IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Revision in terms of Article 154P (3)(a) read with provisions of the Provincial High Court Act No. 19 of 1990 and section 364 of the Code of Criminal Procedure Act read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Revision Application No:
CA (PHC) APN 130/2018

P.H.C. Panadura Case No: **08/2018 (REV)**

Anticipatory Bail Application No: **04/2017**

M.C. Case No: **49580/2017**

Balapuwaduge Rukshan Sampath Mendis

No. 39/12, Fonseka Road, Lakshapathiya, Moratuwa.

Petitioner

Vs.

1. Soft logic retail Private Limited,
   No. 14, De Fonseka Place,
   Colombo 05.
2. Samarakoon Mudiyanselage Mayura Sesath,
   No. 125/9, Johan Rodrigo Mw,
   Katubedda, Moratuwa.
3. OIC,
   Colombo Crimes Division,
   Colombo 08.
4. OIC,
   Police Station, Moratuwa.

5. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents

AND BETWEEN

Balapuwaduge Rukshan Sampath Mendis

No. 39/12, Fonseka Road, Lakshapathiya, Moratuwa.

Petitioner-Petitioner

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Respondents-Respondents-Respondents

BEFORE	:	K. K. Wickremasinghe, J. Mahinda Samayawardhena, J.
COUNSEL	:	AAL Nimal Weerakkody for the Petitioner-Petitioner-Petitioner Nayomi Wickremasekara, SSC for the Respondents-Respondents-Respondents
ARGUED ON	:	07.03.2019
WRITTEN SUBMISSIONS	:	The Petitioner-Petitioner-Petitioner – On 02.04.2019

The Respondents-Respondents-Respondents – On 25.03.2019

DECIDED ON : 09.08.2019

K.K.WICKREMASINGHE,J.

The Petitioner-Petitioner-Petitioner filed this revision application seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of Western Province holden in Panadura dated 31.10.2018 in Case No. REV 08/2018 and seeking to set aside the order of the Learned Magistrate of Panadura dated 14.02.2018 in Bail Application No. 04/2017.

Facts of the case:

A representative and sales manager of 1st Respondent-respondent-respondent (hereinafter referred to as the '1st respondent') made a complaint to the Colombo Crimes Division (hereinafter referred to as "the CCD") on 27.10.2017, stating that the Petitioner- Petitioner- Petitioner (hereinafter referred to as the 'petitioner') had defrauded the 1st Respondent a sum of money Rs.13, 722,922/= while being the Soft Logic Retail Manager in Wadduwa branch. Upon investigations, it was revealed that the petitioner had used names and addresses of 212 customers and had created forged invoices to commit this offence. Accordingly, the facts of the case were reported to the Learned Magistrate of Panadura on 07.11.2017, stating that the petitioner had committed offences under Section 370, 386, 389 and 400 of the Penal Code. Thereafter, on 20.11.2017, another B report was filed by the CCD, informing the Learned Magistrate that the petitioner was absconding and there is a likelihood of petitioner leaving the country. Therefore, the CCD sought a travel ban on the petitioner. Subsequently, the petitioner had filed an application for anticipatory Bail on 12.12.2017, before the Learned Magistrate of Panadura. The

Learned Magistrate dismissed the anticipatory Bail Application of the petitioner by the order dated 14.02.2018.

Being aggrieved by the said order, the petitioner preferred an application for revision to the Provincial High Court of Panadura. The parties were allowed to file written submissions and on 31.10.2018, the Learned High Court Judge dismissed the application.

Being aggrieved by the said dismissal, the petitioner preferred an application for revision to this Court.

Following grounds of revision were averred on behalf of the petitioner;

1. The order of the Learned High Court Judge is contrary to law
2. The Learned High Court Judge's refusal of the application of the petitioner does not reflect any legal analysis of the material before Court
3. There exist no evidence as to petitioner's conduct especially whether he was given notice of the matter pending in the Magistrate's Court
4. The Learned High Court Judge has lost sight of material evidence
5. The Learned High Court Judge and the Learned Magistrate failed and disregarded the circumstances that were prevalent before filing of the bail application

The contention of the Learned Counsel for the petitioner is that a grave misdirection of the concept of anticipatory bail has been occurred in both orders of the Learned Magistrate and the Learned High Court Judge. It was further argued that the investigations have been concluded in 17 cases whereas 212 complaints are alleged to exist and these were concluded in the absence of the petitioner. Therefore, the Learned Counsel for the petitioner raised a question as to whether arresting the petitioner would make a difference.

I observe that the concept of anticipatory bail was newly introduced to Sri Lanka by section 21 of the Bail Act. This is identical to the section relevant to anticipatory bail in India (section 438 of the Indian Code of Criminal Procedure) and since this is a new concept to Sri Lanka, most of the cases relevant to this topic can be found in Indian case law.

The Learned SSC for the Attorney General, submitted that the anticipatory bail was sought after the investigators had informed Court that the petitioner was absconding. It was further submitted that the Learned Magistrate had stated in her order that the petitioner sought anticipatory bail even after there is a travel ban issued to him. The Learned SSC for the Attorney General submitted following case law;

1. **Balachand Jain V. State of Madhya Pradesh [1977 AIR 366, 1977 SCR (2) 52]**
2. **Gurbakshi Singha Sibbia ETC V. State of Punjab [1980 AIR 1632, 1980 SCR (3) 383]**
3. **State of M.P. V. Pradeep Sharma (Criminal Appeal No. 2049 of 2013 dated 06.12.2013)**

I observe that in **Law of Bail, Bonds, Arrest and Custody**[1], the anticipatory bail is described as follows;

> *"...This power of granting 'anticipatory bail' is somewhat extraordinary in character and it is only in exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or 'there are reasonable grounds for holding that a person accused of*

[1] Dr. Ashok Dhamija, *Law of Bail, Bonds, Arrest and Custody*, 1st edn. reprint, LexisNexis Butterworths Wadhwa Nagpur, 2011, p. 325

an offence is not likely to abscond, or otherwise misuse his liberty while on bail' that such power is to be exercised..."

In the case of **Narinderjit Singh Sahni and Anr V. Union of India and Ors [AIR 2001 SC 3810; (2002) 2 SCC 210],** it was held that,

"...Section 438 contemplates an application by a person on an apprehension of arrest in regard to the commission of a non-bailable offence: the object being to relieve a person from unnecessary harassment or disgrace and it is granted when the Court is otherwise convined that there is no likehood of misuser of the liberty granted since he would neither abscond nor take such step so as avoid due process of law..."

In light of these, it is understood that anticipatory bail has to be granted in exceptional cases where it appears that a person might be falsely implicated, or there are reasonable grounds to believe that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail. Therefore, it is trite law that a suspect is not entitled to demand an anticipatory bail as a matter of rule, stating that his arrest would not make any difference. I see no merits in the above argument for the petitioner.

The Learned SSC for the Attorney General contended that an accused that has been declared as an absconder and not cooperated with the investigation should not be given an anticipatory bail. In the case of **Lavesh V. State (Nct of Delhi)** [*as followed in the case of* **State of M.P. V. Pradeep Sharma (supra)],** it was held that,

"From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as "absconder". Normally, when the accused is "absconding" and declared as

a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail." It is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail..."

In the case of **Lilaram L. Revani V. R.D. Gandhi and Ors. [1998 Cri LJ 14]**, it was held that,

"The object of anticipatory bail is to relieve a person from unnecessary apprehension or disgrace. Section 438 of Cr. P.C. is an extraordinary remedy and should be resorted to only in special cases. Anticipatory bail is not to be granted as a matter of rule. It is to be granted only when the Court is convinced that the person is of such a status that he would not misuse his liberty. For invoking the aid of anticipatory bail apart from the conditions of Section 437 of Cr. P.C. a special case should be made out for passing the order. ***It must be remembered that an order of anticipatory bail to some extent intrudes in the sphere of investigation of crime and the Court must be cautious and circumspect in exercising such power of a discretionary nature.*** *Some very compelling circumstances must be made out for granting ancitipatory bail..." (Emphasis added)*

I observe that a warrant of arrest was issued on the petitioner in the instant case, by the Learned Magistrate on 07.11.2018. Thereafter, two more warrants were issued on 13.12.2018 and on 31.01.2019. Therefore, it is manifested that the Police officers are unable to arrest the petitioner in connection with this case since the

petitioner is absconding. I further observe that both the Learned Magistrate and the Learned High Court Judge had considered the behaviour of the petitioner in refusing the application. Since anticipatory bail would not be granted as a matter of rule, in fact the Learned Magistrate was empowered to exercise her discretion in allowing or refusing the anticipatory bail application of the petitioner. Therefore, I answer the above contention of the Learned SSC for the Attorney General in affirmative.

It is imperative to note that the petitioner has filed the bail application only after the CCD has reported facts to the Magistrate on a B report. The Learned Magistrate made the following observation,

> *"...එසේම ඉහත කී 49580 දරන නඩුවේද ප්‍රකාශ කර ඇත්තේ, මෙම අපේක්ෂිත ඇප අයදුම්කරු වන රුක්ෂාන් සම්පත් මෙන්ඩිස් යන අය සිටිය ස්ථානයක් සොයා ගැනීමට නොහැකි බවත් ඔහු අධිකරණය මඟ හැරීමට බොහෝ සෙයින් උත්සාහ දරන බවත්, ඒ අනුව ඔහුගේ විදේශගමන් තහනම් කිරීමේ නියෝගයක් ලබා ගන්නා බවත්ය...*
>
> *ඒ අනුව මෙම අපේක්ෂිත ඇප අයදුම්කරු ද අදාළ පොලිස් විමර්ශන සඳහා සහයෝගය නොදී ස්ථානයට ඉදිරිපත් නොවී මඟ හරිමින් සිටින බවටත් කරුණු ඉදිරිපත් කර ඇති බවය..."* (Page 112 & 113 of the brief)

It is observed that the Learned Magistrate was of the view that the investigations could be adversely affected if the petitioner is granted anticipatory bail. Therefore, I am of the view that the Learned Magistrate was correct in refusing the application, since she was not completely satisfied that the petitioner was falsely implicated, or there were reasonable grounds to believe that the petitioner was not likely to abscond. Therefore, the Learned High Court Judge too was correct in refusing to interfere with the order of the Learned Magistrate.

In the case of **Bank of Ceylon V. Kaleel and others [2004] 1 Sri L.R 284,** it was held that,

> *"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court."*

Since there had been no illegality, irregularity or miscarriage of justice caused in both orders of the Learned High Court Judge and the Learned Magistrate, I am not inclined to interfere with the same. Therefore, I affirm both orders. I refuse to grant anticipatory bail to the petitioner.

The revision application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL