

GAHC010002922024



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : AB/86/2024

SHAFIKUL ISLAM
SON OF SAYED ALI, RESIDENT OF VILLAGE- BALIKURI GAON, POLICE
STATION- KALGACHIA, DISTRICT- BARPETA, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR. A M BORA

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE KAUSHIK GOSWAMI**

ORDER

Date : 07-03-2024

Heard Mr. AM Bora, learned senior counsel assisted by Mr. VA Choudhury, learned counsel for the petitioner. Also heard Mr. P. Borthakur, learned APP for the State respondent.

2. This is an application under section 438 of Cr.P.C., 1973 for seeking

pre-arrest bail for the petitioner i.e. Shafikul Islam who is apprehending arrest in connection with Baghbar P.S. case no.81/2023 registered under sections 120(B)/420/406/409 IPC.

3. The brief case of the prosecution is that one Pallabi Das, BDO, of Mandia Development Bank on 14.12.2023 lodged an FIR before the Officer-in-charge of Baghbar police station inter-alia alleging that between 30.05.2023 to 29.09.2023 substantial amount of funds under 15th Finance Commission which was earmarked for maintenance of PWSS was transferred directly to a vendor namely, Areyan Enterprise through public financial management system.

4. It is further alleged in the FIR that said transfer was in violation of the established protocol outlined for utilization of 15th Finance commission fund. It is also alleged that after coming to know about the said anomalies, the first informant had informed the Chief Executive Officer of Barpeta Zilla Parishad in writing and an inquiry was conducted by the CEO of Barpeta Zilla Parishad by visiting Mandia Development Office Block on 12.12.2023 wherein it was revealed that the transactions were in violation of the govt. guidelines and were not supported by relevant documents and therefore it is suspected that the govt. funds have been misappropriated.

5. The learned senior counsel for the petitioner has submitted that the petitioner is presently posted as BDO at Dhubri, before this posting he was posted as Incharge BDO at Mandia Development Block, Mandia and it came to his knowledge later on that one of the employees of the said Mandia

Development Bank office namely, Sirajul Hoque has illegally transferred sizeable amount of funds to one of the vendors, namely, Saiful Rahman who is the proprietor of M/S Areyan Enterprise in violation of protocols. He further submits that the petitioner is no way involved in transferring the said funds.

6. On the other hand, Mr. P. Borthakur, learned APP submits that the case diary reveals that the IO has collected materials which clearly implicates the petitioner. He further submits that the allegations leveled against the petitioner are grave.

7. I have considered the submissions made at the Bar and have perused the materials available on records.

8. It may be mentioned that by order dated 11.01.2024 this Court granted the privilege of interim pre-arrest bail to the petitioner subject to conditions.

9. It further appears from the case diary that the petitioner has appeared before the IO as per the interim pre-arrest bail order. It further appears that the statement have been recorded under section 161 Cr.P.C. On perusal of the aforesaid statement, it appears that the petitioner has admitted that he along with other co-accused had misappropriated govt. funds in the absence of BDO, Mandiya Development Block.

10. The investigation appears to have progressed substantially.

11. Undoubtedly the offence is grave but that alone cannot be a decisive ground to deny bail to the petitioner. It is well settled that object of bail is neither cumulative nor preventive. The object of bail is to secure appearance of the accused person at his trial by reasonable amount of bail.

12. As early as in the year 1978 the Apex Court in the case of *Gurucharan Singh Vs. State reported in 1978 (1) SCC at page 118*, laid the following criteria for grant of bail:

22. *In other non-bailable cases the court will exercise its judicial discretion in favour of granting bail subject to sub-sec. (3) of Sec. 437, Cr. P. C. if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the court which may defeat proper investigation and a fair trial, the court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to S. 437 (1), Cr. P. C. and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.*

24. *Section 439 (1), Cr. P. C. of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail.*

Unlike under S. 437 (1) there is no ban imposed under S. 439 (1), Cr.P. C. against granting of bail by the High Court or the Court of session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so the High Court or the Court of session will have to exercise its judicial discretion in considering the question of granting of bail under S. 439 (1), Cr. P.C. of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of S. 437 (1) and S. 439 (1) Cr. P. C. of the new code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence, of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many variable factors, cannot be exhaustively set out."

13. The Apex Court in *Siddharam Satlingappa Mhetre Vs. State of Maharashtra and ors.*, reported in 2011 (1) SCC 694 while relying upon its decision rendered by its constitution bench in *Gurbaksh Singh Sibia Vs. State of Punjab* (1980 Vol. 2 SCC 565), laid down the following parameters for grant of bail:

8. In a detailed judgment, the Hon'ble Supreme Court in *Siddharam Satlingappa Mhetre versus State of Maharashtra and Others*, (2011) 1 SCC 694, while relying upon its decision rendered by its Constitution Bench in *Gurbaksh Singh Sibia v. State of Punjab*, (1980) 2 SCC 565, laid down the following parameters for grant of bail:-

111. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly from the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily

depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C, by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honor.

112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

- (i) The nature and gravity of the accusation and the exact role of the accused must be properly understood before arrest is made;*
- (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offense;*
- (iii) The possibility of the applicant to flee from justice;*
- (iv) The possibility of the accused's likelihood to repeat similar or other offenses.*
- (v) Where the accusations have been made only with the object of insulting or humiliating the applicant by arresting him or her.*
- (vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.*
- (vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly understand the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;*
- (viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;*
- (ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;*
- (x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.*

113. Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The

court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

114. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the Judge concerned, after consideration of entire material on record then most of the grievances in favor of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intent we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available."

14. It appears that there are no adverse materials collected by the IO as regards the antecedent of the petitioner.

15. Considering that the petitioner has cooperated with the investigation, the Court finds that the custodial interrogation of the petitioner may not be required in the interest of the ongoing investigation into the case.

16. Accordingly the interim pre-arrest bail granted by order dated 11.01.2024 is hereby made absolute subject to the following conditions:

- (1). That the petitioner shall not leave the jurisdiction of the Trial Court without prior permission,
- (2) That the petitioner shall cooperate with the investigation as and when required,
- (3) That the petitioner shall not directly or indirectly make any inducement or threat or promise to any person acquainted with the facts of the case so as to

dissuade such person from disclosing such facts to the Court or to any police officer.

17. Return the case diary.

18. With the above observations this anticipatory application stands disposed of.

JUDGE

Comparing Assistant