



IN THE HIGH COURT OF ORISSA AT CUTTACK

**ABLAPL No. 11777 of 2023
ABLAPL No. 13978 of 2023 &
ABLAPL No. 13980 of 2023**

(Applications under Section 438 of the Criminal Procedure Code)

AFR

ABLAPL No. 11777 of 2023

Sanjay Kumar Sarangi Petitioner

-Versus-

State of Odisha & Anr. Opposite Parties

ABLAPL No. 13978 of 2023

Pratham Patra @ Ghatak Patra Petitioner

-Versus-

State of Odisha Opposite Party

ABLAPL No. 13980 of 2023

Pratham Patra @ Ghatak Patra Petitioner

-Versus-

State of Odisha Opposite Party

Advocate(s) appeared in these cases:-

For Petitioner(s) :S.K.Mohapatra,L.Achari,
Advocates.
(in **ABLAPL No. 11777 of 2023**)



Mr. D.Panda, Advocate with
M/s. A.Mohanty, P.Patnaik,
J.Sahoo, Advocates.
(In **ABLAPL No. 13978 of 2023**)

Mr. S.C.Mohapatra, Sr. Advocate
with M/s. A.Mohanty, P.Patnaik,
J.Sahoo, Advocates.
(In **ABLAPL No. 13980 of 2023**)

For Opp. Parties : Mr. S.K. Mishra, ASC
for the State.

M/s. S.N.Mishra & K.Panda,
Advocates
(For O.P.-2 in **ABLAPL No.
11777 of 2023**)

CORAM:
JUSTICE SASHIKANTA MISHRA

JUDGMENT
10th April, 2024

SASHIKANTA MISHRA, J. These applications for anticipatory
bail involve the following question of law:-

Whether an application for anticipatory bail is
maintainable at the instance of a person who is
already in custody in connection with a different
case.



This Court has extensively heard Mr. Soura Chandra Mohapatra, learned Senior counsel assisted by Mr. S. Kanungo, learned counsel for the petitioner in ABLAPL No. 11777 of 2023, Mr. Debasis Panda, learned counsel for the petitioner in ABLAPL No. 13978 of 2023 and Mr. Abhas Mohanty, learned counsel appearing for the petitioner in ABLAPL No. 13980 of 2023. This Court has also heard Mr. Sangram Keshari Mishra, learned Additional Standing counsel for the State.

2. Reference to certain relevant facts of these cases would be in order at the outset.

The petitioner in ABLAPL No. 11777 of 2023, is apprehending arrest in connection with EOW P.S. Case No. 07 of 21.02.2023, under Section 419/ 420/ 467/ 468/ 471/120 B of IPC. He is in custody since 04.09.2023 in connection with Special Crime Unit P.S. Case No. 3, dated 10.08.2023, under Sections 419/420/ 465/ 467/ 468/471/ 120 B of IPC.

The petitioner in ABLAPL No. 13978 of 2023, is apprehending arrest in connection with Kalimela P.S. Case



No. 208 of 2023 under Section 20(b)(ii)(c)/27(a)/29 of NDPS Act r/w Section 353/186/341/506 of IPC. He is already in custody since 30.08.2023 in connection with Kalimella P.S. Case No. 216/30.08.2023.

The petitioner in ABLAPL No. 13980 of 2023, is apprehending arrest in connection with Kalimella P.S. Case No. 212 of 2023 under Section 20 (b)(ii)(c)/25(1)(a)/27(a) and 29 of NDPS Act. He is in custody since 30.08.2023 in connection with Kalimella P.S. Case No. 216 dated 30.08.2023.

3. The question, whether the petitioners being already in custody albeit in connection with different cases can maintain the applications for anticipatory bail has been raised at the threshold by the Court. The parties have addressed the Court on said question making extensive arguments. Mr. S.C.Mohapatra, learned Senior counsel, leading the arguments on behalf of all the petitioners, has primarily argued that liberty being one of the most cherished objects of the Constitution as guaranteed under Article 21 of Constitution has to be protected at all costs.



Only because the petitioner is already in custody, it does not mean that he cannot seek to protect his liberty in connection with another case registered against him. Tracing the legislative history of the provision under Section 438 of Cr.P.C., Mr. Mohapatra would argue that such provision was not there in the Code of the Criminal Procedure, 1889. It was made part of Code of Criminal Procedure, 1973 with the specific intention to protect the liberty of a person, who may be subjected to undue harassment or humiliation being taken into custody unnecessarily. The provision confers wide powers on the Court of Session and the High Court to protect the liberty of a person and such power is not curtailed or limited in any manner, save and except in the manner provided in the provision itself. Mr. Mohapatra further submits that save any exceptions contained in other statutes, like SC & ST (POA) Act etc. a person accused of any other offence is entitled to seek protection from the arbitrary exercise of the power of arrest by the police.



4. Per contra, Mr S.K.Mishra, referring to the language employed in Section 438 of Cr.P.C. would contend that the power to protect a person in the event of his arrest obviously cannot be invoked in a case where a person has already been arrested though in connection with another offence. He submits that the order under Section 438 comes into operation only when a person is arrested. In such event, he is released on bail. But when a person is already in custody in connection with another case, he obviously cannot be arrested again or taken into custody. He can only be remanded on the order of the concerned Court. Mr. Mishra concludes his arguments by submitting that the power under Section 438 cannot therefore, be invoked to stop an accused in custody from being remanded in connection with a case on the orders of this Court.

5. Both sides have relied upon several judgments in support of their respective contentions. Mr. Mohapatra has relied upon the judgment of the Bombay High Court in the



case of **Alnesh Akil Somjee vs. State of Maharashtra**¹, and the case of **Amar S. Mulchandani vs. State of Maharashtra**². Mr. Mohapatra has also relied upon the oft-quoted judgment of the Supreme Court in the case of **Gurbaksh Singh Sibbia vs. State of Punjab**³ and **Sushila Aggarwal v State (NCT of Delhi)**⁴. On the other hand Mr. S.K.Mishra has relied upon the judgment of the Rajasthan High Court in the case of **Sunil Kallami vs. State of Rajsthan**⁵ and judgment of the Allahabad High Court in the case of **Rajesh Kumar Sharma vs. CBI**⁶.

6. It is seen that the High Courts of Rajasthan and Allahabad have taken the view that a person already in custody cannot seek anticipatory bail in connection with another case. In the case of **Sunil Kallami** (Supra) a learned Single Judge of the Rajasthan High Court took note

¹ 2021 SCC Online Bom 5276

² 2023 SCC Online Bom 2394

³ (1980) 2 SCC 565

⁴ (2018) 7 SCC 731

⁵ 2021 SCC Online Raj 1654

⁶ 2022 SCC online ALL 832



of the celebrated judgment of the Supreme Court in the case of **Gurbaksh Singh Sibbia** and the scope of exercise of powers under Section 438 of Cr.P.C. The learned Single Judge further took note of the relevant provisions relating to arrest and held that *“Upon reading Section 46 Cr.P.C.(supra), it is apparent that arrest would mean actually touch or confine the body of the person to custody of the police officer. Section 167 of Cr.P.C. lays down that the custody may be given to the police for the purpose of investigation (called as remand) or be sent to jail (called as judicial custody). Thus the essential part of arrest in placing the corpus, body of the person in custody of the police authorities whether of a police station or before him or in a concerned jail”*. Having held as such, the learned single Judge held as follows:

“19. The natural corollary is therefore that a person who is already in custody cannot have reasons to believe that he shall be arrested as he stands already arrested. In view thereof, the precondition of bail application to be moved under Section 438 Cr.P.C. i.e. reasons to believe that he may be arrested” do not survive since a person is already arrested in another case and is in custody whether before the police or in jail.”



The learned Single Judge thereafter, referred to the observation of the Supreme Court in the case of **Narinderjit Singh Sahni** (supra) and ultimately held as follows.

“24. However, keeping in view observations in Narinderjit Singh Sahni, (supra) and considering that the purpose of preventive arrest by a direction of the court on an application under Section 438 Cr.P.C. would be an order in vacuum. As a person is already in custody with the police this Court is of the view that such an anticipatory bail application under Section 438 Cr.P.C. would not lie and would be nothing but travesty of justice in allowing anticipatory bail to such an accused who is already in custody.

25. Examining the issue from another angle if such an application is held to be maintainable the result would be that if an accused is arrested say for an offence committed of abduction and another case is registered against him for having committed murder and third case is- registered against him for having stolen the car which was used for abduction in a different police station and the said accused is granted anticipatory bail in respect to the offence of stealing of the car or in respect to the offence of having committed murder the concerned Police Investigating Agency where FIRs have been registered would be prevented from conducting individual investigation and making recoveries as anticipatory bail once granted would continue to operate without limitation as laid down by the Apex Court in Sushila Aggarwal, (supra). The concept of anticipatory bail, as envisaged under-Section 438 Cr.P.C. would stand frustrated. The provisions of grant of anticipatory bail are essentially to prevent the concerned person from litigation initiated with the object of injuring and humiliating the applicant by having him so arrested and for a person who stands already arrested, such a factor does not remain available.

26. In view of above discussion, this Court holds that the anticipatory bail would not lie and would not be maintainable if a person is already arrested and is in custody of police or judicial custody in relation to another criminal case which may be for similar offence or for different offences.”



The aforesaid judgment of the Rajasthan High Court was followed in toto by the Allahabad High Court in the case of **Rajesh Kumar Sharma** (supra).

7. It is apposite at this stage to refer to the judgment of the Supreme Court in the case of **Narinderjit Singh Sahni** (supra) wherein taking note of the fact that the writ petitioners were already in custody being arrested in connection with cases involving cognizable offences, the Supreme Court held as follows:

“51. On the score of anticipatory bail, it is trite knowledge that Section 438 CrPC is made applicable only in the event of there being an apprehension of arrest. The petitioners in the writ petitions herein are all inside the prison bars upon arrest against all cognizable offences, and in the wake of the aforesaid question relieving the petitioners from unnecessary disgrace and harassment would not arise.”

8. As against the judgments cited in the preceding paragraphs holding the view that the anticipatory bail application in such a situation is not maintainable, the Single Judge of Bombay High Court in the case of **Alnesh Akil Somjee** (supra) relied upon the following observations of the Constitution Bench judgment of the Supreme Court in the case of **Sushila Agrawal**(supra), and held as follows:



“9. The Hon'ble Apex Court in the case of Sushila A Aggarwal (supra), while dealing with the scope of Section 438 of the Cr. P.C. has followed the decision in the case of Shri. Gurbaksh Singh Sibbia v. State of Punjab and regarding the bar or restriction on the exercise of power to grant anticipatory bail, the Hon'ble Apex Court has held as follows:

“62.....In this background, it is important to notice that the only bar, or restriction, imposed by Parliament upon the exercise of the power (to grant anticipatory bail) is by way of a positive restriction i.e. in the case where accused are alleged to have committed offences punishable under Section 376 (3) or Section 376-AB or Section 376-DA or Section 376-DB of the Penal Code. In other words, Parliament has now denied jurisdiction of the courts (i.e. Court of Session and High Courts) from granting anticipatory bail to those accused of such offences. The amendment [Code of Criminal Procedure Amendment Act, 2018 introduced Section 438(4)] reads as follows:

“438. (4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Penal Code, 1860”.

63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of discretion, be insisted upon-that would amount to judicial legislation”.

Having referred to the observations of the Supreme Court as above, the learned Single Judge of the Bombay High Court thereafter held:

“15. In my considered opinion, there was no proper interpretation of Section 438 of the Cr. P.C. at the hands of learned Additional Sessions Judge. Accused has every right, even if he is arrested in number of cases, to move in each of offence registered against him irrespective of the fact that he is already in custody but for different offence, for the reason that the application (s) will have



to be heard and decided on merits independent of another crime in which he is already in custody.

16. One cannot and must not venture, under the garb of interpretation, to substantiate its own meaning than the plain and simple particular though provided by statute. What has not been said cannot be inferred unless the provision itself gives room for speculation. If the purpose behind the intendment is discernible sans obscurity and ambiguity, there is no place for supposition.”

9. Before proceeding to analyse the judgments quoted above, this court would prefer to make an independent study of the problem with reference to the statute. At the outset this Court would remind itself of the salutary principle that liberty is one of the most cherished objects of our constitution as guaranteed under Article 21. As has been argued by learned Senior counsel, there was no provision in the old Code (Cr.P.C. 1889) conferring power on the Court to grant pre-arrest bail. Such power was conferred only in the new Code (Cr.P.C.1973). Section 438 (1), which is relevant, reads as follows;

“(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—

- 1. the nature and gravity of the accusation;*
- 2. 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;*



3. *the possibility of the applicant to flee from justice; and.*
4. *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 in such application.”*

The legislative intent behind the enactment of the above provision as can be culled out from the language employed therein is, to protect a person from the ignominy of being arrested and thereby being subjected to undue humiliation and loss of dignity. This is all the more necessary when a person is sought to be implicated on false accusations.

10. Whether such power can be curbed, curtailed or limited in any manner was also considered by the Supreme Court in **Gurbaksh Singh Sibbia** (supra) as well as Sushila Agarwal (supra). In **Sushila Agarwal** (supra), the following observations made in **Gurbaksh Singh Sibbia** were quoted with approval:

“38. The Supreme Court further clarified that it was impermissible to import restrictions which were not found in the phraseology of Section 438 to whittle down the discretion advisedly vested by the Parliament in the High Court and Court of Session, premised on the guarantee of personal liberty under



Article 21 of the Constitution of India. The observations in paragraphs 53, 56, 63 and 69 read as under:

.....
 “53. It is quite evident, therefore, that the pre-dominant thinking of the larger, Constitution Bench, in *Sibbia (supra)*, was that given the premium and the value that the Constitution and Article 21 placed on liberty-and given that a tendency was noticed, of harassment - at times by unwarranted arrests, the provision for anticipatory bail was made. It was not hedged with any conditions or limitations-either as to its duration, or as to the kind of alleged offences that an applicant was accused of having committed. The courts had the discretion to impose such limitations (like co-operation with investigation, not tampering with evidence, not leaving the country etc) as were reasonable and necessary in the peculiar circumstances of a given case. However, there was no invariable or inflexible rule that the applicant had to make out a special case, or that the relief was to be of limited duration, in a point of time, or was unavailable for any particular class of offences.

56. The reason for enactment of Section 438 in the Code was Parliamentary acceptance of the crucial underpinning of personal liberty in a free and democratic country. Parliament wished to foster respect for personal liberty and accord primacy to a fundamental tenet of criminal jurisprudence, that everyone is presumed to be innocent till he or she is found guilty. Life and liberty are the cherished attributes of every individual. The urge for freedom is natural to each human being. Section 438 is a procedural provision concerned with the personal liberty of each individual, who is entitled to the benefit of the presumption of innocence. As 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 not imposed by the legislature.

.....
 63. Clearly, therefore, where the Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this court, nor can inflexible guidelines in the exercise of discretion, be insisted upon-that would amount to judicial legislation.

.....
 69. It is important to notice, here that there is nothing in the provisions of Section 438 which suggests that Parliament intended to restrict its operation, either as regards the time



period, or in terms of the nature of the offences in respect of which, an applicant had to be denied bail, or which special considerations were to apply. In this context, it is relevant to recollect that the court would avoid imposing restrictions or conditions in a provision in the absence of an apparent or manifest absurdity, flowing from the plain and literal interpretation of the statute (Ref Chandra Mohan v. State of Uttar Pradesh¹⁰).”

Thus, the position that emerges is, the power under Section 438 of Cr. P.C. cannot be whittled down or curbed, save and except as provided under Sub-Section 4 thereof which is quoted herein below:

“(4)Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code”

11. As has been argued by learned Senior counsel, there are restrictions with regard to exercise of the power under Section 438 in some statutes like Section 18 of the SC and ST Act etc. Thus, save and except under the conditions mentioned above, the power under Section 438 cannot be curtailed.

12. Whether such power would extend to a person already in custody is now to be examined. In the present context, custody would mean judicial custody consequent upon arrest and under orders of the Court. It has been argued



that such a person, against whom another case is registered, cannot obviously be rearrested as there is no provision for re-arrest under the Code of Criminal Procedure. In case of such a person, the Investigating Agency/prosecution, if it feels necessary for the purpose of investigation can only seek an order of remand from the court and in such event, it would get the liberty of interrogating him in connection with the case or of taking further steps in investigation like discovery of material evidence on his statement etc as contemplated under Section 27 of the Indian Evidence Act. Learned State counsel Mr. Mishra, has argued that the order of remand cannot be equated with arrest and there cannot be any apprehension of arrest on the part of the accused to invoke the power under Section 438 of Cr.P.C.

In view of the argument as above, it would be profitable to refer to the relevant provisions of the Code relating to Arrest, as mentioned under Chapter-V titled 'Arrest of Persons' containing Sections 41 to 60 A. Section 41 reads as follows;



“41. When police officer may arrest without warrant – (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person;

- 1. who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or*
- 2. who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or*
- 3. who has been proclaimed as an offender either under this Code or by order of the State Government; or*
- 4. in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or*
- 5. who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or*
- 6. who is reasonable suspected of being a deserter from any of the Armed Forces of the Union; or*
- 7. who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or*
- 8. who, being a released convict, commits a breach of any rule made under Sub-Section (5) of section 356; or*
- 9. for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.*

(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of person specified in section 109 or section 110.

Section 46 of the Code reads as follows:

“46. Arrest how made-(1) In making an arrest the police officer or other person making the same shall actually touch or confine the



body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

(4) Save in exceptional circumstances, no women shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made."

Section 60 A of the Code reads as follows:

*"60A. Arrest to be made strictly according to the Code
No arrest shall be made except in accordance with the provisions of this Code or any other law for the time being in force providing for arrest"*

Thus, arrest means physical confinement of a person with or without the order of the Court. What is remand?

Remand is governed under Section 167(2) of Cr.P.C. which is quoted herein below:

"(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction; Provided that—

1. the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention



of the accused person in custody under this paragraph for a total period exceeding—

- 1. ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;*
- 2. sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this Sub-Section shall be deemed to be released under the provisions of Chapter XXXIII for the purposes of that Chapter;*
- 2. no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;*
- 3. no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police.”*

But then, this provision is applicable to a case where the accused is already arrested and charge-sheet has not been filed. There is no specific provision in the code governing a situation where a person is required to be arrested/remanded in connection with a new case when he is already in custody in connection with another case. As has already been stated, in such a situation he can only be remanded in connection with the new case on the order of the Court. Can the order of the remand in such a situation be equated with an act of arrest? Had the accused not been in custody it would be open to police to arrest him following the procedure laid down in Chapter V referred above. Since



he is already arrested and in custody, he can only be taken on remand for the purpose of investigation, if required. Thus, but for his detention in connection with another case, he would have been arrested in connection with the new case if the investigation agency so wanted. Now, what is the purpose and effect of remand? In ordinary circumstances, when a person is arrested he is subjected to investigation as provided in the relevant provisions of the Code such as Sections 160/161/162 and Section 27 of the Indian Evidence Act. In other words, the purpose of remand as in case of arrest is to collect evidence during investigation. It basically amounts to the same thing. The question that falls for consideration in such a situation is, whether an order under Section 438 of Cr.P.C. can be issued in relation to an order of remand. In case of arrest, such an order would be to release him but in case of remand can such an order be passed?

13. To illustrate, a person is in custody in connection with a case and a new case is registered against him for commission of some other offence. Two recourses are



available to the police in such a situation - firstly to seek an order of remand from the Court if the presence of the accused is required for investigation or secondly, to arrest him, as and when he is released from custody in connection with the previous case. It is only in the second scenario that an order of anticipatory bail can become effective because only then can he be 'arrested'. It is trite law that the distinction between an order in case of custody bail and anticipatory bail is that the former is passed when the accused is already arrested and in custody and operates as soon as it is passed (subject to submission of bail bonds etc), while the latter operates at a future time - when the person not being in custody, is arrested. This, according to the considered view of this Court, is the crux of the issue. To amplify, since an order granting anticipatory bail becomes effective only when the person is arrested and as it is not possible to arrest a person already in custody, it follows that when, on being released from custody in the former case, he is sought to be arrested in the new case, there is no reason why he shall be restrained



from moving the Court beforehand to arm himself with necessary protection in the form of anticipatory bail to protect himself from such a situation. If such an order is passed by the Court in his favour, it shall become effective if and when he is arrested as normally happens. The only catch is, he cannot be arrested as long as he is in custody in the first- mentioned case. So, his right to obtain an order in the new case beforehand that can be effective only upon his release from the first-mentioned case cannot be denied under the scheme of the Code.

14. Another aspect must also be taken into consideration – when a person is in custody in connection with a case and a new case gets registered against him, it is, for all practical purposes a separate case altogether. This implies all rights conferred by the statute on the accused consequent upon registration of a case against him as well as the investigating agency are independently protected. There is no provision in the Code that takes away the right of the accused to seek his liberty or of the investigating agency to investigate into the case only because he is in



custody in another case. As already stated, the accused can exercise his right of moving the court for anticipatory bail which would of course be effective only upon his release from the earlier case and in the event of his arrest in the subsequent case. Similarly, the right of the investigating agency to investigate/interrogate in the subsequent case can be exercised by seeking remand of the accused from the court in the subsequent case. Both these scenarios are not mutually exclusive and can operate at their respective and appropriate times. The investigating agency, if it feels necessary for the purpose of interrogation/investigation can seek remand of the accused whilst he is in custody in connection with the previous case and if such prayer is allowed, the accused can no longer pray for grant of anticipatory bail as then he would be technically in custody in connection with the subsequent case also. Then, he can only seek regular or custody bail. It is also to be considered that if the prosecution has the power to register a case against a person who is in custody in connection with another case how can the accused be



deprived of his right to seek protection of his liberty in such case? This would militate against the very principle underlying Article 21 of the Constitution as also Section 438 of the Code.

15. This takes the court to the reasoning adopted by the learned single judge of Rajasthan High Court in the case of **Sunil Kallami (supra)** that “.....*the concerned Police Investigating Agency where FIRs have been registered would be prevented from conducting individual investigation and making recoveries as anticipatory bail once granted would continue to operate without limitation as laid down by the Apex Court in Sushila Aggarwal, (supra)....*”

With great respect, this Court is unable to persuade itself to agree with the above-quoted reasoning in view of the fact that grant of anticipatory bail does not and cannot grant the accused a licence to avoid investigation or clothe him with any immunity there-from. In fact, sub-section (2) of Section 438 holds the answer to this question as follows:

(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 –

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

XXXXXXXXXXXXXXXXXX

It is needless to mention that an order under subsection (1) can be passed only upon hearing the Public Prosecutor. Hence, the prosecution can always insist upon inclusion of such a condition by the court in the order granting anticipatory bail. And in so far as ‘recoveries’ are concerned, as already stated, it is always open to the investigating agency to pray for remand of the accused, as long as he is in custody, for such purpose and an order granting anticipatory bail has not been passed.

Since these aspects have not been taken into consideration by the Rajasthan and Allahabad High Courts in the cases cited *supra*, this Court is unable to agree with the views expressed therein. This Court rather feels persuaded to agree with the reasoning adopted by the Bombay High Court in the case of ***Alnesh Akil Somjee (supra)*** and ***Amar S Mulachandani (supra)***.



16. In the case of **Narinderjit Singh Sahni** (supra) the Supreme Court, in a writ application filed under Article 32 was considering the pleas of several petitioners who, despite being granted bail in one case were continued to be detained on the strength of production warrants issued in several other cases registered against them in different police stations across the country. This, according to the petitioners, was infraction of Article 21, which the Supreme Court did not accept. It was under such fact-situation that it was held that they being in custody cannot pray for anticipatory bail. The Court was persuaded to hold thus more so in the absence of any proof of infraction of Article 21.

The facts of the cases at hand are however entirely different. Firstly, there is nothing on record to show nor stated by the State Counsel that any production warrant has been issued against the petitioners in the subsequent cases. Secondly, despite making the observation as referred above, the Supreme Court was not seized with the specific question of maintainability of anticipatory bail application



by an accused already in custody. In the humble opinion of this Court, therefore, the decision in **Narinderjit Singh Sahni** can be distinguished from the facts of the cases at hand.

16. From a conspectus of the analysis made hereinbefore thus, this Court holds as follows:

- (i) There is no statutory bar for an accused in custody in connection with a case to pray for grant of anticipatory bail in another case registered against him;
- (ii) Anticipatory bail, if granted, shall however be effective only if he is arrested in connection with the subsequent case consequent upon his release from custody in the previous case;
- (iii) The investigating agency, if it feels necessary for the purpose of interrogation/investigation can seek remand of the accused whilst he is in custody in connection with the previous case and in which no order granting anticipatory bail has yet been passed. If such order granting remand is passed, it would no



longer be open to the accused to seek anticipatory bail but he can seek regular bail.

17. In the cases at hand, the prosecution has not sought for nor obtained any order from the Court for remand of the petitioners in the subsequent cases registered against them. Thus, this Court held that the Anticipatory Bail applications are maintainable. Having held so, this Court shall now examine the merits of the same.

18. As already stated, the petitioner in ABLAPL No. 11777 of 2023 is apprehending arrest in connection with EOW P.S. Case No. 07 of 21.02.2023, under Section 419/ 420/ 467/ 468/ 471/120 B of IPC. He is in custody since 04.09.2023 in connection with Special Crime Unit P.S. Case No. 3, dated 10.08.2023, under Sections 419/420/ 465/ 467/ 468/471/ 120 B of IPC. It has been alleged that the informant, who is the owner of a plot of land came to know while surfing the Bhulekh portal of Govt. of Odisha on the internet that a ROR had been issued in respect of the said land in favour of one Rajendra Kumar Sahu. This was done behind his back for which he lodged the FIR.



During investigation it came to light that someone had impersonated him and managed to sell the land and register the sale-deed in the office of the Sub-Registrar thereby committing fraud. In so far as the petitioner is concerned, he is a Section Officer in the office of the Sub-Registrar and claims that he could not have had any personal knowledge about the so-called impersonation and had acted bonafide on the basis of documents produced at the time of registration of the deed. Other officers including the Sub-Registrar had also verified and scrutinized all documents and being satisfied that they were in order, registered the deed. So, the petitioner cannot be singled out and blamed for the entire occurrence.

19. Learned State Counsel opposed the prayer for bail by submitting that the petitioner is a habitual offender and is already in custody in a case involving cheating and forgery. Moreover taking note of his involvement the concerned authorities have placed him under suspension from service. He, therefore, deserves no leniency.



20. Having considered the nature of the accusations, rival submissions and materials available in the case record, this Court finds that the petitioner is in fact, in custody in a case involving similar offences such as, Sections 419/420/465/467/468/471/120-B IPC. However, nothing has been brought on record by the State to suggest that his custodial interrogation in the subsequent case is necessary. It has also not been shown as to the extent of financial gain made by the petitioner in the alleged occurrence, if at all. Under such circumstances, having him arrested in connection with the subsequent case appears unnecessary. I am, therefore, inclined to allow the prayer for bail. It is directed that in the event of arrest the petitioner shall be released on bail by the arresting officer on such terms and conditions as he may deem fit and proper to impose including the condition that he shall make himself available for investigation as and when required by the investigating officer and render full cooperation to him. ABLAPL No. 11777 of 2023 is therefore, allowed.



21. The petitioner in ABLAPL No. 13978 of 2023, is apprehending arrest in connection with Kalimela P.S. Case No. 208 of 2023 under Section 20(b)(ii)(c)/27(a)/29 of NDPS Act r/w Section 353/186/341/506 of IPC. He is already in custody since 30.08.2023 in connection with Kalimella P.S. Case No. 216/30.08.2023. It is alleged that on 26.08.2023 upon receiving reliable information about purchase and dumping of contraband Ganja by the petitioner, the SI of Kalimela PS rushed to the spot where he found a lady guarding the contraband there. On seeing the police she tried to escape and also attempted to assault the police staff by brandishing an axe but was ultimately apprehended. On interrogation, she disclosed the name of the petitioner as being the financier and dealer in the contraband who had obtained the same from Kalimela area for the purpose of sale. She further disclosed that the petitioner and his associates had gone towards Kalimela side to arrange vehicles for transportation of the contraband. In the raid Ganja weighing 300 kgs were found and seized.



Learned counsel for the petitioner submits that there is absolutely no proof of the petitioner's presence at the spot at the relevant time or of possessing the contraband. Even as per the prosecution case, the involvement of the petitioner is sought to be proved through the confession of the co-accused, which is not admissible.

22. Learned State Counsel opposes the prayer for bail by submitting that the petitioner being a regular trader in contraband is involved in the occurrence in question as it is difficult to believe that a lady would be dealing with such trade without help. In these circumstances, her confessional statement cannot be ignored.

23. This Court finds from a reading of the FIR that there is absolutely no mention of the petitioner having been present at the spot. It is also the prosecution case that the contraband was seized from the exclusive and conscious possession of the lady co-accused Gangi Madkami @ Kasamma @ Kaslur @ Kasla Madhi and nothing was seized from the petitioner. There is no other evidence, save and except the confessional statement of co-accused Gangi



to show that the petitioner had procured the Ganja, packed it, dumped it at the spot and was preparing to transport it for sale. It is needless to mention that the confession of a co-accused is not admissible evidence. Thus, this Court finds that prima facie, there is no admissible evidence to show the complicity of the petitioner. The ratio laid down in the case of ***Tofan Singh versus State of Tamil Nadu***⁷ would squarely apply to the facts of the present case.

24. In the above circumstances, there is no reason why the petitioner shall suffer the ignominy of incarceration. This Court is therefore, inclined to allow the prayer of the petitioner. It is directed that in the event of arrest the petitioner shall be released on bail by the arresting officer on such terms and conditions as he may deem fit and proper including the condition that he shall appear before the IIC of Kalimela Police Station on every Sunday at 10.00 am till submission of charge-sheet and further, he shall appear before the Court in seisin of the matter personally

⁷ (2021) 4 SCC 1



on each date of posting of the case without seeking representation.

25. The petitioner in ABLAPL No. 13980 of 2023, is apprehending arrest in connection with Kalimela P.S. Case No. 212 of 2023 under Section 20 (b)(ii)(c)/25(1)(a)/27(a) and 29 of NDPS Act. He is in custody since 30.08.2023 in connection with Kalimela P.S. Case No. 216 dated 30.08.2023. It is alleged that when the SI of Kalimela police station was performing patrolling duty in the night of 27.08.2023 with his staff, they noticed a person standing with several plastic bags on the roadside. On seeing the police the person started running away towards the jungle but he was nabbed by the police staff. He was found with a gun (SMBL) in his hand which was taken away from him. On interrogation he admitted that he was guarding the bags in which Ganja were kept and further disclosed that the Ganja had been procured by him from the petitioner. A total quantity of 1050 kgs of Ganja was found inside the bags and seized.



Learned counsel for the petitioner submits that there is absolutely no proof of the petitioner's presence at the spot at the relevant time or of possessing the contraband. Even as per the prosecution case, the involvement of the petitioner is sought to be proved through the confession of the co-accused, which is not admissible.

26. Learned State Counsel opposes the prayer for bail by submitting that the petitioner being a regular trader in contraband is involved in the occurrence in question. Moreover huge quantity of contraband was seized for which the bar under Section 37 would come into play. In these circumstances, even the confessional statement of the co-accused cannot be ignored.

27. This Court finds from a reading of the FIR that there is absolutely no mention of the petitioner having been present at the spot. It is also the prosecution case that the contraband was seized from the exclusive and conscious possession of the co-accused Gopal Pal and nothing was seized from the petitioner. There is no other evidence, save and except the confessional statement of co-accused Gopal



to show that he had procured the Ganja from the petitioner. In the case of ***Tofan Singh versus State of Tamil Nadu (supra)*** the Supreme Court held that in case of a person implicated on the statement of a co-accused the bar under Section 37 would not apply. It is needless to mention that the confession of a co-accused is not admissible evidence. Thus, this Court finds that prima facie, there is no admissible evidence to show the complicity of the petitioner. The ratio laid down in the case of ***Tofan Singh (supra)*** would squarely apply to the facts of the present case.

28. In the above circumstances, there is no reason why the petitioner shall suffer the ignominy of incarceration. This Court is therefore, inclined to allow the prayer of the petitioner. It is directed that in the event of arrest the petitioner shall be released on bail by the arresting officer on such terms and conditions as he may deem fit and proper including the condition that he shall appear before the IIC of Kalimela Police Station on every Sunday at 10.00 am till submission of charge-sheet and further, he shall



appear before the Court in seisin of the matter personally on each date of posting of the case without seeking representation.

29. In the result, all the three anticipatory bail applications are disposed of in terms of the directions issued herein before.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 10th April, 2024/ Deepak