

Neutral Citation No. - 2024:AHC-LKO:18501

Court No. - 15

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438
CR.P.C. No. - 409 of 2024

Applicant :- Nafees @ Nafees Khan And 2 Others

Opposite Party :- State Of U.P Thru. Secy. Home Civil Sectr. Lko. And And
Another

Counsel for Applicant :- Dhananjai Kumar Tripathi,Kajol,Kavita Yadav

Counsel for Opposite Party :- G.A.

Hon'ble Mohd. Faiz Alam Khan,J.

1. Heard learned counsel for the applicant, learned A.G.A. for the State, as well as Mr. Ajey Singh, Advocate, who has put in appearance and filed his vakalatnama/power on behalf of the opposite party no. 2/informant/complainant, and perused the record. The vakalatnama/power is taken on record.

Learned A.G.A. informs that he has procured complete instructions in the matter, including upto date case diary.

2. This application has been moved by the applicants- **Nafees alias Nafees Khan, Chhabban alias Makbool Khan and Sailoon alias Sailoon Khan** for grant of anticipatory bail in FIR/Case Crime No.0287 of 2022, under Sections 147, 148, 323, 452, 504, 506 and 308 IPC lodged at police station Rupaideeha, district Bahraich.

3. Learned counsel for the applicants submits that it is a case of false implication. There is a cross-version of the incident as a cross FIR has been filed in this case on behalf of the applicants' party and many persons from both the sides have sustained injuries and at this stage it cannot be determined/assessed as to which party was aggressor. It is further submitted that charge-sheets have been filed in both the cases and the applicants have cooperated in the investigation and there was no occasion before the investigating officer of this crime to arrest the applicants and all the offences where the charge-sheet has been filed entail punishment upto 7 years of imprisonment, however, the applicants are having an apprehension that when

they will appear before the trial court for the purpose of getting regular bail, disposal of the same would take some time and having regard to the practice prevalent in the trial court the applicants would be taken into custody and sent to jail where they will remain till their bail application is decided, which will not only curtail their personal liberty but would also tarnish their reputation/image in the society.

4. It is vehemently submitted that the investigating agency has chosen not to arrest the applicants, but the applicants are apprehending their arrest from the court which may not be justified as the charge-sheet has already been filed. Reliance has been placed on the law laid down by the Hon'ble Supreme Court in *Satender Kumar Antil Vs. Central Bureau of Investigation and others : (2021) 10 SCC 773*, *Aman Preet Singh Vs. C.B.I. through Director : 2021 SCC Online SC 941*, *Siddharth v. State of UP : 2021 SCC OnLine SC 615* and *Mahdoo Bava Vs. Central Bureau of Investigation: 2023 SCC OnLine SC 299*. It is further submitted that the applicants are not having any previous criminal record to their credits and they are ready to cooperate in the trial and would remain present before the trial court as and when their presence would be required before it.

5. Learned A.G.A as well as learned counsel for the opposite party no. 2/informant/complainant opposes the prayer of the applicants for grant of anticipatory bail. It is submitted that many persons from the informant's side have been assaulted brutally and having regard to the same, the applicants are not entitled to be extended the facility of anticipatory bail.

6. It is not in dispute that during the course of investigation the applicants have not been arrested and charge-sheet has been filed without making their arrest and all the offences wherein the charge-sheet has been filed entail punish upto 7 years of imprisonment. It is also reflected that the applicants had earlier approached this court by filing criminal misc. writ petition no.8093 of 2022 and the same was disposed of in the light of the law laid down by the Hon'ble Supreme Court reported in *(2014) 8 SCC 273 (Arnesh Kumar vs. State of Bihar)*.

7. The Hon'ble Supreme Court in *Satender Kumar Antil Vs. Central Bureau of Investigation and others : (2021) 10 SCC 773* has chalked out a complete mechanism with regard to the case wherein the charge sheet has been

submitted without arrest of accused person(s) under those offences which are punishable with upto seven years of imprisonment and has held as under:

"3. We are inclined to accept the guidelines and make them a part of the order of the Court for the benefit of the Courts below. The guidelines are as under:

"Categories/Types of Offences

A) Offences punishable with imprisonment of 7 years or less not falling in category B & D.

B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (S.37), PMLA (S.45), UAPA (S.43D(5), Companies Act, 212(6), etc.

D) Economic offences not covered by Special Acts.

Requisite Conditions

1) Not arrested during investigation.

2) Cooperated throughout in the investigation including appearing before Investigating Officer whenever called.

(No need to forward such an accused along with the chargesheet (Siddharth v. State of UP, 2021 SCC OnLine SC 615)

CATEGORY A

After filing of chargesheet/complaint taking of cognizance:

a) Ordinary summons at the 1st instance/including permitting appearance through Lawyer.

b) If such an accused does not appear despite service of summons, then Bailable Warrant for physical appearance may be issued.

c) NBW on failure to failure to appear despite issuance of Bailable Warrant.

d) NBW may be cancelled or converted into a Bailable Warrant/Summons without insisting physical appearance of accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physically on the next date/s of hearing.

e) Bail applications of such accused on appearance may be decided w/o the accused being taken in physical custody or by granting interim bail till the bail application is decided.

(emphasis mine)

CATEGORY B/D

On appearance of the accused in Court pursuant to process issued bail application to be decided on merits."

CATEGORY C

Same as Category B & D with the additional condition of compliance of the provisions of Bail under NDPS S. 37, 45 PMLA, 212(6) Companies Act 43 d(5) of UAPA, POSCO etc.

4. *Needless to say that the category A deals with both police cases and complaint cases.*

5. *The trial Courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by learned ASG is that where the accused have not cooperated in the investigation nor appeared before the Investigating Officers, nor answered summons when the Court feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with.*

6. *We may also notice an aspect submitted by Mr. Luthra that while issuing notice to consider bail, the trial Court is not precluded from granting interim bail taking into consideration the conduct of the accused during the investigation which has not warranted arrest. On this aspect also we would give our imprimatur and naturally the bail application to be ultimately considered, would be guided by the statutory provisions."*

8. The directions of Hon'ble Supreme Court passed in *Satender Kumar Antil (supra)* has been again reiterated in the recent judgement in *Aman Preet Singh Vs. C.B.I. through Director : 2021 SCC OnLine SC 941* by the Hon'ble Supreme Court and it is held as under:

*"9. In our view, the purport of Section 170, Cr.P.C. should no more be in doubt in view of the recent judgment passed by us in *Siddharth v. State of Uttar Pradesh (Criminal Appeal No. 838/2021)*, 2021 SCC OnLine SC 615). In fact we put to learned senior counsel whether he has come across any view taken by this Court qua the said provision. Learned counsel also refers to judgments of the High Court which we have referred to in that judgment while referring to some judicial pronouncements of this Court on the general principles of bail. The only additional submission made by learned counsel is that while the relevant paragraphs of the judgment of the Delhi High Court in *Court on its own Motion v. Central Bureau of Investigation (2004) 72 DRJ 629* have received the imprimatur of this Court, the extracted portions from the judgment of the Delhi High Court did not include para 26. The said paragraph deals with directions issued to the criminal Courts and we would like to extract the portion of the same as under:*

"26. Arrest of a person for less serious or such kinds of offence or offences those can be investigated without arrest by the police cannot be brooked by any civilized society.

Directions for Criminal Courts:

(i) Whenever officer-in-charge of police station or Investigating Agency like CBI files a charge-sheet without arresting the accused during investigation and does not produce the accused in custody as referred in Section 170, Cr.P.C. the Magistrate or the Court empowered to take cognizance or try the accused shall accept the charge-sheet forthwith and proceed according to the procedure laid down in Section 173, Cr.P.C. and exercise the options available to it as discussed in this judgment. In such a case the Magistrate or Court shall invariably issue a process of summons and not warrant of arrest.

(ii) In case the Court or Magistrate exercises the discretion of issuing warrant of arrest at any stage including the stage while taking cognizance of the chargesheet, he or it shall have to record the reasons in writing as contemplated under Section 87, Cr.P.C. that the accused has either been absconding or shall not obey the summons or has refused to appear despite proof of due service of summons upon him.

(iii) Rejection of an application for exemption from personal appearance on any date of hearing or even at first instance does not amount to non-appearance despite service of summons or absconding or failure to obey summons and the Court in such a case shall not issue warrant of arrest and may either give direction to the accused to appear or issue process of summons.

(iv) That the Court shall on appearance of an accused in a bailable offence release him forthwith on his furnishing a personal bond with or without sureties as per the mandatory provisions of Section 436, Cr.P.C.

(v) The Court shall on appearance of an accused in non-bailable offence who has neither been arrested by the police/Investigating Agency during investigation nor produced in custody as envisaged in Section 170, Cr.P.C. call upon the accused to move a bail application if the accused does not move it on his own and release him on bail as the circumstance of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. Reason is simple. If a person has been at large and free for several years and has not been even arrested during investigation, to send him to jail by refusing bail suddenly, merely because charge-sheet has been filed is against the basic principles governing grant or refusal of bail.

XXXXXXXXXX"

10. A reading of the aforesaid shows that it is the guiding principle for a Magistrate while exercising powers under Section 170, Cr.P.C. which had been set out. The Magistrate or the Court empowered to take

cognizance or try the accused has to accept the charge sheet forthwith and proceed in accordance with the procedure laid down under Section 173, Cr.P.C. It has been rightly observed that in such a case the Magistrate or the Court is required to invariably issue a process of summons and not warrant of arrest. In case he seeks to exercise the discretion of issuing warrants of arrest, he is required to record the reasons as contemplated under Section 87, Cr.P.C. that the accused has either been absconding or shall not obey the summons or has refused to appear despite proof of due service of summons upon him. In fact the observations in Sub-para (iii) above by the High Court are in the nature of caution.

11. Insofar as the present case is concerned and the general principles under Section 170 Cr.P.C., the most apposite observations are in sub-para (v) of the High Court judgment in the context of an accused in a non-bailable offence whose custody was not required during the period of investigation. In such a scenario, it is appropriate that the accused is released on bail as the circumstances of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. The rationale has been succinctly set out that if a person has been enlarged and free for many years and has not even been arrested during investigation, to suddenly direct his arrest and to be incarcerated merely because charge sheet has been filed would be contrary to the governing principles for grant of bail. We could not agree more with this."

9. Hon'ble Supreme Court in ***Siddharth v. State of UP : 2021 SCC OnLine SC 615*** opined as follows:

"9. We are in agreement with the aforesaid view of the High Courts and would like to give our imprimatur to the said judicial view. It has rightly been observed on consideration of Section 170 Cr.P.C. that it does not impose an obligation on the Officer-in-charge to arrest each and every accused at the time of filing of the charge-sheet. We have, in fact, come across cases where the accused has cooperated with the investigation throughout and yet on the charge-sheet being filed non-bailable warrants have been issued for his production premised on the requirement that there is an obligation to arrest the accused and produce him before the court. We are of the view that if the investigating officer does not believe that the accused will abscond or disobey summons he/she is not required to be produced in custody. The word "custody" appearing in Section 170 Cr.P.C. does not contemplate either police or judicial custody but it merely connotes the presentation of the accused by the investigating officer before the court while filing the charge-sheet.

10. We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it. If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If

the investigating officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused."

10. Thus, having regard to the law laid down by Hon'ble Supreme Court in *Satender Kumar Antill* (supra) *Aman Preet Singh* (supra) and *Siddharth* (supra), the instant anticipatory bail application moved by the applicants- **Nafees alias Nafees Khan, Chhabban alias Makbool Khan and Sailoon alias Sailoon Khan** is finally ***disposed of*** in terms that applicants may now appear/ surrender before the trial court ***within 20 days from today i.e. till 19th March, 2024*** and move appropriate application for regular bail before the trial court, the trial court shall be under an obligation to dispose of the same in terms of the law laid down by Hon'ble Supreme Court in *Satender Kumar Antill*, (supra), *Aman Preet Singh* (supra) and *Siddharth* (supra).

11. Keeping in view the law laid down by the Hon'ble Supreme Court in '*Nathu Singh Vs. State of U.P. and others*':(2021)6 SCC 64, to facilitate the surrender/appearance of the applicants before the trial court, it is provided that ***for the next 200 days i.e. only till 19.03.2024***, applicants- **Nafees alias Nafees Khan, Chhabban alias Makbool Khan and Sailoon alias Sailoon Khan**, in case of their arrest under any process of the trial court, shall be released forthwith on anticipatory bail on each of them furnishing personal bond of Rs. 50,000/- with two sureties each in the like amount to the satisfaction of the trial court, Station House Officer of the Police Station concerned/ Investigating Officer subject to the following conditions:-

1. The applicants shall appear/ surrender before the trial court within 30 days from today i.e. on or before 19.03.2024 and on their surrender/appearance the trial court shall dispose of their regular bail application strictly in accordance with law propounded in case of *Satender Kumar Antill* (supra), *Aman Preet Singh* (supra) and *Siddharth* (supra).

2. If the applicants shall not appear before the trial court on or before 19.03.2024, the trial court thereafter shall be free to issue coercive process against them for procuring their presence before it.

12. It is clarified that all the observations contained in this order are only for disposal of this anticipatory bail application and shall not affect the trial proceedings in any manner.

13. If the applicants will not follow the terms of this order set-forth herein-before, after passage of 30 days from today, they shall not be entitled for any protection of the instant order and the trial court shall be free to issue coercive process against them for their appearance.

Order Date:-29.02.2024

MVS/-