Sushila Aggarwal vs State (Nct Of Delhi) on 15 May, 2018

Equivalent citations: AIRONLINE 2018 SC 1111

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Bench: Navin Sinha, Mohan M. Shantanagoudar, Kurian Joseph

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

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

SUSHILA AGGARWAL & ORS. PETITIONER (S)

VERSUS

STATE (NCT OF DELHI) & ANR. RESPONDENT(S)

ORDER

KURIAN, J.

1. Whether an anticipatory bail should be for a limited period of time is the issue before us on which there are two divergent views.

2. The line of judgments that anticipatory bail should not be for a limited period places its reliance on the Constitution Bench decision of this Court in Shri Gurbaksh Singh Sibbia and others v. State of Punjab1.

3. Siddharam Satlingappa Mhetre v. State of Maharashtra and others2 is a very detailed judgment by a Bench of two Judges on the scope and object of an anticipatory bail. In Mhetre (supra), this Court took the view that the Constitution Bench has held that anticipatory bail granted by the court should ordinarily continue till the trial of the case. To quote:

> "94. The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The Public Prosecutor or the complainant would be at liberty to move the same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.
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> 95. The order granting anticipatory bail for a limited duration and thereafter directing 1 (1980) 2 SCC 565 2 (2011) 1 SCC 694 the accused to surrender and apply for a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in Sibbia case." (Emphasis supplied) The decision in Mhetre was recently followed in Bhadresh Bipinbhai Sheth v. State of Gujarat and another3.

4. The other line of judgments is that orders of anticipatory bail should be of a limited duration. Salauddin Abdulsamad Shaikh v. State of Maharashtra4 is one of the earlier decisions of a three Judge Bench. True, there is no reference to the Constitution Bench in Sibbia's case (supra). However, discussing the concept of anticipatory bail, this Court took the view that :-

> "2. Under Section 438 of the Code of Criminal Procedure when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High Court or the Court of Session may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions having regard to the facts of the particular case, as it may deem appropriate. Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but 3 (2016) 1 SCC 152 4 (1996) 1 SCC 667 that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realised that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is, therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.
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> 3. It should be realised that an order of anticipatory bail could even be obtained in cases of a serious nature as for example murder and, therefore, it is essential that the duration of that order should be limited and ordinarily the court granting

anticipatory bail should not substitute itself for the original court which is expected to deal with the offence. It is that court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail." This view has also been followed in K.L. Verma v. State and another5, Sunita Devi v. State of Bihar and another6, Adri Dharan Das v. State of W.B.7. In K.L. Verma (supra), after referring to Salauddin (supra), this Court held as follows:

"3. We have carefully examined both the orders of 9-10-1996 and 11-10-1996 and have also heard counsel for the accused as well as counsel for the CBI and we are of the opinion that the proper course for the High Court was to decide on the question of the requirement of sanction and if the High Court could not do so, to have stayed further proceedings till that vital question was answered. On the other question emanating from the order dated 9-10-1996, we find that the High Court placed reliance on this Court's decision in Salauddin Abdulsamad Shaikh v. State of Maharashtra which was a case in which the High Court, while granting interim anticipatory bail, imposed certain conditions, one of which was that the accused should move for regular bail before the Court which was in seisin of the case pending against him. The High Court also observed that the application should be disposed of uninfluenced by the observations made in the earlier order. The special leave petition was directed against that order of the High Court. While dealing with that order, this Court observed that under Section 438 of the Code, when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the

5 (1998) 9 SCC 348 6 (2005) 1 SCC 608 7 (2005) 4 SCC 303 High Court or the Court of Session may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions as it may deem appropriate. This Court further observed that anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed. It was, therefore, pointed out that it was necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted. By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher court, if they so desire. This decision was not intended to convey that as soon as the accused persons are produced before the regular court the anticipatory bail ends even if the court is yet to decide the question of bail on merits. The decision in Salauddin case has to be so understood." In

Nirmal Jeet Kaur v. State of M.P. and another8, K.L. Verma (supra) in so far as it stated that " ...or even a few days thereafter to enable the accused persons to move the higher court, if they so desire ... " was held to be in conflict with the statutory requirement under Section 439. To quote:

> "13. The grey area according to us is the following part of the judgment in K.L. Verma case "or even a few days thereafter to enable the accused persons to move the higher court, if they so desire".
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> 20. In Salauddin case also this Court observed that the regular court has to be moved for bail.

Obviously, an application under Section 439 of the Code must be in a manner in accordance with law and the accused seeking remedy under Section 439 must ensure that it would be lawful for the court to deal with the application. Unless the applicant is in custody his making application only under Section 439 of the Code will not confer jurisdiction on the court to which the application is made. The view regarding extension of time to "move" the higher court as culled out from the decision in K.L. Verma case shall have to be treated as having been rendered per incuriam, as no reference was made to the prescription in 8 (2004) 7 SCC 558 Section 439 requiring the accused to be in custody.

In State v. Ratan Lal Arora it was held that where in a case the decision has been rendered without reference to statutory bars, the same cannot have any precedential value and shall have to be treated as having been rendered per incuriam. The present case stands at par, if not, on a better footing. The provisions of Section 439 do not appear to have been taken note of.

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23. If the protective umbrella of Section 438 is extended beyond what was laid down in Salauddin case the result would be clear bypassing of what is mandated in Section 439 regarding custody. In other words, till the applicant avails remedies up to higher courts, the requirements of Section 439 become dead letter. No part of a statute can be rendered redundant in that manner."

5. This Court in HDFC Bank Limited v. J.J. Mannan9 has referred to a contention based on the Constitution Bench decision in Sibbia (supra) and yet it has taken the view that the protection under Section 438 is only till the investigation is completed and chargesheet is filed. To quote paragraphs 14 and 18 to 20 :-

> "14. Referring to the decision of the Constitution Bench in Gurbaksh Singh 9 (2010) 1 SCC 679 Sibbia v. State of Punjab, wherein the application of Section 438 CrPC had been considered in detail, Mr Dutta submitted that the said provision had been interpreted to be a beneficent provision relating to personal liberty guaranteed under Section 21 of the Constitution. Mr Dutta submitted that the Constitution Bench had

> observed 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 CrPC.
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> 18. Furthermore, it has also been consistently indicated that no blanket order could be passed under Section 438 CrPC to prevent the accused from being arrested at all in connection with the case. To avoid such an eventuality it was observed in Adri Dharan Das case that anticipatory bail is given for a limited duration to enable the accused to surrender and to obtain regular bail. The same view was reiterated in Salauddin case wherein it was, inter alia, observed that anticipatory bail should be of limited duration only and primarily on the expiry of that duration or extended duration, the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge-sheet is submitted.
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> 19. The object of Section 438 CrPC has been repeatedly explained by this Court and the High Courts to mean that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant.

But at the same time the provisions of Section 438 CrPC cannot also be invoked to exempt the accused from surrendering to the court after the investigation is complete and if charge-sheet is filed against him. Such an interpretation would amount to violence to the provisions of Section 438 CrPC, since even though a charge-sheet may be filed against an accused and charge is framed against him, he may still not appear before the court at all even during the trial.

20. Section 438 CrPC contemplates arrest at the stage of investigation and provides a mechanism for an accused to be released on bail should he be arrested during the period of investigation. Once the investigation makes out a case against him and he is included as an accused in the charge-sheet, the accused has to surrender to the custody of the court and pray for regular bail. On the strength of an order granting anticipatory bail, an accused against whom charge has been framed, cannot avoid appearing before the trial court.

21. If what has been submitted on behalf of the appellant that Respondent 1 has never appeared before the trial court is to be accepted, it will lead to the absurd situation that charge was framed against the accused in his absence, which would defeat the very purpose of sub-section (2) of Section 240 CrPC."

6. In Satpal Singh v. The State of Punjab10 at paragraph 14, it has been held:

> "14. In any case, the protection under Section 438, Cr.P.C. is available to the 10 (2018) SCC Online SC415 accused only till the court summons the accused based on the charge sheet (report under Section 173(2), Cr.P.C.). On such appearance, the

> accused has to seek regular bail under Section 439 Cr.P.C. and that application has to be considered by the court on its own merits. Merely because an accused was under the protection of anticipatory bail granted under Section 438 Cr.P.C. that does not mean that he is automatically entitled to regular bail under Section 439 Cr.P.C. The satisfaction of the court for granting protection under Section 438 Cr.P.C. is different from the one under Section 439 Cr.P.C. while considering regular bail."

7. It is relevant to point out that placing reliance on Sibbia (supra), the two-Judge Bench in Mhetre (supra) has taken the stand that the decisions in Salauddin (supra), KL Verma (supra), Adri Dharan Das (supra) and Sunita Devi (supra) are per incuriam. To quote:-

> "123. In view of the clear declaration of law laid down by the Constitution Bench in Sibbia case, it would not be proper to limit the life of anticipatory bail. When the Court observed that the anticipatory bail is for limited duration and thereafter the accused should apply to the regular court for bail, that means the life of Section 438 CrPC would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The Constitution Bench in Sibbia case clearly observed that it is not necessary to rewrite Section 438 CrPC. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under Section 438 CrPC granting bail cannot be curtailed.
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> 124. The ratio of the judgment of the Constitution Bench in Sibbia case perhaps was not brought to the notice of Their Lordships who had decided the cases of Salauddin Abdulsamad Shaikh v. State of Maharashtra, K.L. Verma v.

State, Adri Dharan Das v. State of W.B. and Sunita Devi v. State of Bihar.

125. In Naresh Kumar Yadav v. Ravindra Kumar a two-Judge Bench of this Court observed: (SCC p. 632d) "the power exercisable under Section 438 CrPC is somewhat extraordinary in character and it [should be exercised] only in exceptional cases." This approach is contrary to the legislative intention and the Constitution Bench's decision in Sibbia case.

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127. The judgments and orders mentioned in paras 124 and 125 are clearly contrary to the law declared by the Constitution Bench of this Court in Sibbia case1. These judgments and orders are also contrary to the legislative intention. The Court would not be justified in rewriting Section 438 CrPC.

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138. The analysis of English and Indian law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a coequal strength is also binding on a Bench of Judges of coequal strength. In the instant case,

judgments mentioned in paras 124 and 125 are by two or three Judges of this Court. These judgments have clearly ignored the Constitution Bench judgment of this Court in Sibbia case which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 CrPC. Consequently, the judgments mentioned in paras 124 and 125 of this judgment are per incuriam."

8. Shri Harin P. Raval, learned Senior Counsel and Amicus Curiae submits that in the light of the two conflicting schools of thought the matter needs consideration by a larger Bench.

According to him even the Constitution Bench in Sibbia (supra) does not, in so many words, lay down a proposition that the protection of anticipatory bail is available to an accused till the conclusion of the trial.

9. Also having heard learned counsel appearing on both sides, we are of the prima facie view that the Constitution Bench in Sibbia (supra) has not laid down the law that once an anticipatory bail, it is an anticipatory bail forever.

10. In Sibbia (supra), this Court has briefly dealt with the question of duration of anticipatory bail. It seems to us that the discussion primarily pertained to grant of anticipatory bail at the pre-FIR stage (see paragraph 43 quoted below). It appears that there are indications in Sibbia (supra) that anticipatory bail may be for a limited period. To quote paragraphs 19, 40, 42 and 43:-

> "19. ... While granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police.

The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody:

> submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under Section 167(2) of the Code is made out by the investigating agency.

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40. We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition (2). We agree that a 'blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.

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42. There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can an order of bail be passed under the section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

43. During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in Section 438(2) (i), (ii) and (iii). The court has, in

addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made under Section 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the FIR in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various courts have long since been released by this Court under Section 438(1) of the Code." (Emphasis supplied)

11. In the light of the conflicting views of the different Benches of varying strength, we are of the opinion that the legal position needs to be authoritatively settled in clear and unambiguous terms. Therefore, we refer the following questions for consideration by a larger Bench :-

(1) Whether the protection granted to a person under Section 438 CrPC 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.

12. Accordingly, we direct the Registry to place the papers before Hon'ble the Chief Justice of India.

.....J. [KURIAN JOSEPH] .....J. [MOHAN M. SHANTANAGOUDAR] .....J. [NAVIN SINHA] NEW DELHI;

MAY 15, 2018.