

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**ANTICIPATORY BAIL APPLICATION NO. 1311 OF 2021
WITH
INTERIM APPLICATION NO. 1471 OF 2021**

Nikhil Rajendra Chandarana ... Applicant

Versus

The State of Maharashtra & Anr. ... Respondents

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Mr. Shailendra Pendse i/by Shreyas Shrivastav, Advocate for the Applicant in ABA.

Mr. S. R. Agarkar, APP for the Respondent No.1 – State.

Mr. Aabad Ponda, Senior Advocate a/w Mr. Vivek Pandey, Advocate for respondent No.2.

Ms. Priyatama Muthe, (I. O.) Kapurbawdi Police Station, Present.

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CORAM : PRAKASH D. NAIK, J.

DATE : 13th SEPTEMBER, 2021.

PER COURT:

1. This is an application for anticipatory bail in C.R. No. 144 of 2021 registered with Kapurbawdi Police Station, Dist. Thane, for offences under Sections 498-A, 323, 504 & 506 r/w Section 34 of Indian Penal Code (for short “IPC”). The First Information Report (for short ‘FIR’) was lodged on 8th May, 2021.

2. The case of the complainant is that her marriage was performed with applicant on 1st August, 2015. Child was born out

of wedlock on 1st November, 2016. For a period of one month she was treated well. In September, 2015 she was assaulted. She did not lodge complaint. In October 2016, she was slapped by applicant. She lodged N.C. Complaint with Kapurbavadi Police Station. On 9th November, 2016, applicant abused complainant's parents and assaulted her father. She lodged complaint with Police Station. She left house with parents on 9th November, 2016. In March-2017 Son Riyan was sent to applicant. Complainant was threatened that she will be assaulted with knife, if she takes away child from him. She was assaulted with kick blows. In 2018 she was abused. Although they were residing separately, in the same building complex, applicant abused complainant and her parents. On 27th September, 2020, the applicant abused complainant and her sister's husband and stated that she is having affair with sister's husband. Even thereafter, in March – 2021 she was abused, threatened and assaulted. He behaved indecently in presence of complainant and son. Applicant and his mother are continuously harassing complainant. Subsequently complainant had alleged that child was sexually abused by applicant.

3. Station diary recorded by Kapurbavadi Police Station on 12th May, 2021 that WPI and women attached to Bhartiya Stree

Shakti and officer from Child Care Special Unit Anjali Hadawale visited residence of complainant and made enquiry about allegations of child abuse relating to son of complainant by his father and it was noticed that, child was possibly tutored. There was no complaint of pain in private part of child. No medical examination. There was continuous interference of child's mother and Aunt. Hence, more information could not be collected. Women officer Anjali Hadawale has submitted report in that regard. On enquiry with child's father he informed that, he has access of child from the age of three months. He has taken care of him. He used to clean him, put him to bath. There was no sexual abuse of child. There is matrimonial dispute between him and his wife and case under Domestic Violence Act relating to custody of child is pending before Court and the next date is 13th May, 2021. The intention is to deny custody of child or access to him. Since last four years he has been meeting his son and there was no complaint from his wife. The complaints made by complainant to various authorities do not refer to any grievance about any harassment to child. Overall the complaint about harassment to child from his father is false. Report dated 12th May, 2021 was submitted by Anjali Hadawale reiterates the above version. The complainant has preferred Writ Petition before this Court challenging the inaction of

Police regarding child abuse and not taking action under Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act').

4. The contention of the applicant is that the FIR is false. The allegations with regards to child abuses are concocted. The FIR was registered 4 years after the complainant left matrimonial home and started residing at her parental home. Investigation is completed. Custodial interrogation of the applicant is not necessary. The inquiry in relation to the allegations to child abuse revealed that the child was being tutored. The complainant has initiated proceedings under Domestic Violence Act.

5. Learned APP submitted that, on inquiry the complaint with regards to the child abuse was found untrustworthy. The station diary in that regard dated 12th May, 2021 and the statement of the Women Cell mentions that there is no truth in the said allegations. Investigation is almost complete.

6. Learned Senior Advocate Mr. Ponda for respondent No.2 submitted that inaction or the decision with regards to the allegations of the POCSO is challenged by the complainant before this Court and the petition in that regard is pending. The complainant was repeatedly assaulted, abused and harassed. There

are instances of the assault, abuse and humiliation. There are obscene gestures by applicant. The complainant was subjected to physical and mental cruelty. The Police are acting under the influence of the applicant, who is employed in reputed company. The complaints were lodged with the Police in the past. Cognizance of the said cases were not taken and they were taken as N.C. Complaints. The mother of the complainant had lodged complaint relating to the assault upon them and initially the offence was registered under Section 324 of IPC although there was serious injuries. Charge sheet was filed and thereafter the offence was altered to Section 326 of IPC. The station diary entry recorded by Police with regards to the inquiry relating to the allegations of child abuse and the letter submitted by the Women Cell were given to the applicant. The offence is of serious nature. He also relied upon the chats relating to the conversation between applicant and complainant urged that the said chats refers to the abuses and filthy language used by the applicant. There are several instances of assault. The applicant is extremely cruel. Complainant was assaulted during her pregnancy. He did not spare her father. He referred to complaint dated 28th November, 2016 and medical certificate. The report and station diary regarding child abuse indicate applicant's influence over police. As mother of child, when

the incidents of sexual abuse was reported to her, it is her duty to report it to police. If she maintains silence, the child may question her about it in future. The complainant has preferred Writ Petition against inaction of police to invoke POCSO provision. The police have not followed legal procedure. The applicant had filed reply to application filed by complainant in Domestic Violence Act proceedings contending that the issue of POCSO shall not be touched during interview of child. The applicant had filed application for access of child in Domestic Violence Act proceedings and the applications were rejected vide order dated 7th September, 2021. The learned Magistrate in the aforesaid order has observed that, the child shown unwillingness to meet his father. Child has stated that his father had pressed his private part.

7. The complainant has filed application for intervention, affidavit-in-reply dated 23rd June, 2021 and additional Affidavit dated 1st September, 2021 along with documents opposing the application for anticipatory bail. Mr. Ponda further submitted that the powers under Section 438 of Cr.P.C. are required to be exercised in appropriate case. The Police machinery is not interested in arresting the applicant. The Court has to look into the merits of the case, magnitude of offence while deciding such application.

He relied upon the decisions of the Supreme Court in the case of 1) **Adri Dharan Das V/s. State of West Bengal, AIR 2005 SC 1057.** 2) **D.K. Ganesh Babu V/s P. T. Manokaran and others, AIR 2007 SC 1450.** 3) **P. Chidambaram, V/s. Director of Enforcement, AIR 2019 SC 4198.** 4) **Mayank Pathak V/s. The State (Govt. of NCT of Delhi) 2014 All MR (Cri.) 4136.**

8. In rejoinder, the learned counsel for the applicant had submitted that the child was apparently tutored by the mother (complainant). The intention of complainant is to keep away the applicant from custody or access to child. The learned Magistrate in his order dated 7th September, 2021 has observed that, the child himself told that, applicant had pressed his private part. The said statement was made by the child even when he was not questioned about it. It is submitted that the child was continuously in custody of complainant for last six months. The circumstances confirms tutoring of child. On instructions it is submitted that the applicant is willing to stay away from the current residence and vicinity of residence of complainant.

9. The marriage between the applicant and the complainant was solemnized on 1st August, 2015. Child was born on 1st November, 2016. The complainant has referred to alleged

instances of abuses and assault. Undisputedly, the complainant is residing separately at her parental home from 9th November, 2016. The FIR is lodged on 8th May, 2021. There are issues between parties regarding custody/access of child. The complainant had initiated proceedings under Domestic Violence Act. Parties had approached marriage counsellor. The applicant has provided details in the application about arrangement regarding access of child given to applicant. The complainant had preferred application for custody of child. The complaint about child abuse was made after registration of FIR. The contention of complainant is that after the child has disclosed about abuse she lodged the complaint. Both the parties are residing in same complex. There was no complaint of sexual abuse of child in the past. Since last four and half years, the applicant and complainant are residing separately. In pursuant to complaint about child abuse, enquiry is made as referred above with observations reflected in report of officer and station diary. The complainant has preferred Writ Petition No. 2951 of 2021 before Division Bench of this Court challenging the inaction of the Police relating to the provisions of the POCSO Act which is pending. The station diary entry and letter referred to herein above indicate that the investigation authority felt that the allegations about child abuse were not genuine. Since the petition is pending

challenging the said aspect it would not be appropriate to go into the merits of the said issue. It is apparent that the child is in custody of the mother since last six months. Prior to registration of the FIR dated 8th May, 2021, the complainant had initiated the proceedings under the Domestic Violence Act, which are pending before the appropriate Court. Learned APP has submitted that the investigation is almost completed. The complaints are filed from both the sides. Some of the complaints were treated as N.C. complaints. The dispute is between the husband and the wife which had arisen on account of matrimonial discord.

10. The decisions relied upon by the learned counsel for the respondent No.2/complainant relates to the parameters for considering the application under Section 438 of Cr.P.C. In the case of *Adri Dharan Das V/s. State of West Bengal*, (Supra) it is observed that, an order under Section 438 is a device to secure the individuals liberty, it is neither a passport to the commission of crime nor a shield against any and all kinds of accusation likely or unlikely. It is for the Court concerned to decide whether a case has been made out for granting the relief sought. In the case of *D.K. Ganesh Babu V/s P. T. Manokaran and others* (Supra) the Apex Court observed that the power exercisable under Section 438 is

somewhat extra ordinary in character and it is to be exercised only in exceptional cases. In the case of Mayank Pathak V/s. The State (supra) anticipatory bail was refused to the accused in case under Section 498-A considering factual aspects of that case. In the decision in case of P. Chidambaram, V/s. Director of Enforcement, (supra) it is observed that the privilege of pre-arrest bail should be granted only in exceptional cases.

11. Considering the factual aspects of this matter, the custodial interrogation of the applicant is not warranted. The applicant can be granted relief under Section 438 of Cr.P.C.

12. Hence, I pass the following order:

ORDER

(i) Anticipatory Bail Application No.1311 of 2021 is allowed;

(ii) In the event of arrest of the applicant in connection with in C.R. No. 144 of 2021 registered with Kapurbawdi Police Station, Dist. Thane, the applicant be released on bail on furnishing P. R. Bond in the sum of Rs.25,000/- with one or more sureties in the like amount;

(iii) The applicant shall attend the investigating officer on 20th, 21st & 22nd September, 2021 between 11.00 a.m. to 1.00 noon and thereafter as and when called for.

(iv) The applicant shall not tamper with the evidence in any manner.

(v) In view of the statement of the applicant he shall change his place of residence and shall reside away from vicinity of residence of complainant till the conclusion of the trial.

(vi) The applicant is granted two weeks time to find out alternate accommodation and move away from current residence.

(vii) Anticipatory Bail Application & Interim Application stand disposed of accordingly.

(PRAKASH D. NAIK, J.)