ***Prithvi Raj Chauhan*** (supra), overruled certain portion of the judgment of ***Subhash Kashinath Mahajan*** (supra). Relevant paragraphs and findings of the ***Prithvi Raj Chauhan*** (supra) case read as follows:

"9.Concerning the provisions contained in Section 18A, suffice it to observe that with respect to preliminary inquiry for

registration of FIR, we have already recalled the general directions (iii) and (iv) issued in Dr. Subhash Kashinath's case (supra). A preliminary inquiry is permissible only in the circumstances as per the law laid down by a Constitution Bench of this Court in Lalita Kumari v. Government of U.P., (2014) 2 SCC 1, shall hold good as explained in the order passed by this Court in the review petitions on 1.10.2019 and the amended provisions of Section 18A have to be interpreted accordingly.

10 The Section 18A(i) was inserted owing to the decision of this Court in Dr. Subhash Kashinath (supra), which made it necessary to obtain the approval of the appointing authority concerning a public servant and the SSP in the case of arrest of Accused persons. This Court has also recalled that direction on Review Petition (Crl.) No. 228 of 2018 decided on 1.10.2019. Thus, the provisions which have been made in Section 18A are rendered of academic use as they were enacted to take care of mandate issued in Dr. Subhash Kashinath (supra) which no more prevails. The provisions were already in Section 18 of the Act with respect to anticipatory bail

11. Concerning the applicability of provisions of Section 438 CrPC, it shall not apply to the cases under the 1989 Act. However, if the complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act, the bar created by Sections 18 and 18-A(i) shall not apply. We have clarified this aspect while deciding the review petitions.

12. The Court can, in exceptional cases, exercise power under Section 482 CrPC for quashing the cases to prevent misuse of provisions on settled parameters, as already observed while deciding the review petitions. The legal position is clear, and no argument to the contrary has been raised.

.....

33. I would only add a caveat with the observation and emphasise that while considering any application seeking pre-arrest bail, the High Court has to balance the two interests : i.e. that the power is not so used as to convert the jurisdiction into that under Section 438 of the Criminal Procedure Code, but that it is used sparingly and such orders made in very exceptional cases where no prima facie offence is made out as shown in the FIR, and further also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law. I consider such stringent terms, otherwise contrary to the philosophy of bail, absolutely essential, because a liberal use of the power to grant pre-arrest bail would defeat the intention of Parliament.

34. It is important to reiterate and emphasize that unless provisions of the Act are enforced in their true letter and spirit,

with utmost earnestness and dispatch, the dream and ideal of a casteless society will remain only a dream, a mirage. The marginalization of scheduled caste and scheduled tribe communities is an enduring exclusion and is based almost solely on caste identities. It is to address problems of a segmented society, that express provisions of the Constitution which give effect to the idea of fraternity, or bandhutva (बन्धुत्व) referred to in the Preamble, and statutes like the Act, have been framed. These underline the social - rather collective resolve-of ensuring that all humans are treated as humans, that their innate genius is allowed outlets through equal opportunities and each of them is fearless in the pursuit of her or his dreams. The question which each of us has to address, in everyday life, is can the prevailing situation of exclusion based on caste identity be allowed to persist in a democracy which is committed to equality and the Rule of law? If so, till when? And, most importantly, what each one of us can do to foster this feeling of fraternity amongst all Sections of the community without reducing the concept (of fraternity) to a ritualistic formality, a tacit acknowledgment, of the "otherness" of each one's identity."

13. It is settled law that when the words of a statute are clear and unambiguous, Courts must give effect to the legislative intent/literal interpretation. In this context, the wording of the State amendments leaves no room for judicial discretion in granting anticipatory bail for offences punishable by death sentence. The prohibition is absolute and does not allow for exceptions based on the nature of the offence or the facts of the case. The Supreme Court in case of ***Gurudevdatta VKSSS Maryadit and others v. State of Maharashtra and others, (2001) 4 SCC 534*** held:

"26. ....it is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to

that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver. The courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute…."

In the case of ***Raghunath Rai Bareja and another vs. Punjab National Bank and others*****, *(2007) 2 SCC 230***, the Supreme Court held :

"*58. We may mention here that the literal rule of interpretation is not only followed by judges and lawyers, but it is also followed by the layman in his ordinary life. To give an illustration, if a person says "this is a pencil", then he means that it is a pencil; and it is not that when he says that the object is a pencil, he means that it is a horse, donkey or an elephant. In other words, the literal rule of interpretation simply means that we mean what we say and we say what we mean. If we do not follow the literal rule of interpretation, social life will become impossible, and we will not understand each other. If we say that a certain object is a book, then we mean it is a book. If we say it is a book, but we mean it is a horse, table or an elephant, then we will not be able to communicate with each other. Life will become impossible. Hence, the meaning of the literal rule of interpretation is simply that we mean what we say and we say what we mean."*

A five Judges Bench of the Supreme Court in the case of ***Sachidananda Banerjee, Assistant Collector of Customs, Calcutta vs. Sitaram Agarwala and another, 1965 SCC OnLine SC 45***, has held that:

"The rule of construction of such a clause creating a criminal offence is well settled. The following passage from the judgement of the Judicial Committee in The Gauntlet [(1872) 4 CP 184 at p. 191] may be quoted:

"No doubt all penal statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to

be included, and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any instrument."

The clause, therefore, must be construed strictly and it is not open to the court to strain the language in order to read a casus omissus. The court cannot fill up a lacuna : that is the province of the legislature. ***The second rule of construction equally well settled is that a court cannot construe a section of a statute with reference to that of another unless the latter is in pari materia with the former. It follows that decisions made on a provision of a different statute in India or elsewhere will be of no relevance unless the two statutes are in pari materia. Any deviation from this rule will destroy the fundamental principle of construction, namely, the duty of a court is to ascertain the expressed intention of the legislature.****" (emphasis added)*

Again a five Judges Bench of the Supreme Court in ***A.R. Antulay vs. Ramdas Sriniwas Nayak and another, (1984) 2 SCC 500***, has held that:

"18. *It is a well-established canon of construction that the court should read the section as it is and cannot rewrite it to suit its convenience, nor does any canon of construction permit the court to read the section in such manner as to render it to some extent otiose."*

14. A bare perusal of the aforesaid judgments clearly show that in special facts and circumstances, Supreme Court gave a different interpretation to Section 18 of the 1989 Act. Said Section 18 is not at all *pari materia* to Section 438 of Cr.P.C. and hence, interpretation given to Section 18 of the 1989 Act cannot be applied to Section 438 of Cr.P.C. Neither any facts or material is placed nor any submissions are made by the applicant to show that Section 18 of the 1989 Act is *pari*

materia to Section 438 of Cr.P.C.

15. In the present case, the State amendment explicitly prohibits anticipatory bail for offences punishable by death sentence. The statutory bar is absolute. It is not for the Courts to rewrite the law or create exceptions to a legislative mandate that is unequivocal. While the Courts are the guardians of individual liberties, they are also bound to uphold the rule of law and respect the boundaries set by the legislature.

16. The argument that the nature of the offence should be considered in determining whether anticipatory bail can be granted, despite the statutory prohibition, is untenable. Such an approach would effectively render the legislative bar meaningless and open the door to judicial overreach.

17. Any perceived hardship or injustice that may arise from the strict application of the statutory bar is a matter for the legislature to address through amendment. It is not for the Courts to fill perceived gaps in the law by exercising discretion contrary to the express provisions of the statute. However, as settled by the Supreme Court in the case of ***Prithvi Raj Chauhan*** (supra), the Court in its inherent jurisdiction under Section 482 Cr.P.C. or under Article 226/227 of the Constitution of India can still grant interim protection from arrest if *prima facie,* the offences alleged are not made out from the contents of the complaint. Further, even an interim bail can be granted by a Court, in appropriate cases, pending a regular bail application.

18. In light of the clear and unequivocal wording of Section 438 of the Cr.P.C., which prohibits filing of anticipatory bail application in cases where the offence is punishable by death sentence, this Court is of the opinion that no judicial discretion can be exercised to entertain anticipatory bail application in such cases.

19. The answer to the question referred to this Bench is, therefore, in the negative. The Courts cannot entertain anticipatory bail application in cases where the State amendment prohibits it.

20. The reference is answered accordingly. The matter is directed to be placed before the learned Single Judge, who will decide the matter in accordance with the observations made by this Court.

[Narendra Kumar Johari,J.] [Vivek Chaudhary,J.]

Dated: October 18, 2024
Sachin