

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****ANTICIPATORY BAIL APPLICATION NO. 754 OF 2019**

Farhan Sharukh Mirza & Anr.

.....Applicants

Vs.

The State Of Maharashtra & Ors.

.....Respondents

Ms. Pinaz Contractor for the Applicants.

Mr. Y.M. Nakhwa APP for the Respondent-State.

Mr. Kunal Phoole, Ms. Shreya Shrivastava, Ms. Varsha A. for the Respondent No.3.

CORAM : A. S. GADKARI, J.**DATE : 1st SEPTEMBER, 2021.****PC.:-**

Heard Ms. Contractor, learned Advocate for the Applicants, Mr. Nakhwa, learned APP for the Respondent-State and Mr. Phoole learned counsel for the Respondent No.3-informant. Perused record of investigation.

By an Order dated 28th March, 2019, the Applicants were granted interim relief.

2 Perusal of record indicates that, taking into consideration the fact that, the present crime is registered basically out of matrimonial discord, this Court with a view to have amicable settlement between the parties, had in fact referred the matter to the Mediator by its Order dated 23rd July, 2021. As recorded in the Order dated 18th August, 2021, the

learned Mediator in her report dated 12th August, 2021 has stated that, the process of mediation has failed, as the parties are firm on their stance and no amicable solution/settlement could be reached. In view thereof, the present Application is taken up for hearing today.

3 The First Information Report is lodged by Respondent No.3- wife against the Applicant No.1- husband and Applicant No.2-mother-in-law.

It is the prosecution case that, in the month of August, 2012, informant got acquainted with the Applicant No.1. The Applicant No.1 told the informant that, he was the owner of Green Wheel Construction Company and constructed various buildings at Nainital. That, he was a financially sound person and was having substantial bank balance in his Account. The Respondent No.1 and the informant got married on 8th February, 2013 at Andheri Mumbai. After the marriage, the Respondent No.3 realized that, the Applicant No.1 is a drug addict and has no work to do. The Applicant No.1 has painted false picture of his financial status. That, the Applicant No.1 was not having any of the properties which he had earlier told to the Respondent No.3 and with a malafide intention he performed the said marriage. In the year, 2013, the Applicant No.1 forced the Respondent No.3 to perform medical terminations of pregnancy.

It is further alleged that, the Applicant No.1, under the influence of drugs, committed unnatural offence as contemplated under

Section 377 of the Indian Penal Code against the Respondent No.3. The Applicant No.1 has also done videography of the said act and the other acts when the Respondent No.3 and Applicant No.1 were having intimate relationship on his mobile phone. The Respondent No.3 opposed the said act of Applicant No.1 however, he used to threatened her to circulate the said video clips publicly. The Applicant No.1 also threatened the Respondent No.3 that, he was having a gun and he would kill her.

It is further alleged that, both the Applicants forced the Respondent No.3 to part with substantial amounts for their personal pleasures. It is also alleged that, the Applicants have tortured the Respondent No.3 and forced her to part with property i.e. cash and ornaments worth Rs.66 lakhs during the period when she was cohabiting with the Applicant No.1.

In this brief premise, the present crime is registered on 1st October, 2018 under Sections 376, 377, 316, 498(A), 295, 323, 504, 506(2), 406, 379, 420, 414 read with 34 of the Indian Penal Code and Section 66 of the Information Technology Act, 2000.

4 Ms. Contractor, learned counsel for the Applicants submitted that, the lodgment of the present crime is a counter-blast to the matrimonial Petition filed by the Applicant No.1 for restitution of conjugal rights in the Court of Civil Judge, Senior Division at Panvel, District Raigad. She further submitted that, as a matter of fact, the Applicant No.1 has

parted with huge amounts with the Respondent No.3 which can be discerned from the bank statement of the Applicant No.1. She submitted that, the statement made in the First Information Report about videography of the intimate acts of Applicant No.1 and Respondent No.3, so also the alleged act as contemplated under Section 377 of the Indian Penal Code is a palpably false statement. She submitted that, there was no reason for the Applicant No.1, to make the alleged videography public, as the Respondent No.3 was and is, his legally wedded wife. That, after about 6 years of their marriage the present allegations have been made by the Respondent No.3 against the Applicant No.1. She submitted that, nothing has to be recovered from the Applicants and therefore, the Applicants may be protected by pre-arrest bail.

5 Mr. Nakhwa, learned APP vehemently opposed the Application and pointed out the necessity of custodial interrogation of the Applicants. Mr. Phoole, learned counsel for the Respondent No.3 also vehemently opposed the Application and in addition to the arguments advanced by the learned APP submitted that, the statements made in F.I.R., as per his instructions, are correct.

6 Perusal of the First Information Report, clearly indicates that, the offence levelled against the Applicant No.1 under Section 377 of the Indian Penal Code is a serious offence. The alleged videography effected by the Applicant No.1 on his mobile phone, is yet to be recovered. The

allegation that, the Applicant No.1 was/is having a gun, needs to be thoroughly investigated by the police and if it is true then, the same has to be recovered from him. The further allegation that, the Applicant No.1 is a drug addict, is also to be investigated by the police. Unless the Applicant No.1 is custodially interrogated by the police, the said recoveries and investigation into the said aspects are not possible. Application of Applicant No.1 for pre-arrest bail is accordingly rejected.

7 The Hon'ble Supreme Court in the case of *Aman Kumar & Ors. Vs. State of Haryana*, reported in *AIR 2004 SC 1497* has held that, the evidence of prosecutrix stands at higher pedestal than injured witness, needs no corroboration. The Hon'ble Apex Court in the case of *State of Himachal Pradesh Vs. Shree Kant Shekhari* reported in *AIR 2004 SC 4404 = (2004) 8 SCC 153*, has held that, the prosecutrix is not accomplice in crime. Mere delay in lodging FIR *per se* is not a mitigating circumstance for accused when there was accusation of rape and does not render prosecution version brittle.

Thus, it is clear at this stage that, the statement of the prosecutrix has to be accepted as it is, which makes out serious allegations against the Applicant No.1.

8 As far as the Applicant No.2 is concerned, except some passing references of demand of amount from the Respondent No.3 and coercing her to sell her ornaments, no other serious allegations are made against her.

Applicant No.2 is a woman, a senior citizen and therefore, for the purpose of investigation of the present crime, her custodial interrogation, in view of this Court, is not necessary.

9 After taking into consideration the aforesaid facts and the need of custodial interrogation of the Applicant No.1, the Application of Applicant No.1 is rejected.

Application of Applicant No.2 is accordingly allowed.

The interim relief granted by Order dated 28th March, 2019, is confirmed in favour of the Applicant No.2 only.

Application is partly allowed in the aforesaid terms.

10 At this stage, learned counsel for the Applicants submitted that, the Applicant No.1 intends to challenge the present Order before the Hon'ble the Supreme Court and the effect and implementation of present Order may be stayed for a period of two weeks.

At her request, the effect and implementation of the present Order is stayed for the period of two weeks from the date of uploading of this Order on the Official Website of the Bombay High Court.

(A.S. GADKARI, J.)

SANJIV
SHARNAPPA
MASHALKAR
Digitally signed
by SANJIV
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MASHALKAR
Date: 2021.09.14
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