

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
ANTICIPATORY BAIL APPLICATION NO. 1158 OF 2017

Ahsan Wahid Shaikh & Ors.	...	Applicants
Vs.		
State of Maharashtra	...	Respondents

Ms. Anjali Patil, for the applicants.
Mr.Arfan Sait, APP, for the State.

CORAM: SMT.SADHANA S.JADHAV, J.
DATE : 8th AUGUST, 2017.

P.C.

Heard. By an order dated 10.1.2017, this Court had rejected the application filed by the present applicants under Section 438 of Cr.P.C. This Court had specifically observed that a non-bailable warrant is issued against the present applicants and, therefore, an application under Section 438 of Cr.P.C. would not be maintainable. At that stage, the learned counsel appearing for the applicants had sought liberty to withdraw the application and appear before the learned Magistrate in RCC No.285 of 2015 and file an application requesting the learned Magistrate to recall the non-bailable warrant. The applicants were hence protected till 17.1.2017.

2. It is apparent on the face o record that the applicants had not appeared before the learned Magistrate on 17.1.2017.

3. The present application is filed under Section 438 of Cr.P.C. on 5.7.2017 under Section 438 of Cr.P.C.

4. The learned counsel for the applicants has initially submitted that non-bailable warrant was issued against the present applicants and that they had no knowledge whether the non-bailable warrant was issued. The learned APP has placed on record a copy of the non-bailable warrant issued against the applicants vide order dated 22.9.2016. It is pertinent to note that only after the warrants were issued on 22.9.2016, an application for re-arrest was filed before this Court which was rejected on 10.1.2017. The learned counsel for the applicants has further submitted that the applicants had every right to file an application under Section 438 of Cr.P.C. provided that their names appeared in the first information report.

5. Upon perusal of the FIR, it is clear that the name of the applicant No.1 appears in the first information report. The learned counsel further submits that no specific role is attributed to the applicants. However, upon perusal of the FIR, it is seen that there was a demand of Rs.5 lakhs by the present applicant No.1. It is true that there are no specific allegations against applicant No.2. In any case, since the non-bailable warrant is issued, this Court was not inclined to grant pre-arrest bail. The learned

counsel for the applicants further submits that the applicants had no knowledge that any crime was registered against them and, therefore, they have been deprived of a right to file an application under Section 438 of Cr.P.C.

6. The learned APP has drawn attention of this Court to the order dated 29.12.2016 passed by the Addl. Sessions Judge, City Civil Court, Borivli Division, Dindoshi, wherein it has been observed as follows :-

“The prosecution has objected on the grounds that the police for two times went to Kataichvar, U.P., native of the applicants/accused, but they did not trace out at that spot. Ld. Metropolitan Magistrate 67th Court, Borivali, Mumbai has issued non-bailable warrant against the applicant/accused. The applicants/accused are permanent resident of U.P. They have no permanent residence in Mumbai. There is also possibility of their abscondence. Though the police has issued notice under section 41 of Cr.P.C., but the applicants did not attend the police station for investigation purpose.”

Hence, it is clear that the applicants were given sufficient opportunity to file an application under Section 438 of Cr.P.C. It is in these circumstances that the Addl. Sessions Judge has rejected the application.

7. The approach of the applicants is deprecated. It is necessary for every applicant to approach the Court with clean hands. In the eventuality that the application was filed under Section 438 of Cr.P.C., at

the very threshold, the merits of the matter could have been considered. This Court has time and again placed implicit reliance upon a Judgment of the Hon'ble Apex Court in the case of **Arnesh Kumar vs. State of Bihar, reported in (2014) 8 SCC 273** has protected the liberty of the applicants who are being prosecuted under Section 498A of Cr.P.C. However, after issuance of non-bailable warrant, it would not be open to the applicants to file an application under Section 438 of Cr.P.C.

8. In the case of **Lavesh vs. State (NCT of Delhi) (2012) 8 SCC 730**, the Hon'ble Apex Court has observed as under :-

“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.”

Hence, the application is rejected.

[SMT. SADHANA S.JADHAV, J.]