

In anticipation - of arrest

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WHAT is the pre-condition for a divorce?

Answer: Marriage

And what is the pre-condition for a bail? Obviously, "**arrest**"

. Then what is 'anticipatory bail'? Can one get a divorce in anticipation of a marriage?

Prior to 1973, there was no provision for anticipatory bail in the earlier Code of Criminal Procedure 1898. The position was that courts did not have the authority to grant anticipatory bail. In ***State of Madhya Pradesh v Narayan Prasad Jaiswal***, the Madhya Pradesh High Court (16 March, 1963) held that under the provisions of the Code of 1898, bail could not be granted to a person who hadn't been arrested.

The need for introducing a new provision in the CrPC authorizing Courts to grant "**anticipatory bail**" was pointed out by the 41st Law Commission of India in its report in 1969. The Commission observed that there was a need for granting anticipatory bail because there was a possibility that powerful persons may try to implicate their rivals in fake cases with the motive of "**disgracing**" them or with the motive of getting them to undergo imprisonment for few days.

Anticipatory bail is now a legal reality in Section 438 of the Code of Criminal Procedure 1973.

This is the story of an IAS officer who ultimately failed in his endeavour to get an anticipatory bail. Our IAS Officer, let us call him MGR, joined the IAS in 1985 and worked in various positions as Additional Secretary in the Central Home Ministry, Chief Secretary of Madhya Pradesh etc.,

In January 2021, the Enforcement Directorate issued summons to our MGR asking him to appear before the ED on 21.01.2021 as his presence was required for investigation of offences under the 'Prevention of Money Laundering Act'.

Apprehending his arrest in connection with the ED case, he approached the Telangana High Court by way of an anticipatory bail application under Section 438 Cr.PC. Without considering the rigour/bar under Section 45 of the PML Act, 2002 and observing that as per the decision of the Supreme Court in the case of ***Nikesh Tarachand Shah Vs. Union of India - 2017-TIOL-433-SC-PMLA***, the provisions of Section 45 of the Act, 2002 do not apply to Section 438 Cr.PC proceedings, the High Court allowed the anticipatory bail application and directed that in case of his arrest in connection with ED case, he be released on bail.

Aggrieved with this order of the High Court, the Directorate of Enforcement (ED) preferred an appeal in the Supreme Court.

The ASG, appearing for the ED - appellant vehemently submitted that in the facts and circumstances of the case, the High Court has committed a very serious error in granting anticipatory bail as:

1. The High Court has materially erred in observing that the provisions of Section 45 of the Act, 2002 shall not be applicable to Section 438 Cr.PC proceedings.
2. The High Court has erred in relying upon the decision of the Supreme Court in the case of ***Nikesh Tarachand Shah***.

3. The impugned judgment passed by the High Court is contrary to the decision of the Supreme Court in the case of **Dr. V.C. Mohan**.

4. The ED had gathered material which indicates nexus between respondent No. 1 (MGR) and one Srinivas Raju Mantena, who is found to have committed the offences of money laundering. During the investigation the ED has found that respondent No. 1 had availed and enjoyed free trips in last one year alone on the luxury plane of Mantena on multiple occasions. He had also availed other patronages from Srinivas Raju Mantena like sponsoring foreign exchange through Hawala Channels for his son.

5. Respondent No. 1 (MGR) was summoned by ED but instead of appearing before the IO, he filed a criminal petition before the High Court and obtained the interim relief.

6. Later, he appeared before the ED and his statement was recorded. However, he was totally evasive and non-cooperative and therefore, his custodial interrogation is required.

It was submitted by the counsel for the respondent No. 1 (MGR) that in the facts and circumstances of the case the High Court has not committed any error in granting anticipatory bail:-

1. In the present case so far as the main FIR is concerned, the other accused have been acquitted/discharged.
2. In the present case, respondent No. 1 was not named in the FIR for the scheduled offence(s).
3. As other accused persons have been acquitted/discharged for the predicate offence/schedule offence there is no question of any offence by respondent No. 1 under the 2002 Act /money laundering.
4. While granting the anticipatory bail, the High Court has followed the decision of the Supreme Court in the case of **Nikesh Tarachand Shah**, the law which was prevalent at the relevant time.
5. The prospective overruling of the said decision by the Supreme Court in the case of Dr. V.C. Mohan therefore, cannot be pressed into service while challenging the impugned judgment and order passed by the High Court granting anticipatory bail relying upon the decision/law prevalent at the relevant time.

The Supreme Court delivered its judgement last weekend (FEBRUARY 24, 2023) observing,

"Once the enquiry/investigation against respondent No. 1 is going on for the offence under the Act, 2002, the rigour of Section 45 of the Act, 2002 would be attracted".

As per Section 45 of the Act, 2002: Â-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence under this Act shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

The Supreme Court noted:

While granting anticipatory bail, the High Court has observed that the provisions of Section 45 of the Act, 2002 shall not be applicable with respect to the anticipatory bail applications/proceedings under Section 438 Cr.PC. for which the High Court has relied upon the decision of the Apex Court in the case of **Nikesh Tarachand Shah**. In the case of **Dr. V.C. Mohan**, this Court has specifically observed and held that it is the wrong understanding that in the case of **Nikesh Tarachand Shah**, this Court has held that the rigour of Section 45 of the Act, 2002 shall not be applicable to the application under Section 438

Cr. PC.

Therefore, the observations made by the High Court that the provisions of Section 45 of the Act, 2002 shall not be applicable in connection with an application under Section 438 Cr.PC is just contrary to the decision in the case of Dr. V.C. Mohan and the same is on misunderstanding of the observations made in the case of **Nikesh Tarachand Shah**. Once the rigour under Section 45 of the Act, 2002 shall be applicable, the impugned judgment and order passed by the High Court granting anticipatory bail to respondent No. 1 is unsustainable.

Even on merits, the Supreme Court found the impugned judgment of the High Court granting anticipatory bail to be erroneous and unsustainable. The Court observed,

While granting the anticipatory bail to respondent No. 1 (MGR) the High Court has not at all considered the nature of allegations and seriousness of the offences alleged of money laundering and the offence(s) under the Act, 2002. Looking to the nature of allegations, it can be said that the same can be said to be very serious allegations of money laundering which are required to be investigated thoroughly. As per the investigating agency, they have collected some material connecting the respondent having taken undue advantage from Srinivas Raju Mantena. From the impugned judgment, it appears that the High Court has considered the matter, as if, it was dealing with the prayer for anticipatory bail in connection with the ordinary offence under IPC.

Regarding the submissions of respondent No. 1 that he was not named in the FIR with respect to the scheduled offence and that the other accused are discharged/acquitted, the Supreme Court observed,

merely because other accused are acquitted, it cannot be a ground not to continue the investigation against respondent No. 1. An enquiry/investigation is going on against respondent No. 1 with respect to the scheduled offences. Therefore, the enquiry/investigation itself is sufficient at this stage.

The Supreme Court further observed,

"as per the catena of decision of this Court, more particularly, observed in the case of P. Chidambaram in case of economic offences, which are having an impact on the society, the Court must be very slow in exercising the discretion under Section 438 of Cr.PC."

The Supreme Court held,

the rigour of Section 45 of the Act, 2002 shall be applicable even with respect to the application under Section 438 Cr.PC

and therefore, the impugned judgment of the High Court granting anticipatory bail to respondent No. 1 is unsustainable.

Consequently, the impugned judgment of the High Court granting anticipatory bail to respondent No. 1 (MGR) is quashed and set aside.

However, the Court observed and made it clear that after respondent No. 1 is arrested, if he files any regular bail application, the same be considered in accordance with law and on its own merits and considering the material collected during enquiry/investigation of the case.

No bail anticipated in PMLA?

It is relevant to note that after the decision of the Supreme Court in the **Nikesh Tarachand Shah**

case, Parliament amended Section 45 of the PMLA in 2018. This was challenged in the Supreme Court in

Vijay Madanlal Choudhary vs Union of India - [2022-TIOL-60-SC-PMLA-LB](#). The Apex Court upheld the validity and held:

It would be preposterous and illogical to hold that if a person applies for bail after arrest, he/she can be granted that relief only if the twin conditions are fulfilled; but another person, who is yet to be arrested in connection with the same offence of money-laundering, will not be required to fulfil such twin conditions whilst considering application for grant of bail under Section 438 of the 1973 Code.

We have no hesitation in observing that in whatever form the relief is couched including the nature of proceedings, the underlying principles and rigors of Section 45 must come into play and without exception ought to be reckoned to uphold the objectives of the 2002 Act, which is a special legislation providing for stringent regulatory measures for combating the menace of money-laundering.

Until Next week