A.F.R.

Court No. - 67

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 12714 of 2021

Applicant :- Ivan Masood And 3 Others
Opposite Party :- State of U.P. and Another
Counsel for Applicant :- Ashok Nath Tripathi
Counsel for Opposite Party :- G.A.,Rajiv Lochan Shukla

Hon'ble Rahul Chaturvedi,J.

(1) Heard Shri Ashok Nath Tripathi, learned counsel for the applicants; Shri Rajiv Lochan Shukla, learned counsel for the opposite party no.2 as well as learned A.G.A. for the State. Perused the records of the case.

(2) Instant application u/s 438 Cr.P.C. on behalf of the applicants, namely, Ivan Masood, Masudur Rab, Smt. Fatmi Iqbal and Asif, being preferred before this Court straightaway, who are apprehending their arrest pursuant to F.I.R. lodged by opposite party No.2 as Case Crime No.499 of 2021, u/s 498-A, 307, 504, 506 I.P.C., Section ¾ of Dowry Prohibition Act and Section ¾ of Muslim Women (Protection of Rights on Marriage) Act, 2019, P.S.-Karaili, District-Prayagraj.

(3) From the records of the case, it is evident that the applicants have approached this Court directly without getting their anticipatory bail application rejected from the Court of Session, Prayagraj. Capitalizing this issue, Shri Rajiv Lochan Shukla, learned counsel for the opposite party no.2 has raised two fold preliminary objections with regard to the maintainability of the instant application itself. They are :

> **(a)** That the applicants without exhausting the forum i.e. approaching the Court of Session at the first instance, have directly approached this Court in exercise of power u/s 438 Cr.P.C. (U.P. Act No.4 of 2019) and without specifying those “special and extraordinary circumstances” for this bye-pass, as propounded in the Full Bench judgment of this Court in ***Ankit Bharti and others vs State of U.P. and another*** reported in ***2020 (3)***

ADJ 575 and thus the instant Anticipatory Bail Application is liable to be dismissed on this score alone, in the light of above judgment.

(b) Secondly, it was argued by the learned counsel for the opposite party no.2 that since the F.I.R. among many other sections of I.P.C. and D.P. Act, is also under Section ¾ of Muslim Women (Protection of Rights on Marriage) Act, 2019, thus, the provisions of Section 7(c) of the Act 2019 are also attracted in this case. For the sake of brevity, the above provisions of Section 7(c) are spelled out herein below :-

"7. Notwithstanding anything contained in the Code of Criminal Procedure, 1973,-

(c) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom talaq is pronounced, is satisfied that there are reasonable grounds for granting bail to such person."

From the above provisions, it was argued that 'the Magistrate while entertaining bail application filed by the accused, shall have to give an opportunity of hearing to that married muslim woman upon whom *talaq* is pronounced before adjudging the bail application. Thus, a notice is required to be served upon the *"triple talaq victim"* before adjudicating the present anticipatory bail.

(4) Let us examine these two initial objections raised by the learned counsel for the opposite party no.2 one by one:-

(I) So far as approaching this Court directly u/s 438 Cr.P.C. is concerned, as to the maintainability of present anticipatory bail application, without exhausting the first ladder i.e. approaching to the Court of Sessions, without spelling out that special and extraordinary situation which prompted the applicants to approach this Court directly. In this regard, Shri Ashok Nath Tripathi, learned counsel for the applicants has drawn attention of this Court to Clause 7 of Section 438 Cr.P.C. (U.P. Act No.4 of 2019), which states :

"(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."

On the plain reading of above clause, as argued by learned counsel for the applicants, it is explicit and self-contained, that the High Court and the Court of Sessions, both have been given concurrent powers to deal and decide the anticipatory bail, with only one rider that, if a person approaches the High Court at the first instance without exhausting his earlier remedy i.e. approaching to the Court of Sessions, then he would not be relegated back to approach the Court of Sessions after loosing this case from the High Court.

Shri Tripathi, learned counsel for the applicants further submits for applying ***Lord Wensleydale's Golden Rules of Interpretation*** *for any statute. [According to him "Interpretation is the method by which the true sense or meaning of the world is understood. 'The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. The purpose of the interpretation of the statute is to unlock the locks put by the legislature. For such unlocking, keys are to be found out. These keys may be termed as aids of interpretation and the principles of interpretation. …….....'*

It is a very useful rule in the construction of a statute to adhere to ordinary meaning of the words used, and to the grammatical construction unless that is at variance with intention of the Legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further."]

Learned counsel for the applicants argued that, with the help and aid of above Golden Rules of Interpretation for knowing the true import of Clause (7) of Section 438 Cr.P.C. (U.P. Act No.4 of 2019), it is explicit that the statute nowhere speaks about the "exceptional or extraordinary circumstance" which was hammered and pointed out by Shri Shukla, learned counsel for opposite party no.2 in his preliminary objections.

Learned counsel for the opposite party no.2 strenuously backed his argument after deriving strength from the latest Full Bench Court judgment; ***Ankit Bharti and others vs State of U.P. and another***, ***2020 (3) ADJ 575*** . Learned counsel has emphasized upon

paragraphs 16 and 18 of said judgment, which are quoted herein below:

> *"**16**. We, therefore, hold that the conclusions as recorded in Vinod Kumar on the meaning to be ascribed to exceptional or special circumstances needs no reconsideration. It must, as was noted there, be left to the concerned Judge to exercise the discretion as vested in him by the statute dependent upon the facts obtaining in a particular case.*
>
> *"**18.** Viewed in that backdrop it is manifest that it was open for the learned Judge to assess the facts of each case to form an opinion whether special circumstances existed or not entitling the applicant there to approach the High Court directly. Considered from the aforesaid perspective, it is manifest that Question (i) as framed by the learned Judge is really unwarranted. If the learned Judge was of the opinion that the averments made in support of the existence of special circumstances were "not appealing" [as he chooses to describe it] or unconvincing, nothing hindered the Court from holding so."*

On this, it has been argued by the counsel for the opposite party no.2, that no special circumstances has been mentioned by the counsel for the applicants in his pleadings.

The Full Bench decision of this Court explicitly clear in this regard, as it casts the burden upon the Judge concerned to assess the "Special Circumstance" and its sufficiency or insufficiency to entertain the anticipatory bail.

In this regard, learned counsel for the applicants, in para 4 of his petition mentioned the reason for approaching to this Court straightaway, which reads thus:

> "*4. That this is First Anticipatory Bail Application of the applicants before this Hon'ble Court. The applicants have directly approached this Hon'ble Court without filing any Anticipatory Bail Application in the court below. It is relevant to mention here that due to pandemic Covid-19, applicants are unable to approach the Court below and are directly approaching to this Hon'ble Court for consideration of their Anticipatory Bail Application.*"

In these times of utter uncertainty, where nobody can predict that from when the district administration would promulgate the lock-down on account of recent pandemic and markets, schools, institutions, offices are often closed. It is highly unjust and risky to adhere to the alleged self-

created rider and an additional technicality regarding the forum entertaining anticipatory bail. On the other hand, when the police personnel are hotly chasing the applicants to any how nab them in connection with above F.I.R., in this time of utter confusion and uncertainty, to ask the named accused to adhere with self-created restrictions by the Courts would be mockery of justice and the system. In addition to this, the accused-applicants consciously have given up their one remedy available to them and approached the High Court directly, instead of approaching to the Court of Sessions with the risk, that if they loose their case from the High Court, no second innings would be available to them.

However, keeping in view the judicial propriety, discipline and following the conservative mode and the ratio laid down in the Full Bench judgment, it is the satisfaction of the judge concerned to entertain any anticipatory bail application. From Para-4 of the petition, quoted herein above, I find that the reasons spelled out in it are quite convincing and to my utmost satisfaction. Thus, first objection raised by learned counsel for opposite party no.2 is hereby turned down.

(II) Now coming to the second objection, that is, before deciding the present anticipatory bail application on behalf of applicants, it was argued by learned counsel that keeping in view the provisions of Section 7(c) of the Muslim Women (Protection of Rights on Marriage) Act, 2019, it is mandatory to give notice to the victim of triple talaq and as such the instant anticipatory bail application can not be heard and decided in the absence of victim or she being represented.

On this, it has been argued by Shri Tripathi, learned counsel for the applicants that the present F.I.R. is in retaliation of the written notice for *talaq* given by the Husband to his wife on 28.4.2021 (Annexure-2) and its service upon opposite party no.2 on 11.5.2021. Soon after the receipt of the first written notice for *talaq on 11.5.2021*, the father of the wife after due consultation with the lawyers has managed to draft the present F.I.R. levelling all sorts of bogus acquisitions and canards, with the allegation of triple *talaq* upon her daughter Sana Nasir. It is further contended by

the applicants' counsel, that had there been any motive to adopt the procedure of *Talaq-e-biddat* (having instantaneous and irrevocable divorce), the husband would not have given the first notice of *talaq* dated 28.4.2021. All the allegations are bogus, well-thought and after due legal consultation to paste more serious and grim look to entire episode.

It has been further argued by the applicants' counsel that the Muslim Women (Protection of Rights on Marriage) Act, 2019 provides a deterrent shield to those muslim married ladies who suffer atrocities from their husbands and are always on tentacle hooks, who in fit of anger or frustration adopt worst kind of *Talaq* i.e. *Talaq-e-Biddat*. This type of *talaq* was made punishable and strongly deprecated. But it does not mean, that all forms of *talaq* are prohibited by this enactment. As mentioned above, that the husband had chosen *Talaq-e-Ahsan*, an ideal way of dissolving the muslim marriage, accepted and acknowledged by Shariyat Law. This is why, first written notice was given by the husband. On this, it was argued that the provisions of Muslim Women (Protection of Rights on Marriage) Act, 2019 would not apply in the facts of the present case. Thus, there is no question of giving any notice to the victim lady as per Section-7(c) of this Act. Consequently, second objection also goes to shambles.

Now coming to the merits of the case :

(5) It has been contended by the learned counsel for the applicants that the applicants have got no criminal antecedents and they have not undergone any imprisonment after conviction by any court of law in relation to any cognizable offence previously. An assurance was also advanced by learned counsel for the applicants on behalf of the applicants that they would render all requisite co-operation and assistance in the process of law and with the investigating agency and shall not create any hindrance to reach to its logical conclusion and shall not flee away from the course of justice.

(6) Learned counsel for the applicants has strenuously argued that the applicants have been made target just to besmirch their reputation and

belittle him in the public estimate by the informant. Number of arguments were advanced by learned counsel for the applicants to demonstrate the falsity of the accusation made in the FIR against the applicants by the informant. Learned counsel for the applicants has also relied upon the judgments in the cases of ***Arnesh Kumar vs State of Bihar and another, (2014) 8 SCC 273; Joginder Kumar vs State of U.P. and others (1994) 4 SCC 260*** *and* ***Sanaul Haque vs State of U.P. and another, 2008 Cri. LJ 1998***, to buttress his contentions.

(7) In the case of Arnesh Kumar (*supra*) Hon'ble Apex Court has opined that the pith and core is that the police officer before arrest must put questions to himself, Why arrest?, Is it really required?, What purpose it will serve? What object it will achieve? If it is only after these questions are addressed and one or other conditions, as enumerated above, are satisfied, the power of arrest needs to be exercised. Before the arrest the police office should have a reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to satisfy further that the arrest is necessary for one or more purposes envisaged in sub-clauses (a) to (e) to Clause-1 of Section 438 Cr.P.C.

(8) In the background of said legal proposition, it has been argued by learned counsel for the applicant that the present FIR was got registered by opposite party no.2 under the aforesaid sections against the husband (applicant no.1) and rest of the accused persons who are his close related family members. It is further contended by the counsel for applicants that this F.I.R. was lodged by the father of the victim on 2.6.2021 at Police Station Kareili, Prayagraj only after receiving a letter/written notice of *Talaq-e-Ahsan* dated 28.4.2021/11.5.2021 received by Smt. Sana Nasir w/o applicant no.1. It has been argued by the counsel for the applicants that the opposite party no.2 got infuriated by this notice of husband and in retaliation to it, the present F.I.R. was got registered leveling an usual allegation prevailing now-a-days for alleged dowry demand and its related harassment by the applicant no.1 and his family members. The

applicant no.1 got married with Sana Nasir on 14.9.2016. Nasir Zen, informant and father of the lady is working at Saudi Arabia. Initially Sana Nasir got her schooling from Saudi Arabia and thereafter went to Canada for her higher education. It is contended by the learned counsel for the applicants that after the marriage with applicant no.1 and Sana Nasir, there were deep rooted differences on account of their respective attitude, behavior, temperament etc between them. This was resulted into serious discord between them. It was quite obvious, there was yawning differences in their values, their family background, as it is evident from their Whatsapp chatting, ever low conversation between them.

First notice of *talaq* dated 28.4.2021 is self explanatory about the quantum of differences and discord between them, besides the Whatsapp conversations. From the F.I.R. it is clear that the informant Nasir Zen met with S.H.O. Kareli on 22.5.2021 and the concerned S.H.O. has rendered his good offices to settle down the issue. Exercising his power, the S.H.O. has summoned the applicant no.1 and his parent to the police station and it was decided that the applicant would take her wife along with him. This calling by S.H.O. to the police station might have flared up the tempers of the applicant against opposite party no.2. From the text of the F.I.R., it is evident that the relationship between the husband and wife, which was already sour, but the things have gone bad to worse after lodging the instant F.I.R. Learned counsel for the applicants has argued that there would be further irrevocable and permanent damage in the relationship, if the applicants are sent to jail. Undercurrent of the F.I.R. is a matrimonial discord between the husband and wife. No useful purpose would be served, if the applicants are sent to jail. It has been further submitted by the counsel that the present F.I.R. is a counterblast to the alleged first notice of *talaq.* There is no injuries on the record attracting Section 307 I.P.C. as alleged in the F.I.R. It has been urged by the counsel that in order to save the parties from the permanent and irrevocable damage, in the interest of justice the present anticipatory bail should be allowed.

(9) Per contra, learned counsel for opposite party no.2 and learned

A.G.A. vehemently opposed the anticipatory bail application by mentioning that though the applicants have got no criminal antecedents but there is nothing on record to satisfy that the police personnel are after the applicants to arrest them. The alleged apprehension on behalf of applicants is imaginary and unfounded one. Learned A.G.A. has also submitted that in view of the seriousness of the allegations made in the F.I.R., the applicants are not entitled for any relaxation from this Court.

(10) After considering the record of the case as available before the Court, in the light of rival submissions made at the Bar and keeping in view the nature and gravity of the accusation, antecedents of the applicants, their undertaking to make themselves available to the authorities whenever required, the Court feels satisfied that it would be expedient to grant an order of anticipatory bail in favour of the applicants. Thus instant Anticipatory Bail stands ALLOWED.

(11) Without expressing any opinion upon ultimate merits of the case either ways which may be adversely affect the investigation and subsequent stage of the case, the Court directs that in the event of arrest of the applicants in aforesaid case crime, they shall be released on bail on furnishing a personal bond of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of the Arresting Officer till the submission of report u/s 173 (2) Cr.P.C. by the I.O., with the conditions that :

(i) The applicants shall make themselves available for the interrogation by the police as and when required. The Investigating Officer of the case would give 48 hours prior notice or telephonically inform the concerned accused-applicant to remain available to him for the purposes of interrogation and the accused-applicants are obliged to abide by such directions.

(ii) The applicants shall not directly or indirectly make any inducement, threats or comments to any person acquainted with the facts of the case so as to dissuade him from disclosing the correct facts to the court or to the police officer.

(iii) The Investigating Officer of the case would make all necessary endeavour to gear up the investigation in utmost transparent and professional way and would try to conclude the same within a maximum period of 90 days. During this period the accused-applicants would not leave the State of Uttar Pradesh without informing the Investigating Officer of the case and sharing his contact number.

(iv) In the event the applicants are having their passports, they will have to surrender the same before the concerned SP/SSP of the District till the submission of report u/s 173(2) Cr.P.C.

(12) In the event, the applicants breach or attempt to breach any of the aforesaid conditions or willfully violate above conditions or abstains themselves from the investigation, it would be open for the Investigating Officer or the concerned authority to apply before the court of Session for cancellation of bail and the Court of Session has every liberty and freedom to revoke the anticipatory bail after recording the reasons for the same.

Order Date :-10.8.2021
M. Kumar