

AFR

Reserved on 31.03.2022

Delivered on 06.04.2022

Court No. - 34

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438
CR.P.C. No. - 20357 of 2021

Applicant :- Yogendra Kumar Mishra

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Dharmendra Shukla, Sr. Advocate

Counsel for Opposite Party :- G.A., Subhash Chandra Tiwari

Hon'ble Saurabh Shyam Shamsbery, J.

1. Applicant-Yogendra Kumar Mishra has approached this Court by way of filing this Criminal Misc. Anticipatory Bail Application under Section 438 Cr.P.C. after rejection of his anticipatory bail application vide order dated 30.11.2021 passed by Additional District and Additional District and Sessions Judge/Special Judge (POCSO Act), Allahabad, seeking Anticipatory Bail in Case Crime No. 324 of 2021, under Sections 376, 506, 328 IPC, 3/4 POCSO Act and 67 I.T. Act, Police Station Kotwali, District Prayagraj.

2. Sri Anil Tiwari, learned Senior Advocate has vehemently argued that it is a fit case for anticipatory bail. Undisputedly the applicant is a married person having a wife and son whereas Opposite Party No. 2 (Informant) alongwith her daughter (a minor girl and victim) are living separately from her husband. The Informant is a Teacher in a School where applicant is working as Class-IV employee in same school. It is admitted case that applicant has consensual relationship with Informant and Informant and her daughter are staying with him. There are cordial relationship with the son of applicant with the daughter of First Informant as brother and sister. In support of this submission learned Senior Advocate has relied on the photographs and whatsapp chat history which are part of record. Learned Senior Advocate also submits that their relations were very cordial and he has purchased a land in his name as well as in the name of Opposite Party No. 2 and an agreement to sell is also on record. The relationship become strained when First Informant, though not legally divorced, insisted

applicant to get merry which was not possible for applicant because he is a married person. In these circumstances, applicant withdrew the money deposited towards agreement to sell. All these circumstances made the First Informant annoyed and, therefore, a false FIR was lodged wherein false allegation of rape against applicant, not only with First Informant but with her minor daughter, was levelled. All the alleged incidents mentioned in FIR are very old. So far the allegation of rape with minor daughter is concerned, it is the case of First Informant that applicant himself communicated to her about the incident, therefore, considering that it is absolutely improbable, a case of anticipatory bail is made out. Learned Senior Advocate has also fairly submits that after the Trial Court rejected applicant's anticipatory bail, not only non-bailable warrant was issued against applicant but proceedings were also initiated under Sections 82 and 83 Cr.P.C.

3. Sri Munne Lal, learned A.G.A. appearing for State and Sri Subhash Chandra Tiwari, Advocate appearing for Opposite Party No. 2, have vehemently opposed the aforesaid submissions. They submitted that First Informant as well as her minor daughter have made a categorical statement against applicant in their statements recorded under Section 164 Cr.P.C. that they were raped on multiple times taking benefit of their separation and trust imposed by First Informant and her daughter with applicant. They also submitted that applicant is not cooperating with investigation process, therefore, not only non bailable warrant was issued but now proceedings under Sections 82 and 83 Cr.P.C. have also been initiated against applicant, therefore, no case for anticipatory bail is made out.

4. I have heard learned counsel for rival parties and perused the material available on record.

5. Few factors and parameters, which this Court has to consider for exercising discretion for grant or refusal of anticipatory bail are nature and gravity of accusation, exact role of the accused, his or her antecedents, possibility of the accused to flee from justice, likelihood to repeat similar or other offence. Whether accusation are made only with the object of injury and causing humiliation to the accused or case is of large magnitude with possible effect on a large number of people. Greater care and caution is

required while considering cases under Section 34 and 149 IPC. Further consideration of threat to complainant and witnesses and tempering of evidences are other relevant factors.

6. While considering anticipatory bail application this Court has to struck balance between two factors namely, no prejudice should be caused to the fair and free investigation and accused should not be subjected to harassment, humiliation and unjustified detention. This Court is justified to impose conditions spelt out in Section 437 Cr.P.C. and also other restrictive conditions if deem necessary in the facts and circumstances of a particular case including limit of the anticipatory bail but not in routine manner. An Anticipatory Bail Application has to be based on concrete facts (and not vague or general allegations) relatable to offence and why the applicant reasonably apprehends his or her arrest, as well as his version of the facts.

7. Before considering the case of applicant on merit with regard to prayer for anticipatory bail, I have to consider that since there are proceedings initiated against applicant under Sections 82 and 83 Cr.P.C., whether in the facts and circumstances of present case, the applicant is entitled for anticipatory bail or not.

8. In this regard it is relevant to rely upon the judgment passed by Supreme Court in **Prem Shankar Prasad vs. State of Bihar and another, AIR 2021 SC 5125** where in similar facts since proceedings under Sections 82 and 83 Cr.P.C. were initiated, the Supreme Court has relied on the judgment passed in **State of Madhya Pradesh v. Pradeep Sharma, (2014) 2 SCC 171** and reiterated that if anyone has been declared as absconder/ proclaimed offender under Section 82 Cr.P.C., he is not entitled for relief of anticipatory bail. The relevant paragraphs of the judgement in **Prem Shankar Prasad (supra)** are reproduced as under:

“7.2. Despite the above observations on merits and despite the fact that it was brought to the notice of the High Court that Respondent No. 2-Accused is absconding and even the proceedings Under Sections 82-83 of Code of Criminal Procedure have been initiated as far as back on 10.01.2019, the High Court has just ignored the aforesaid relevant aspects and has granted anticipatory bail to Respondent No. 2-Accused by observing that the nature of accusation

is arising out of a business transaction. The specific allegations of cheating, etc., which came to be considered by learned Additional Sessions Judge has not at all been considered by the High Court. Even the High Court has just ignored the factum of initiation of proceedings Under Sections 82-83 of Code of Criminal Procedure by simply observing that "be that as it may". The aforesaid relevant aspect on grant of anticipatory bail ought not to have been ignored by the High Court and ought to have been considered by the High Court very seriously and not casually.

7.3. In the case of State of Madhya Pradesh v. Pradeep Sharma (Supra), it is observed and held by this Court that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of Code of Criminal Procedure, he is not entitled to relief of anticipatory bail. In paragraph 14 to 16, it is observed and held as under:

14. In order to answer the above question, it is desirable to refer to Section 438 of the Code which reads as under:

438. Direction for grant of bail to person apprehending arrest.--(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--

(i) the nature and gravity of the accusation;

(ii) 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;

(iii) the possibility of the applicant to flee from justice; and

(iv) 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 above provision makes it clear that the power exercisable Under Section 438 of the Code is somewhat extraordinary in character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person Accused of an offence is not likely to otherwise misuse his liberty.

15. In Adri Dharan Das v. State of W.B. (2005) 4 SCC 303 this Court considered the scope of Section 438 of the Code as under: (SCC pp. 311-12, para 16)

16. Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead innocence, since he is not on the date of application for exercise of power Under Section 438 of the Code convicted for the offence in respect of which he seeks bail. The applicant must show that he has 'reason to believe' that he may be arrested in a non-bailable offence. Use of the expression 'reason to believe' shows that the belief that the applicant may be arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief' for which reason it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief of the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the court concerned to decide whether a case has been made out for granting of the relief sought. The provisions cannot be invoked after arrest of the Accused. A blanket order should not be generally passed. It flows from the very language of the Section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be

said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail 'whenever arrested for whichever offence whatsoever'. Such 'blanket order' should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order Under Section 438 is a device to secure the individual's liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. On the facts of the case, considered in the background of the legal position set out above, this does not prima facie appear to be a case where any order in terms of Section 438 of the Code can be passed.

16. Recently, in Laves v. State (NCT of Delhi) (2012) 8 SCC 730, this Court (of which both of us were parties) considered the scope of granting relief Under Section 438 vis-a-vis a person who was declared as an absconder or proclaimed offender in terms of Section 82 of the Code. In para 12, this Court held as under: (SCC p. 733)

12. 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.

Thus the High court has committed an error in granting anticipatory bail to Respondent No. 2-Accused ignoring the proceedings Under Section 82-83 of Code of Criminal Procedure.”

(emphasis supplied)

9. In the present case, Trial Court vide order dated 10.01.2022 has noted that despite proclamation for applicant being absconder issued under Section 82 Cr.P.C. and in this regard publication was also made in newspaper, the applicant remained absconding, therefore, by the said order Trial Court issued order for attachment of property, movable or immovable or both, belongs to proclaimed person, i.e., applicant, under the provisions of Section 83 Cr.P.C. Therefore, the facts and circumstances of present case squarely covers by the judgment passed by Supreme Court in **Prem Shankar Prasad (supra)**.

10. At this stage, this Court also deals with the rival submissions made by parties on merit.

11. On the basis of record available it appears that applicant first inspired confidence of victims and when they imposed complete trust on him, not only applicant violated the trust of First Informant but her minor daughter also. The averments made in the statements recorded under Section 164 Cr.P.C. also depict that applicant not only raped the First Informant but also raped her minor daughter. There are allegation that applicant has certain unsolicited video clips also and he has put threat to viral it and blackmailed the victim and her mother.

12. In view of above discussion the applicant is not entitled for anticipatory bail on the ground that applicant was not only declared proclaimed offender under Section 82 Cr.P.C. but proclamation of attachment of property was also issued under Section 83 Cr.P.C. and, therefore, as held in **Prem Shankar Prasad (supra)** applicant is not entitled for anticipatory bail. Even otherwise, on merit also, considering the specific averments made under Section 164 Cr.P.C. by First Informant as well as her minor daughter, there are very serious allegations against the applicant and, therefore, no case for anticipatory bail is made out on merit also.

13. The application is accordingly rejected.

14. However, two weeks time is granted to applicant to surrender before Trial Court and to move an application for bail. In case such an application is filed by applicant, Trial Court is directed to decide the same expeditiously

considering the judgment passed by Supreme Court in **Satender Kumar Antil vs. Central Bureau of Investigation and another, (2021) 10 SCC 773.**

Order Date :- 06.04.2022

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