

the instant case, persons holding identical posts of P.C.M.S. Class II and having been admitted to the Post Graduate Courses for the purpose of improving their educational qualifications cannot be treated differently in the matter of pay for the duration of the Course solely on the ground of their length of service in P.C.M.S. Class II service. The length of service in the P.C.M.S. Class II service is to my mind wholly irrelevant so far as the Post Graduate Courses are concerned. Against, the doctors who were selected for the Post Graduate Courses in January, 1987 Session and have two years of rural service to their credit have also been given full pay during the period of the Course whereas it is denied to the doctors who joined in any subsequent session. There is no rationale behind this either. The Changed policy of the State Government is, therefore, discriminatory, violative of Article 14 of the Constitution and cannot be sustained.

Before concluding, it may be mentioned that counsel for the petitioners raised some other contentions as well which were peculiar to their cases but in view of the fact that my finding is that the changed policy of the State Government is discriminatory, it is not necessary to refer to those contentions.

In the result, the writ petitions are allowed and the decision of the State Government contained in Annexure P4 with the writ petition is quashed to the extent to which it denies to the P.C.M.S. Class II doctors with less than five years service their full pay during the period of the Post Graduate Course. The State Government is, thus, directed to pay to all the P.C.M.S. Class II officers their full pay for the duration of the Post Graduate Course, if not already paid. The petitioners shall have their costs which are assessed at Rs. 500 in each petition.

J.S.T.

Before : J. S. Sekhon, J.

HAKAM SINGH AND OTHERS.—Petitioner.

versus

THE STATE OF PUNJAB.—Respondent.

Criminal Misc. 8261-M of 1992.

Criminal Procedure Code (II of 1974)—Ss. 204 and 438(3)—Anticipatory bail—Magistrate can issue under section 204 either bailable

or non bailable warrants of arrest of an accused person—S. 438 (3) does not qualify the powers of the Magistrate in his discretion to issue warrants under section 204 after taking cognizance of a warrant case—Issuance of non-bailable warrants in the first instance is legal.

(Para 4)

Balwant Singh and others v. State of Punjab, 1993 Recent Criminal Reports 420, dissented from.

Held, that a conjoint reading of the entire section 438 of the Code leaves no doubt that sub-section (1) empowers the High Court or the court of Sessions to issue a direction for anticipatory bail when any person having reasonable apprehension that he may be arrested on an accusation of having committed non-bailable offence approaches such Court.

Held, that there is no escape but to hold that provisions of Sub-Section (3) of S. 438, Code of Criminal procedure only direct the Magistrate to issue non-bailable warrants while taken cognizance of the offence in non-bailable cases against those persons only which had procured anticipatory bail from the High Court or the court of Sessions under the provisions sub-section (1) of Section 438 of the code. By no stretch of imagination, it can be inferred that the provisions of Sub-Section (3) of section 438 of the code qualify the powers of the Magistrate in issuing warrants of arrest of an accused person under section 204 of the code after taking cognizance of warrant case.

Held, that it has been left to the discretion of the concerned Magistrate whether to issue bailable warrants or non-bailable warrant because if the legislature intended to circumvent the powers of the Magistrate to issue bailable warrants then only it would have specifically stated so in this provision.

Petition under Section 438 of the Code of Criminal Procedure praying that the petition may kindly be accepted and the petitioners may kindly be allowed pre-arrest bail during the pendency of the Trial.

It is further prayed that the adinterim stay of arrest may kindly be granted to the petitioners during the pendency of the petition in this Hon'ble Court, in case complaint No. 30 of 24th February, 1992 pending in the court of Sub-Divisional Magistrate, Anandpur Sahib, District Ropar under Section 302 read with Section 34 of the Indian Penal Code and 109 and 120-B of the Indian Penal Code.

A. S. Kalra, Advocate, for the Petitioner.

JUDGMENT

J. S. Sekhon, J.

(1) This Court had already rejected the application for anticipatory bail of the co-accused of the petitioners. As allegations of the complainant, these petitioners alongwith the co-accused had killed a hapless lady. The autopsy reveals that she has

died due to asphyxia. The committing Magistrate on taking cognizance of the offence had issued non-bailable warrants against the accused-petitioners. Instead of appearing before the Magistrate, the petitioners had approached this Court for anticipatory bail after it was rejected by the learned Additional Sessions Judge, Ropar.

(2) Mr. Kalra, learned counsel for the petitioners relying upon the judgment of the Single Bench of this Court in *Balwant Singh and others v. State of Punjab and another* 1983. Recent Criminal Reports 470 contends that as per provisions of sub-section (3) of Section 438 Cr. P.C. a Magistrate while taking cognizance of the non-cognizable offence was required to issue bailable warrants only and not non-bailable warrant. Thus he maintains that the petitioners are entitled to be released on anticipatory bail. The above-referred observation was made by the Single Bench while deciding the controversy whether in a case where Magistrate on a complaint had issued non bailable warrant, an application under section 438 Cr.P.C. for anticipatory bail is maintainable. In that case, it was not brought to the pertinent notice of the Single Bench that word 'such person figuring in sub-section (3) of Section 438 Cr.P.C.' pertains to the person who had already secured anticipatory bail on apprehension of being arrested to an accusation of having committed a non-bailable offence. With utmost respect to the learned Judge, I fail to agree with his observation that under section 204 Cr.P.C. Magistrate has powers to issue bailable warrants only in a warrant case.

(3) The provisions of Section 438 Cr.P.C. requires reproduction in order to understand the import of sub-section (3) thereof in proper context. Section 438 of the Code reads as under :—

“438. *Director for grant of bail to person apprehending arrest* :—

- (1) When any person has reason to believe that he may be arrested on an 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; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.
- (2) When the High Court or that 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;
 - (ii) a condition that the person shall not directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
 - (iii) a condition that the person shall not leave India without the previous permission of the Court;
 - (iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.
- (3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time, while in the custody of such officer, to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue aailable warrant conformity with the direction of the Court under Sub-Section (1)."

(4) A con-joint reading of the entire section leaves no doubt that sub-section (1) empowers the High Court or the Court of Session to issue a direction for anticipatory bail when any person having reasonable apprehension that he may be arrested on an accusation of having committed non-bailable offence approaches such Court. It is further clarified that the Court may direct in such cases that in the event of such arrest, the accused shall be released on bail. Sub-section (2) empowers the High Court and the Court of Session to impose such conditions in such directions under the facts and circumstances of the particular case including the one enumerated therein while sub-section (3) provides that if such person is thereafter arrested, without warrant by an officer-in-charge of a police station, on such accusation, then he shall be released on bail, if he is prepared to give bail and if a Magistrate decides to take cognizance of such offence against such person, then onlyailable warrant in conformity with the direction of the Court under sub-section (1)

shall be issued. Consequently, there is no escape but to hold that the provisions of sub-section (3) only direct the Magistrate to issue non-bailable warrants while taken cognizance of the offence in non-bailable cases against those persons only which had procured anticipatory bail from the High Court or the Court of Session under the provisions of sub-section (1) of Section 438 of the Code. By no stretch of imagination, it can be inferred that the provisions of sub-section (3) of Section 438 of the Code qualify the powers of the Magistrate in issuing warrants of arrest of an accused person under section 204 of the Code after taking cognizance of a warrant case. The provisions of Section 204 (1) read as under :—

204. *Issue of Process.*

- (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—
 - (a) summons-case, he shall issue his summons for the attendance of the accused; or
 - (b) a warrant case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) xx	xx	xx	xx
(3) xx	xx	xx	xx
(4) xx	xx	xx	xx
(5) xx	xx	xx	xx

Clause (b) of Sub-section (1) of Section 204 of the Code clearly empowers the Magistrate in a warrant case to issue warrants for causing the accused to be brought before him. It has been left to the discretion of the concerned Magistrate whether to issue a bailable warrant or non-bailable warrant because if the Legislature intended to circumvent the powers of the Magistrate to issue bailable warrants only then it would have specifically stated so in this provision. Consequently, for the reasons recorded above, there is no force in the contention of Mr. Kalra, that the Magistrate could have issued bailable warrants only.

(5) On merits also, keeping in view the aggravating circumstances of the case under which the murder of Mst. Balbir Kaur suffering from paralysis of the right side was committed by her own kith and kin, no case for anticipatory bail is made out.

Dismissed.