

Dr. Kartikeya Sharma And 2 Others vs State Of U.P. And Another on 9 May, 2023

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

Neutral Citation No. - 2023:AHC:101507

Court No. - 84

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 3107 of 2023

Applicant :- Dr. Kartikeya Sharma And 2 Others

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

Counsel for Applicant :- Surya Bhan Singh

Counsel for Opposite Party :- G.A.,Ajay Kumar Shukla

Hon'ble Nalin Kumar Srivastava,J.

1. Rejoinder affidavit filed today is taken on record.

2. Apprehending their arrest in criminal case no.29542 of 2022 arising out of case crime no.1306 of 2021 under Sections 498-A, 323, 354, 504, 506 IPC and 3/4 Dowry Prohibition Act, Police Station Quarsi, District Aligarh, the applicants - Dr. Kartikeya Sharma, Ajaya Kumar Sharma and Smt. Sangeeta Sharma have moved this anticipatory bail application after submission of the charge-sheet before this Court.

3. The two anticipatory bail applications moved by the applicants have been rejected by the Court of Sessions Judge, Aligarh vide order dated 28.2.2023.

4. Heard Sri Surya Bhan Singh, learned counsel for the applicants, Sri Ajay Kumar Shukla, learned counsel for the complainant / opposite party no.2 and Sri Devesh Kumar Singh, learned A.G.A. for the State.

5. It is alleged in the F.I.R. that the informant Dr. Pallavi Sharma was married to applicant no.1 Dr. Kartikeya Sharma on 27.11.2015 and since after the marriage, the informant was being subjected to cruelty and harassment on account of demand of Rs.2 Crore as additional dowry and she was being mentally and physically exploited by her in-laws. Her father-in-law also used criminal force to her with intent to outrage her modesty. Accused applicant no.1 is the husband, applicant no.2 is the father-in-law and applicant no.3 is the mother-in-law of the informant / opposite party no.2. F.I.R. was lodged on 28.12.2021 and investigation started.

6. Learned counsel for the applicants submits that the applicants are innocent and they have apprehension of their arrest in the above-mentioned case, whereas there is no credible evidence against him. Allegations levelled against the applicants are false. It is further submitted that the applicant no.1 and opposite party no.2 are well educated persons and doctor by profession. No dowry demand was ever made by the applicants and the informant / opposite party no.2 was never subjected to cruelty and harassment by them. Since the opposite party no.2 was pressurizing the applicant no.1 to leave his parents, she started to live separately with applicant no.1 and his son. Both husband and wife are working as Doctor and they have very good income. The opposite party no.2 was continuously pressurizing the applicant no.1 to settle at Aligarh and to manage the Nursing Home of her father leaving his old aged parents at Ghaziabad, but when the applicant no.1 was not ready to fulfill her demand, the present F.I.R. was lodged with false facts. It is further submitted that the applicant nos. 2 & 3 are senior citizens and are suffering from the diseases of old age and are also unable even to walk properly without any support. It is further submitted that the applicants have preferred criminal misc. writ petition no.1529 of 2022 before this Court and same was disposed of in view of the scope and objective of Section 41 and 41-A Cr.P.C. in the light of the decision of the Hon'ble Apex Court in Arnesh Kumar vs. State of Bihar and another, (2014) 8 SCC 273. It is further submitted that in this matter, the charge-sheet has been filed under Sections 498-A, 323, 354, 504, 506 IPC and 3/4 Dowry Prohibition Act wherein the maximum period of imprisonment is prescribed upto seven years. Under these circumstances, the applicants deserve for grant of anticipatory bail till end of the trial.

7. Per contra, learned A.G.A. as well as learned counsel for the informant vehemently opposing the anticipatory bail application have submitted that during the course of investigation, sufficient evidence has been collected against the accused applicants. It is further submitted that the applicants have moved an application u/s 482 Cr.P.C. No. - 35236 of 2022 before this Court, but the same was withdrawn and vide order dated 8.12.2022, this Court disposed of the aforesaid application as withdrawn with liberty given to them to appear before the court concerned and file appropriate application for bail. However, instead of moving bail application, another application u/s 482 Cr.P.C. No. - 42203 of 2022 was moved before this Court by the applicants but the same was dismissed vide order dated 28.1.2023. It is further submitted that after filing of the charge-sheet, several processes were issued against the accused applicants, but they deliberately avoided the service of the processes sent by the Court of Magistrate and subsequently, on 18.4.2022,

the court of Magistrate at Aligarh passed an order to issue process under Section 82 Cr.P.C. against the accused applicants. Attention of the Court has drawn to the fact that the process of the court has not been honoured by the accused applicants. After filing of the charge-sheet, when process was issued to summon them, they did not appear before the court and the court then proceeded to issue non-bailable warrant against them and subsequently process under section 82 Cr.P.C. was also issued against them, which means that they have been declared proclaimed offenders by the court. It is further submitted that since the applicants are not obeying the orders passed by the court and they are in the category of proclaimed offenders, they are not entitled for any relief in the form of anticipatory bail.

8. Reliance has been placed on the decision of the Hon'ble Supreme Court in Prem Shankar Prasad Versus State of Bihar and Another, 2021 SCC OnLine SC 955. In the facts of the aforesaid case, charge-sheet was filed under Sections 406, 420 IPC against the accused and thus it was explicit that a prima facie case against the accused was found. From the record, it revealed that the arrest warrant was issued by the Magistrate against the accused and thereafter proceedings under Sections 82, 83 Cr.P.C. had been initiated pursuant to the order passed by the Magistrate. Only thereafter the accused moved an application before the trial court for anticipatory bail, which was rejected by the Sessions Court. However, subsequently anticipatory bail was granted to the aforesaid accused by the High Court and when the matter came before the Hon'ble Apex Court, it was observed like this.

"19. 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 Cr. P.C. 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 Cr. P.C. 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.

20. 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 Cr. P.C., he is not entitled to relief of anticipatory bail."

9. In rejoinder, learned counsel for the applicants further submits that the present anticipatory bail application on behalf of the applicants has been filed before this Court prior to issuance of proclamation under section 82 Cr.P.C. The proclamation u/s 82 Cr.P.C. has been issued by the court concerned on 18.4.2022, as such, meaning thereby that when the present applicants filed this application u/s 438 Cr.P.C. on 18.3.2023, they were not declared as proclaimed offenders so the bar imposed by the Hon'ble Apex Court entertaining anticipatory bail of the proclaimed offender would not attract in the present case. In support of his contention, learned counsel for the applicants has

placed reliance on the decision of this Court in *Manish Yadav Vs. State of U.P.*, 2022 o Supreme (All) 629. In that matter, anticipatory bail application was filed in the month of April, 2022 before the Sessions Court and was rejected on 30.4.2022 and proclamation under section 82 Cr.P.C. was issued by the court concerned on 9.5.2022 and it was held therein that after rejection of the anticipatory bail application, the aggrieved person has got a right to approach the High Court for such anticipatory bail and if in the interregnum period any proclamation under section 82 or section 83 Cr.P.C. is issued, it may be considered as a circumventive exercise being taken by the Investigating Officer. It was further held by the Division Bench of this Court that when the application for anticipatory bail was filed before the Sessions Court, there was no proclamation under section 82 Cr.P.C. and such proclamation was issued after the rejection of anticipatory bail application. Hence it was held that the bar to entertain anticipatory bail application after issuance of proclamation under section 82 Cr.P.C. would not be attracted in that case.

10. In the present case, the anticipatory bail application was rejected by the Sessions Court on 28.2.2023 and a perusal of the rejection order reveals that since then no proceedings under section 82 or 83 Cr.P.C. were started against the accused applicants after rejection of the anticipatory bail application from the Sessions Court, on 18.3.2023 the present anticipatory bail application has been moved before this Court for anticipatory bail. It reveals from the perusal of the record that process under section 82 Cr.P.C. has been issued on 18.4.2022, which means that pending application for anticipatory bail before this Court, the said proclamation was made by the court concerned. Hence, it is clear that the present applicants were not proclaimed offenders at the time of making their application for anticipatory bail before this Court. So the bar imposed by the Hon'ble Supreme Court in *Prem Shankar Prasad* (supra) for not entertaining the anticipatory bail application of a proclaimed offender is not attracted in the present case.

11. The alleged offences are punishable with the imprisonment of maximum period of seven years. Admittedly, proclamation u/s 82 Cr.P.C. is issued after filing of the present anticipatory bail application u/s 438 Cr.P.C. Charge-sheet has been filed in the matter. Applicants have been cooperative during the course of investigation and there is nothing on record to show otherwise. The investigating officer did not find any ground to arrest them during the course of investigation. They have not misused the liberty granted to them. Their custodial interrogation was also considered as not required by the investigating officer.

12. In *Sushila Aggarwal and others vs. State (NCT of Delhi) and another*, (2020) 5 SCC 1, the Hon'ble Apex Court has settled the controversy finally by holding the anticipatory bail need not be of limited duration invariably. In appropriate case, it can continue upto conclusion of trial.

It has been further held therein that anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.

It has been further held by the Hon'ble Apex Court that while considering an application for grant of anticipatory bail, the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence including intimidating witnesses, likelihood of fleeing justice, such as leaving the country, etc. It has further

been held that Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion.

13. Hence, considering the settled principles of law regarding anticipatory bail, submissions of the learned counsel for the parties, nature of accusation, role of applicants and all attending facts and circumstances of the case, without expressing any opinion of the merits of the case, in my view, it is a fit case for anticipatory bail to the applicants till end of the trial in the matter.

14. The anticipatory bail application is allowed.

15. In the event of arrest of the applicants in the aforesaid case, they shall be released on anticipatory bail till end of the trial on their furnishing a personal bond of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of the Court concerned with the following conditions :-

(i) The applicants shall make themselves available before the court concerned on the date fixed in the matter;

(ii) The applicants 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 / her from disclosing such facts to the Court or to any police officer;

(iii) The applicants shall not leave India without the previous permission of the Court and if they have passport, the same shall be deposited by them before the S.S.P./S.P. concerned.

16. In case of default of any of the conditions, same may be a ground for cancellation of protection granted to the applicants.

17. Before parting, the Court owes it as its duty to remind the Sessions Courts as to what is the actual scope of Section 438 Cr.P.C. and powers of the Sessions Court thereunder and the Court has moved into this direction, as the learned A.G.A. has drawn the attention of the Court to the anticipatory bail rejection order dated 28.2.2023 passed by the Sessions Court, Aligarh. At page 3 of the said rejection order, it is mentioned like this -

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18. With utter surprise to this Court even after so many directions issued by the Hon'ble Apex Court with regard to the scope of anticipatory bail, it appears that still there exists a state of confusion amongst the Sessions Courts. Right from the renowned case of Gurbaksh Singh Sibbia Vs. State of Punjab (1980) 2 SCC 565 upto the case of Sushila Aggarwal and others vs. State (NCT of Delhi) and another, (2020) 5 SCC 1 and even in umpteen subsequent pronouncements, it has repeatedly been held and reiterated that filing of the charge-sheet into a criminal matter is never meant that the scope of anticipatory bail comes to an end.

19. The Hon'ble Supreme Court in Sushila Aggarwal (supra) case, considering the observations made by the Constitution Bench of Hon'ble Supreme Court in Gurbaksh Singh Sibbia (supra) case held as hereinunder.

"We are of the opinion that the conditions can be imposed by the concerned court while granting pre-arrest bail order including limiting the operation of the order in relation to a period of time if the circumstances so warrant, more particularly the stage at which the "anticipatory bail" application is moved, namely, whether the same is at the stage before the FIR is filed or at the stage when the FIR is filed and the investigation is in progress or at the stage when the investigation is complete and the charge-sheet is filed. However, as observed hereinabove, the normal rule should be not to limit the order in relation to a period of time."

It was also held in the aforesaid case that to lay down strict, inflexible and rigid rules for exercise of such discretion under section 438 Cr.P.C. by limiting the period for which an order under section 438 Cr.P.C. could be granted, is unreasonable and the courts should not impose restrictions on the ambit and scope of section 438 Cr.P.C. which are not envisaged by the legislature. The Court cannot rewrite the provision of the statute in the garb of interpreting it.

20. It is to be reminded that following questions had been referred to the Larger Bench of five Judges in Sushila Aggarwal (supra) case.

(1) Whether the protection granted to a person under Section 438 Cr. PC should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.

(2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court.

Regarding first question, it was concluded that the protection granted under section 438 Cr.P.C. should not always or ordinarily be limited to a fixed period; it should ensure in favour of the accused without any restriction as to time. However, usual or standard conditions under section 437 (3) read with section 438 (2) may be imposed having regard to the peculiar features of a particular case.

The second question, which is pertinent for the matter in hand was answered by holding that the life of an anticipatory bail does not end generally at the time and stage when the accused is summoned by the court, or after framing of charges, but can also continue till the end of the trial. However, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

It was further held explicitly that "anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial. Also orders of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence." and the legal dictum is more specific when it pronounces that "anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge-sheet till end of trial."

21. The same principle echoes in Ravindra Saxena Vs. State of Rajasthan, 2010 (1) SCC 684, wherein the Hon'ble Supreme Court reiterating the verdict of the Constitutional Bench in Gurbaksh Singh Sibbia (supra) case held that "anticipatory bail can be granted at any time so long as the applicant has not been arrested. When application is made to High Court or Court of Sessions, it must apply its own mind on the question and decide when the case is made out for granting such relief. The High Court ought not to have left the matter to Magistrate only on the ground that challan has now been presented.....Salutory provision contained in Section 438 was introduced to enable the court to prevent deprivation of personal liberty. It cannot be permitted to be jettisoned on technicalities such as the challan having been presented, anticipatory bail cannot be granted."

22. Earlier in Bharat Chadhary Vs. State of Bihar, (2003) 8 SCC 77, it was specifically held by the Hon'ble Supreme Court that "The object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the courts concerned while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of a charge sheet cannot by itself be construed as a prohibition against the grant of anticipatory bail. The courts i.e. the Court of Session, High Court or Supreme Court have the necessary power vested in them to grant anticipatory bail in non-bailable offences under Section 438 Cr.P.C. even when cognizance is taken or a charge sheet is filed provided the facts of the case require the court to do so."

23. So far as the present case is concerned, since the offences alleged against the accused applicants were punishable with imprisonment for a maximum period of seven years, a notice under Section 41-A Cr.P.C. was given to them by the Investigating Officer, which means that their custodial interrogation was not considered necessary by the Investigating Officer of the case and their personal liberty was protected till submission of police report under Section 173 (2) Cr.P.C.

24. The legal consequences ensue the same, whether an accused is granted anticipatory bail till filing of police report under Section 173 (2) Cr.P.C. by the Court or a notice under section 41-A Cr.P.C. is given to him by the Investigating Officer, that the accused is not going to be arrested during the course of investigation subject to the conditions imposed upon him by the Court or terms embodied in the said notice.

25. From the above, it is explicitly clear that even if the charge-sheet is filed and cognizance is taken by the court against the accused, who has got an immunity from being arrested during the course of investigation either by way of order of a competent court protecting him by grant of anticipatory bail or by service of notice under Section 41-A Cr.P.C. by the Investigating Officer, anticipatory bail application moved by him is legally maintainable and it can never be rejected on the ground that now charge-sheet has been filed and cognizance has been taken by the court concerned. Hence, the observation given by the learned Sessions Court while rejecting the anticipatory bail application of the applicants vide order dated 28.2.2023 is a misnomer and the settled legal position cannot be permitted to be contorted in any manner.

26. Registry is directed to send a copy of this order to the court concerned.

Order Date :- 9.5.2023 ss