

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Criminal Miscellaneous II Bail Application No. 20655/2021

Yashraj Bhardwaj Son of Shri Ashwini Bharadwaj, Aged About 26 Years, Resident of 677-A, Ganesh Vihar, Niwaroo Road, Jhotwara, Jaipur.

----Accused-Applicant

Versus

State Of Rajasthan, Through Public Prosecutor.

----Respondent

For Petitioner(s)	:	Mr. Swadeep Singh Hora with Mr. Tara Chand Sharma
For Respondent(s)	:	Mr. Ghan Shyam Singh Rathore, GA- cum-AAG Ms. Pragya Pandey with Mr. Rishi Kumar Sharma for the complainant

HON'BLE MR. JUSTICE MAHENDAR KUMAR GOYAL

Order

28/09/2022

This application for second anticipatory bail has been filed by the petitioner apprehending his arrest in connection with F.I.R. No. 365/2020 registered at Police Station Jawahar Circle, District Jaipur City (East) for the offence(s) under Section(s) 376(2)(n), 323, 341 & 384 IPC.

Learned counsel for the petitioner submits that after rejection of the first bail application by this Court vide its order dated 13.09.2021, there are certain subsequent developments which have material bearing on the issue entitling him to renew his prayer for pre-arrest bail.

He submits that FIR in the instant case itself was not maintainable as it was lodged on 17.07.2020 whereas, the

prosecutrix had already filed a complaint on 18.02.2020 in the Court of learned Chief Metropolitan Magistrate, Jaipur Metropolitan-I with similar allegations which came to be withdrawn by her on 17.07.2021 only after cognizance was already taken therein. He submits that from the statement of Shri Balveer Singh son of Shri Ratan Singh, an employee with the Hotel Moti Mahal, Pushkar, District Ajmer, recorded under Section 161 Cr.P.C., it is apparent that the prosecutrix has visited the hotel along with the petitioner on 27.02.2020 and has stayed there for a day; i.e., after filing the complaint on 18.02.2020. He submits that this fact itself demolishes the entire prosecution story. Learned counsel, drawing attention of this Court towards the charge-sheet No.109/2021 dated 07.05.2021 filed against Shri Kailash Chand Bohra in FIR No.80/2021 lodged by the prosecutrix, submitted that it reveals that the investigation done by Shri Kailash Chand Bohra in the FIR lodged against the petitioner was tainted and unfair. Referring to the status report dated 25.10.2021 submitted by the Assistant Police Commissioner Adarsh Nagar, Jaipur (East) in the Court of learned Chief Metropolitan Magistrate, Jaipur Metropolitan-I, learned counsel submitted that it unequivocally states that the petitioner has co-operated during the course of investigation. He submitted that in two more FIRs i.e., FIR No.68/2021 dated 25.01.2021 and FIR No.123/2021 dated 17.02.2021 lodged by the prosecutrix against him, the police after thorough investigation submitted negative final report. He would further submit that from a perusal of the contents of charge sheet filed against him, it is apparent that it was a case of consensual sex in between him and the prosecutrix and no offence is made

out. He, therefore, prays for benefit of pre-arrest bail. To buttress his submission that the petitioner is entitled to renew the prayer for pre-arrest bail, learned counsel relies upon the judgments of the Hon'ble Apex Court of India in the cases of **Rani Dudeja Vs. State of Harayana (2017) 13 SCC 555, Babu Singh & Ors. Vs. State of U.P. (1978) 1 SCC 579, Ravindra Saxena Vs. State of Rajasthan (2010) 1 SCC 684, Bharat Chaudhary and Anr. Vs. State of Bihar and Anr., (2003) 8 SCC 77, Bhadresh Bipinbhai Sheth Vs. State of Gujarat and Anr., (2016) 1 SCC 152 and Shri Gurbaksh Singh Sibbia and Ors. Vs. State of Punjab (1980) 2 SCC 565** and a judgment of full Bench of this Court in the case of **Ganesh Raj vs. State of Rajasthan and Ors., 2005 SCC OnLine Raj 319.**

Per contra, learned Government Advocate-cum-Additional Advocate General submitted that there is no such substantial change in circumstance or supervening facts after dismissal of the first bail application by this Court vide its order dated 13.09.2021 on merit, which could entitle the petitioner to renew prayer for pre-arrest bail. Placing reliance upon a judgment of Hon'ble Apex Court of India in case of **G.R. Ananda Babu Vs. State of Tamil Nadu & Anr., (2021) SCC OnLine SC 176**, learned Government Advocate submitted that this successive bail application under Section 438 Cr.P.C. is not maintainable.

Relying on a judgment of the Hon'ble Apex Court of India in case of **Kapil Agarwal & Ors. vs. Sanjay Sharma & Ors., (2021) 5 SCC 524**, learned AAG submitted that the scheme of Code of Criminal Procedure, 1973 (for brevity, "the Code of 1973") permits lodging of an FIR as also a criminal complaint on the same

set of allegation. He submits that in the instant case, after lodging the FIR, the prosecutrix has withdrawn the complaint filed by her. Inviting attention of this court towards the order sheets of the learned Court in the complaint case filed by the prosecutrix, he submitted that cognizance was never taken therein and the seal dated 11.01.2021 to the effect the matter was transferred to the Court of learned Additional Chief Metropolitan Magistrate-2, Jaipur Metropolitan-I under Section 192 Cr.P.C. came to be affixed inadvertently/erroneously. He would further submit that merely because Shri Balveer Singh, an employee in the Moti Mahal Hotel, Pushkar, has stated in his statement under Section 161 Cr.P.C. that the petitioner and the complainant visited the hotel on 27.02.2020, i.e., after filing the complaint on 18.02.2020, it is of no significance and help to the petitioner in the totality of circumstances wherein, based on the statements of the prosecutrix recorded under Sections 161 & 164 Cr.P.C and other overwhelming evidence on record, charge-sheet has been filed against him under Sections 376(2)(n), 323, 341, 384, 313 & 120-B IPC and Sections 67 of the Information Technology Act, 2008.

With regard to contention of the learned counsel for the petitioner that he has falsely been implicated on account of tainted investigation by Shri Kailash Chand Bohra, learned Government Advocate submitted that he remained Investigating Officer from 03.11.2020 to 14.03.2021 only and the investigation was carried out by two Investigating Officers prior to that and one Investigating Officer thereafter and on the basis of material collected by them during course of investigation, complicity of the

petitioner was found in the offence culminating into charge-sheet against him.

Inviting attention of this Court towards the charge-sheet filed against the petitioner, he submitted that the petitioner neither co-operated during the course of investigation nor, he appeared before the Investigating Officer even in pursuance of the notice dated 12.08.2021 served upon him which was issued in pursuance of direction of this Court dated 14.12.2020 in S.B. Criminal Misc. Petition No.3581/2020. He would further submit that since the petitioner is absconding, an order has been passed by the learned trial Court to initiate proceedings under Sections 82 and 83 of the Code of 1973. He, therefore, prayed for dismissal of the second bail application.

Shri Rishi Kumar Sharma, learned counsel for the complainant/prosecutrix submitted that she has already filed protest petitions in the matter of negative final reports submitted by the Investigating Agency in FIR No. 68/2021 and in FIR No.123/2021 which are pending consideration.

Heard. Considered.

First this Court examines the scope of entertaining the successive bail application under Section 438 Cr.P.C. after dismissal of the first bail application on its merit.

In case of **Rani Dudeja (supra)**, their Lordships, while dealing with a situation wherein, the High Court had dismissed the second petition filed by the accused-appellant after dismissal of the first bail application as withdrawn, held as under:

"3.We are afraid, the stand taken by the High Court cannot be appreciated. The petition was for anticipatory bail and the one which had

been filed earlier might have been withdrawn in a given situation, without inviting the Court to consider the same on merits. On change of circumstances, when another application under Section 438 Cr.P.C. was filed, the High Court should have considered the same on merits. The principle of res judicata could not have operated in an application for bail."

In case of **Babu Singh (supra)**, it was held that an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations.

In case of **Ravindra Saxena (supra)**, their Lordships held that the High Court erred in dismissing the successive anticipatory bail without considering his case solely on the ground that the challan has now been presented.

In case of **Bharat Chaudhary (supra)**, it was held that mere fact of taking of cognizance or filing of charge-sheet would not preclude the Court from entertaining the application under Section 438 Cr.P.C.

In case of **Bhadresh Bipinbhai Sheth (supra)**, it was held that frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

In case of **Shri Gurbaksh Singh Sibbia (supra)**, a Constitution Bench has laid down general principles governing the grant of pre-arrest bail.

In case of **G.R. Ananda Babu (supra)**, a three Judges Bench of the Hon'ble Apex Court of India held as under:

"7. As a matter of fact, successive anticipatory bail applications ought not to be entertained and more so, when the case diary and the status report, clearly indicated that the accused (respondent No. 2) is absconding and not cooperating with the investigation. The specious reason of change in circumstances cannot be invoked for successive anticipatory bail applications, once it is rejected by a speaking order and that too by the same Judge."

In case of **Ganesh Raj (supra)**, a Full Bench of this Court held that the second or subsequent anticipatory bail application under Section 438 Cr.P.C. can be filed if there is a change in the fact, situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Second or subsequent anticipatory bail application shall not be entertained on the ground of new circumstances, further developments, different considerations, some more details, new documents or illness of the accused.

From the conspectus of the aforesaid judgments, the legal position which emerges is that right of an accused to renew his prayer for pre-arrest bail cannot be precluded only on the ground of dismissal of first bail application on merit. If there is some substantial change/development in the fact situation or in law which requires reconsideration of the prayer, it can be entertained.

Now, the question arises as to whether this second bail application meets the aforesaid requirement for its entertainment and as to whether the petitioner is entitled for the benefit of bail, if circumstances entitling the petitioner for renewal of prayer for pre-arrest bail exist.

Although, the first submission of the learned counsel for the petitioner that FIR itself was not maintainable inasmuch as it was lodged during pendency of the complaint containing the self-same allegations against him which, after taking cognizance, was withdrawn by her vide order dated 17.07.2021, does not constitute a new fact or new development post dismissal of the first bail application; in any case, would not furnish the petitioner a ground for benefit of pre-arrest bail for the reasons; firstly, from the order-sheets placed on record, this Court is not satisfied that cognizance on the complaint filed by the prosecutrix was ever taken and secondly, under the scheme of the Code of 1973, there is no bar against lodging of an FIR along with the complaint/during its pendency on the same set of allegations as has been held by the Hon'ble Apex Court of India in case of **Kapil Agarwal (supra)**. Hence, in the considered opinion of this Court, the petitioner is not entitled for benefit of bail on this ground.

The second circumstance relied upon by the learned counsel for the petitioner for renewal of prayer is statement of Shri Balveer Singh, the hotel employee, recorded under Section 161 Cr.P.C. submitted along with the charge-sheet post rejection of the first bail application, although, may furnish the petitioner a ground for renewal of prayer; but, is also of no help to the petitioner in view of overwhelming evidence and material on record showing his complicity in the offence for which he has been charge-sheeted as it is trite law that marshalling or sifting of evidence is not permissible at the stage of consideration of bail application.

This Court is not satisfied that the petitioner deserves benefit of pre-arrest bail on account of tainted investigation by Shri

Kailash Chand Bohra inasmuch as he has remained Investigating Officer from 03.11.2020 till 14.03.2021 and before he joined the investigation, two Investigating Officers have already conducted a part of investigation wherein, they have recorded the statements under Section 161 Cr.P.C. including the statement of the prosecutrix under Section 164 Cr.P.C. and as per the factual report dated 07.09.2020, i.e., before Shri Kailash Chand Bohra joined the investigation, petitioner was found to be involved in the offence. Even otherwise also, the last Investigating Officer, after investigation, submitted charge-sheet against the petitioner finding his involvement in the offence. In view thereof, this Court is not satisfied that the petitioner has been roped in only on account of tainted investigation by one of the Investigating Officers.

This Court is not inclined to extend the petitioner benefit of pre-arrest bail on the plea that he has cooperated during investigation. The charge-sheet filed against him reveals that the petitioner did not cooperate during the course of investigation and he did not appear before the Investigating Officer despite receipt of seven days prior notice dated 12.08.2021 which was issued in pursuance of order of this Court dated 14.12.2020 passed in S.B. Criminal Misc. Petition No.3581/2020. Even otherwise also, the charge-sheet against the petitioner has been filed under Section 299 Cr.P.C., the learned trial Court has held the petitioner to be absconder vide its order dated 20.05.2022 and has directed initiation of proceedings under Sections 82 and 83 Cr.P.C.

Taking into consideration the totality of the circumstances, the nature and gravity of allegation against the petitioner and the

material contained in the charge-sheet; but, without expressing any opinion on the merits of the case, this Court is not inclined to extend the petitioner benefit of pre-arrest bail.

The second pre-arrest bail application is dismissed accordingly.

(MAHENDAR KUMAR GOYAL),J

Sudha/25

RAJASTHAN HIGH COURT



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