

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

ANTICIPATORY BAIL APPLICATION NO.1984 OF 2021

Adnan Iqbal Moulvi .. Applicant

Versus

- 1) State of Maharashtra; and
- 2) Iffatnaaz Adnan Moulvi .. Respondents

**WITH
INTERIM APPLICATION NO.2197 OF 2021
IN
ANTICIPATORY BAIL APPLICATION NO.1984 OF 2021**

Mrs.Iffatnaaz Adnan Moulvi .. Intervenor

IN THE MATTER BETWEEN :

Adnan Iqbal Moulvi .. Applicant

Versus

- 1) State of Maharashtra; and
- 2) Iffatnaaz Adnan Moulvi .. Respondents

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Mr.Ali Kaashif Khan Deshmukh a/w. Ms.Riya Jain, Advocate for the Applicant in ABA.

Mr.Adnan Shaikh i/b. Ms.Yogita Joshi, Advocate for the Intervenor.

Mr.R.M. Pethe, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATED : SEPTEMBER 27th, 2021.

P.C. :

The applicant is anticipating arrest in connection with C.R.No.525 of 2021, registered with Oshiwara Police Station, Mumbai, on 16th June, 2021, for the offences punishable under Sections 498-A, 406, 354, 509, 323, 504 and 506 read with 34 of Indian Penal Code ("IPC", for short) and Section 4 of the Muslim Women (Protection of Rights on Divorce) Act, 2019.

2 The complainant is the wife of the applicant. First Information Report ("FIR", for short), alleges that the marriage of the complainant and the applicant was performed on 25th April, 2015. After the marriage, the complainant started residing with the applicant, father-in-law, mother-in-law, brother-in-law and sister-in-law at Harikrupa Societey, Room No.44, Sai Nagar, Old Panvel. In August 2011, the complainant was working as Air Hostess with Indigo Airlines. Her in-laws restrained her from continuing with her job, hence, she resigned from the company in March 2015. For initial period, she was treated well. However, thereafter, her mother-in-law started ill treating her. She informed about it to applicant. He assured her that things would be normal shortly. Her mother-in-law told her to bring Rs.10,00,000/-, from her parents. The informant told her that her

parents are poor they would not be in position to arrange the amount. The accused caused physical and mental ill treatment to her. During the marriage, the accused had demanded articles mentioned in FIR, which were provided to the accused before marriage, which are in their custody. On 22nd May, 2021, since pest control was conducted in the house at Kharghar, to avoid harm to her son, she was advised to go to her parental home. She proceeded to house of her parents. After the period of ten days, the complainant gave a call to applicant to take her to matrimonial home. The applicant stated that he would take her to his house provided she brings amount of Rs.10,00,000/-. Since her parents could not arrange such amount, she continued to stay with her parents. On 29th May, 2021, the applicant sent SMS from his cell phone, to complainant stating that he is pronouncing triple talak to her. From 25th April, 2015 to 22nd May, 2021, there was demand of money by the accused from the complainant. The Streedhan worth Rs.9,00,000/-, gold ornaments, cash of Rs.60,000/-, and household articles worth Rs.4,50,000/-, totally amounting to Rs.14,10,000/-, were misappropriated by the accused. FIR was lodged against all the accused. The brother-in-law had entered into her house while no one was in house and by touching he inappropriately outraged her modesty. She was

threatened of dire consequences, if she discloses the incident to any person. The applicant refused to take responsibility of child. The FIR was registered against husband, father-in-law, mother-in-law, elder brother-in-law and younger brother-in-law.

3 Applicant preferred an application for anticipatory bail before the Court of Sessions, which was rejected by order dated 29th July, 2021. The co-accused were granted anticipatory bail by Sessions Court.

4 Learned advocate appearing for the applicant submitted that the FIR is concocted. The dispute is on account of matrimonial differences. There are no previous complaints. The complainant has alleged that she was residing along with the applicants separately from his parents. There is no bar for granting anticipatory bail under the provisions of the Muslim Women (Protection of Rights on Divorce) Act, 2019. They have a joint account in Bank and joint credit cards. The chats exchanged between the parties shows that the complainant is in possession of jewellery. Custodial interrogation of the applicant is not necessary. Non cognizable complaint is registered against the first informant under Sections 504 and 506 of IPC on 26th August,

2021, by the applicant. The co-accused were granted relief under Section 438 of Cr.P.C. Allegations under Section 354 of IPC were made against brother-in-law of complainant. There are no previous complaints. The applicant and complainant were residing separately. They had visited Dubai for honeymoon. The complainant was taken to Umrah in 2019. The applicant through his advocate, issued notice of restitution of conjugal right on 16th July, 2021. The notice was replied by complainant through advocate vide reply dated 20th July, 2021. In March 2016, the applicant purchased flat at Kharghar. The applicant and informant shifted to new flat in October 2016. They went to Dubai in December 2017. Child was delivered on 28th March, 2018. The informant was creating quarrels under the influence of her mother. The informant left to her parents house with child and jewellery. She took away her belongings. There was no demand of money from informant. The chats relied upon by informant are manipulated. Messages sent by informant are missing. Bank statement shows that Rs.30,000/- were transferred to complainant on 20th September, 2021. Reliance is placed on the decision of Supreme Court in the case of ***Rahna Jalal Versus State of Kerala and Ors.***¹, and order dated 12th March, 2021, passed by this Court in ABA No.1760 of 2019.

1 AIR 2021 SC 225

5 Learned APP submitted that there is evidence of pronouncement of Triple Talaq against applicant. The jewellery has been retained/misappropriated by the accused. It has to be recovered. The victim was subjected to continuous harassment amounting to physical and mental cruelty.

6 Learned counsel for the complainant submitted that the victim was continuously harassed. There was demand of money. The accused had extra marital affair. Complaint was submitted to police. No action was initiated. Writ Petition was filed by the complainant. Ornaments were misappropriated by the accused. There was demand of Rs.10,00,000/-. Accused had pronounced Triple Talaq. There is evidence on record about pronouncement of Triple Talaq. The offence is of serious nature. Application under Section 438 of Cr.P.C, is not maintainable in respect to the offence under the the Muslim Women (Protection of Rights on Divorce) Act, 2019. The complainant has preferred intervention application and relied upon the N.C. complaint, text message of Triple Talaq, message of abuses. Copy of medical certificate of victim, N.C. complaints, complaint under the D.V. Act, copy of divorce petition pending before the Family Court, medical certificate etc, letter written to Kharghar Police Station etc.

7 Learned counsel for the complainant further submitted that the custodial interrogation of the applicant is necessary for recovery of ornaments. He was absconding. The previous advocate representing him was threatened. Complaint was filed by him. Section 4 of the Muslim Women (Protection of Rights on Divorce) Act, 2019, through Section 7(a) provides a specific bar to any accused to directly prefer application under Section 438 of Cr.P.C. The applicant shall first prefer an application for bail as contemplated under the provisions of above Act, and, after exhausting the remedy, can move an application under Section 438 of Cr.P.C., as observed in the decision of High Court of Kerala relied upon by complainant. The accused had issued threats. Victim was subjected to ill treatment. Custodial interrogation of the applicant is necessary. The complainant has filed affidavit-in-reply opposing application for anticipatory bail.

8 Reliance is placed on the following decisions:

- (i) Order dated 3rd August, 2020, passed by High Court of Kerala at Ernakulam in Bail Application No.9163 of 2019;***
- (ii) Order dated 9th June, 2020, passed by this Court in the case of Yusuf Usman Shaikh Versus State of Maharashtra;***

(iii) Order dated 21st October, 2020, passed by this Court in ABA No.2224 of 2020, in the case of Ebrahim Lakdawala Vs. State of Maharashtra²;

9 The co-accused were granted bail by the Sessions Court by order dated 11th August, 2021. The charge under Section 354 of IPC is attributed to brother-in-law. The applicant and complainant were residing separately for some period of time. While allowing application preferred by co-accused, the learned Sessions Judge has observed that, in the absence of specific averments that belongings of informant-victim, including gold ornaments, household articles were kept by in laws and since application preferred by applicant/accused no.1 was rejected for the purpose of custodial interrogation for recovery of ornaments, custodial interrogation of co-accused is not necessary.

10 Advocate for the complainant has relied upon the decision of the Kerala High Court in the case of ***Nahas Versus The State of Kerala and Anr. (Supra)***, wherein it was observed that Consideration of bail is dealt with in Section 7(c) of the Act, 2019. Section 7 starts with a notwithstanding clause. As per Section 7(c), notwithstanding anything contained in the Code of

Criminal Procedure, 1973, no person accused of an offence punishable under the 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. On reading Section 7(c), it is clear that a separate procedure is contemplated for the disposal of bail applications of the accused against whom offence under the Act, is alleged. Hearing of married Muslim woman upon whom talaq is pronounced is mandatory while considering an application for bail by an accused. Moreover, speaking order is necessary from Magistrate, while granting bail to a person accused of offence under the Act of 2019. When there are specific provisions and specific procedure contemplated under Section 7(c) of the Act, whether application under Section 438 of Cr.P.C. is to be entertained is the question. There is no prohibition of applicability of Section 438 of Cr.P.C., for the offence under Section 7(c) of the Act. Therefore, it cannot be said that there is total bar to entertain application under Section 438 of Cr.P.C. However, whether the discretionary jurisdiction under Section 438 of Cr.P.C. can be exercised in each and every case in which offence under the said Act is alleged. As per Section 7(c) of the

Act, Magistrate is empowered to consider an application under Section 7(c) of the Act, after hearing the Muslim woman upon whom talaq is pronounced. When there is specific provisions under the Act of 2019, normally an application under Section 438 of Cr.P.C. need not be entertained. There is no total prohibition for entertaining application under Section 438 of C.P.C. But, when a specific Section is provided in the Act of 2019 for consideration of bail application by Magistrate Court, an accused should avail such right before exercising his right under Section 438 of Cr.P.C. It will be beneficial to the victims in the Act of 2019, because all of them may not able to appear before the Sessions Court or High Court due to financial situation. It will be easier for them to approach their jurisdictional Magistrate Court, there may be an extraordinary situation in which remedy of an accused will be only under Section 438 of Cr.P.C. In such cases, an accused should explain in his application filed under Section 438 of Cr.P.C. about the reason for not approaching the learned Magistrate under Section 7(c) of the Act. If the accused appear before the Court of Magistrate and files application for bail under Section 7(c) of the Act, the learned Magistrate can consider the bail Application only after issuing notice to the complainant. The offence under Section 4 of the Act is non bailable. The accused

can be taken in custody. In the opinion of Court, for filing application for bail under Section 7(c) of the Act 2019, the presence of the accused is not mandatory. Accused can file an application for bail under Section 7(c) through a lawyer. The Court then interpreted Section 437(1) of Cr.P.C., and, observed that, magistrate can entertain an application under Section 437(1) of Cr.P.C. in case of arrest or detained without warrant by officer in charge of police station. But, Section 7 starts with sentence notwithstanding anything contained in Section 437(1) of Cr.P.C., separate procedure is contemplated in Section 7(c) of Act for consideration of bail application by Magistrate. The appearance is not insisted as per Section 7(c).

11 With great respect to the learned Judge, it is difficult to concur with the view expressed in the above decision. It is difficult to accept that the application for bail can be filed through lawyer without remaining present before the Court. The non obstante clauses cannot be stretched to the extent as observed by the Court. Clause (c) of Section 7 stipulates that married women upon whom talaq is pronounced has to be heard and Court has to be satisfied that there are reasonable grounds for granting bail to such person. The provisions even by inference

does not contemplate that bail application can be moved without appearing before the Court. In the event, Court is not satisfied that reasonable grounds for granting bail to such person,, the application could be rejected. The aforesaid judgment suggests that order of rejection can be challenged before higher Court. The decision also suggests that, if bail application is rejected/or allowed by speaking order, the party can challenge order before superior Court, and, the said Court will be in a better position to understand case. Thus, in the event, if an application for bail is rejected without appearing before Magistrate Court, the accused can challenge the order before higher Court. The judgment also indicate that Section 437(1) of Cr.P.C. is not applicable, since Section 7 of the Act is independent of provisions of Cr.P.C. The remedy of bail suggested by the said decision is in the nature of pre arrest bail. The other observation of the Court that, although Section 438 is applicable, normally such application need not be entertained. When specific Section is provided for bail, by Magistrate Court, the accused should avail such right before exercising right under Section 438 of Cr.P.C. In extra ordinary circumstances, where accused prefers application under Section 438 of Cr.P.C., he shall explain reason for not approaching the learned Magistrate under Section 7(c) of the Act of 2019. This

procedure suggested by the Court is contrary to well established principles of law. Having observed that application under Section 438 of Cr.P.C., the question of first applying for bail under Section 7(c) and giving explanation for preferring application under Section 438 of Cr.P.C. does not arise. It is settled law that, whenever the person apprehends arrest in connection with non bailable offence, he/she can resort to pre arrest bail under Section 438 of Cr.P.C.

12 Learned advocate then relied upon the decision in the case of ***Yusuf Usman Shaikh Versus State of Maharashtra***, wherein it was observed that reading Talaqnama at the instance of the accused on phone would attract different offence and since provisions of Muslim Women Protection Act is added and the same is a bailable offence for which the accused can be admitted to bail. Reading provisions of Section 7(c) of the Act of 2019, it is clear that the offence is non bailable. The accused has remedy of preferring application under Section 438 of Cr.P.C. The order dated 21st October, 2020, passed by this Court in the case of ***Ebrahim Lakdawala (Supra)*** rejecting application for anticipatory bail was delivered in facts of the said case.

13 The Hon'ble Supreme Court in the case of ***Rahna***

Jalal Versus State of Kerala and Ors.(Supra), has held that on a true and harmonious construction of Section 438 of the Code of Criminal Procedure and Section 7(c) of the Act, there is no bar on granting anticipatory bail for an offence committed under the Act. The facts of the case before the Apex Court indicate that accused had applied for anticipatory bail under Section 438 of Cr.P.C. before the High Court which was rejected. It was submitted on behalf of respondents before the Apex Court, that power of the Court to grant anticipatory bail under Section 438 of Cr.P.C., is taken away by provisions of Section 7(c) of the Act. The submission by counsel for petitioner/accused was that, Section 7(c) of the Act provides no express prohibition on the exercise of the power of the Court to grant anticipatory bail. It would be appropriate to quote paragraphs 7, 8, 9, 10, 11 and 18 of the said decision, which read as follows:

“7 Sections 3 and 4 of the Act prove as follows:

3. Talaq to be avoid and illegal : Any pronouncement of talaq by a Muslim husband upon his wife, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.

4 Punishment for pronouncing talaq : Any Muslim husband who pronounces talaq referred to in Section 3 upon his wife shall be punished with

imprisonment for a term which may extend to three years, and shall also be liable to fine.

8 Under Section 3 a pronouncement of talaq by a Muslim husband upon his wife has been rendered void and illegal. Under Section 4, a Muslim husband who pronounces talaq upon his wife, as referred to in Section 3, is punishable with imprisonment for a term, which may extend to three years. The prohibition in Sections 3 and 4 is evidently one which operates in relation to a Muslim husband alone. This is supported by the Statement of Objects and Reasons accompanying the Muslim Women (Protection of Rights on Marriage) Bill 2019, when it was introduced in the Parliament. The reasons for the introduction of the bill specifically stated that the bill was to give effect to the ruling of this court in *Shayara Bano V. Union of India* [(2017) 9 SCC 1], and to liberate' Muslim women from the customary practice of talaq-e-biddat (divorce by triple talaq) by Muslim men. It is in this context that the provisions of Section 7 would have to be interpreted. Section 7 provides as follows:

"7. Offences to be cognizable, compoundable, etc: Notwithstanding anything contained in the Code of Criminal Procedure, 1973, -

(a) an offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom talaq is pronounced or any person related to her by blood or marriage;

(b) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom talaq is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine;

(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."

The provisions of Section 7(c) apply to the Muslim husband. The offence which is created by Section 7(c) is on the pronouncement of a talaq by a Muslim husband upon his wife. Section 3 renders the pronouncement of talaq void and illegal. Section 3 makes the Act of the Muslim husband punishable with imprisonment. Thus, on a preliminary analysis, it is clear that the appellant as the mother-in-law of the second respondent cannot be accused of the offence of pronouncement of triple talaq under the Act as the offence can only be committed by a Muslim man.

9 *Having said that, we shall now deal with the contention that Section 7(c) of the Act bars the power of the court to grant anticipatory bail under Section 438 of the CrPC. Under clause (c) of Section 7, Parliament has provided that no person who is accused of an offence punishable under the Act shall be released on* CrI.A./2020

bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom the talaq is pronounced, is satisfied that there are reasonable grounds for granting bail.

10 *Section 7 begins with a non-obstante clause, which operates “notwithstanding anything contained” in the Cr.P.C. However, it is equally necessary to emphasize that the non-obstante clause operates only in the area covered by clauses (a), (b) and (c). Under clause (a), the offence is cognizable if the information is given by the married Muslim woman or a person related to her by blood or marriage to the officer in charge of a police station of the commission of the offence. Under clause (b), the offence is compoundable at the instance of the married Muslim woman upon whom the talaq is pronounced. However, in clause (b), the permission of the Magistrate is required. The Magistrate can specify the terms and conditions for compounding. Facially, clause (c) begins with the words “no person accused of an offence punishable under this Act shall be released on bail”. But what follows is equally important, because it conditions what precedes it. Two conditions follow. One of them is in the realm of procedure while the second is substantive. The former requires a hearing to be given to the married Muslim woman upon whom talaq has been pronounced. The latter requires the court to be “satisfied that there are reasonable grounds for granting bail to such person”. This substantive condition is only a recognition of something which is implicit in the judicial power to grant bail. No court will grant bail unless there are reasonable grounds to grant bail. All judicial discretion has to be exercised on reasonable grounds.*

Hence, the substantive condition in clause (c) does not deprive the court of its power to grant bail. Parliament has not overridden the provisions of Section 438 of the CrPC. There is no specific provision in Section 7(c), or elsewhere in the Act, making Section 438 inapplicable to an offence punishable under the Act. The power of the court to grant bail is a recognition of the presumption of innocence (where a trial and conviction is yet to take place) and of the value of personal liberty in all cases. Liberty can, of course, be regulated by a law which is substantively and procedurally fair, just and reasonable under Article 21. In Hema Mishra V. State of U.P. (2014) 4 SCC 453, this Court emphasized on the mandate of a constitutional court to protect the liberty of a person from being put in jeopardy on account of baseless charges. This Court held that a writ court is even empowered to grant anticipatory bail inspite of a statutory bar imposed against the grant of such relief.

11 *The statutory text indicates that Section 7(c) does not impose an absolute bar to the grant of bail. On the contrary, the Magistrate may grant bail, if satisfied that “there are reasonable grounds for granting bail to such person” and upon complying with the requirement of hearing the married Muslim woman upon whom talaq is pronounced. Hence, though Section 7 begins with a non obstante clause which operates in relation to the Cr.P.C. a plain construction of Section 7(c) would indicate that it does not impose a fetter on the power of the Magistrate to grant bail, save and except, for the stipulation that before doing so, the married Muslim woman, upon whom talaq is pronounced, must be heard and there should be a satisfaction of the Magistrate of the existence of*

reasonable grounds for granting bail to the person. This implies that even while entertaining an application for grant of anticipatory bail for an offence under the Act, the competent court must hear the married Muslim woman who has made the complaint, as prescribed under Section 7(c) of the Act. Only after giving the married Muslim woman a hearing, can the competent court grant bail to the accused.

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18 For the above reasons, we have come to the conclusion that on a true and harmonious construction of Section 438 of CrPC and Section 7(c) of the Act, there is no bar on granting anticipatory bail for an offence committed under the Act, provided that the competent court must hear the married Muslim woman who has made the complaint before granting the anticipatory bail. It would be at the discretion of the court to grant ad-interim relief to the accused during the pendency of the anticipatory bail application, having issued notice to the married Muslim woman."

14 Thus, the application under Section 438 of Cr.P.C. is maintainable in law in respect to the offences under the Muslim Women (Protection of Rights on Divorce) Act. The applicant had issued notice for restitution of conjugal rights, which was replied

by complainant. There are matrimonial differences between both the parties. The complainant has filed proceedings under Domestic Violence Act before the Court of Metropolitan Magistrate on 23rd June, 2021, which is evident from copy of complaint annexed to intervention application of complainant. The complainant has preferred application for maintenance under Section 125 of Cr.P.C. The complainant has initiated proceedings under Section 2(1),(iv), (viii) (a), (b), (c) of Dissolution of Muslim Marriage Act. Although it is alleged that the applicant has pronounced triple talaq vide cellphone message, in the facts of this case, custodial interrogation of applicant is not necessary.

15 Hence, I pass the following order:

:: ORDER ::

- (i) Anticipatory Bail Application is allowed and disposed of;
- (ii) In the event of arrest of applicant in connection with C.R.No.525 of 2021, registered with Oshiwara Police Station, Mumbai, 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 investigating officer on 6th, 7th and 8th October, 2021, between 11:00 a.m. to 01:00 p.m. and thereafter as and when called, till filing of charge-sheet.

(PRAKASH D. NAIK, J.)