

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.38750 of 2021

Arising Out of PS. Case No.-191 Year-2021 Thana- BAHADURPUR District- Darbhanga

SANTOSH YADAV @ SANTOSH KUMAR YADAV Son of Ram Prasad
Yadav Resident of Village- Abdullapur, P.S.- Bahadurpur, District-
Darbhanga.

... .. Petitioner/s

Versus

The State of Bihar Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s : Ms. Vaishnavi Singh, Advocate

For the Opposite Party/s : Dr. Mrityunjaya Kr.Gautam, APP

CORAM: HONOURABLE MR. JUSTICE SATYAVRAT VERMA
ORAL ORDER

6 04-07-2022 Heard learned counsel for the petitioner and learned
A.P.P. for the State.

The petitioner apprehends his arrest in a case registered for the offences punishable under Sections 147, 148, 149, 323, 325, 307, 341, 354(B), 448, 380, 504 and 302 of the Indian Penal Code.

Learned counsel for the petitioner submits that the petitioner is a person with clean antecedent and the informant alleges that on 30.03.2021, accused Ram Prasad Yadav who is her elder brother-in-law misbehaved with her by cracking dirty jokes which was objected, on which Ram Prasad Yadav caught her by hair and dashed her on the ground and tore her clothes, it is further alleged that on *hulla*, the minor niece of the informant



came to save her when all the accused persons started misbehaving with her and even tore her clothes and assaulted her, further alleges that her son Rohit also came to save her when Mahesh assaulted him by *rod* leading to fracture of hand, Mantun assaulted the informant by rod hitting on her hand and the petitioner also assaulted the informant by rod on her hand leading to fracture, further alleges that the accused persons also disrobed her.

Learned counsel for the petitioner submits that the petitioner has been falsely implicated in the present case, it is next submitted that though it is alleged in the F.I.R. that the petitioner assaulted her by an iron rod causing fracture on the left hand but from perusal of the F.I.R. it would manifest that the F.I.R. was instituted on 31.03.2021 at 11:00 am when from perusal of the paragraph '28' of the case diary it would manifest that the informant was under treatment at D.M.C.H. and her *fardbyan* was recorded at 12:10 pm in the hospital itself. The learned counsel thus submits that if her *fardbyan* was recorded at 12:10 pm in the hospital then how come the present F.I.R. came to be instituted at 11:00 am, thus the learned counsel casts aspersions on the truthfulness and veracity of the present F.I.R.

Learned counsel for the petitioner submits that from



perusal of the postmortem report it would manifest that the informant had received injury on both of her hands thus submits that how come she went to the police station and gave a written application with her signature, this further creates doubt with regard to the veracity of the allegations as alleged in the F.I.R. learned counsel next submits that the present F.I.R. is a counterblast to Bahadurpur P.S. Case No. 192 of 2021 instituted by one Vikash Kumar Yadav.

Learned A.P.P. for the State opposes the prayer for anticipatory bail of the petitioner and submits that the allegations as alleged in the F.I.R. gets corroborated by the injury found in the postmortem report, learned A.P.P. further submits that after perusal of case diary it manifests that anticipatory bail application of the petitioner is not maintainable as process under Section 82 Cr.P.C. has been issued against the petitioner. Learned A.P.P. in support of his submission relies on the case of **Lavesh vs State (NCT of Delhi)** reported in (2012) 8 SCC 730 and **State of Madhya Pradesh Vs. Pradeep Sharma** reported in (2014) 2 SCC 171.

Learned counsel for the petitioner rebuts the submissions of the learned A.P.P. for the State and submits that Right to Life and Personal Liberty is a sacrosanct Fundamental



Right as envisaged in Article 21 of the Constitution of India and liberty of a person cannot be curtailed except in accordance with the procedure established by law and definitely not by giving restrictive interpretation of a statute. Learned counsel further submits that Section 438 Cr.P.C. was incorporated in the Cr.P.C. in pursuance of the report of 41st Law Commission, it is further submitted that Section 438 Cr.P.C. is an embodiment of Article 21 of the Constitution of India. Learned counsel next submits that mere abscondence is not the sole criteria to deny the valuable right of personal freedom of an individual more so when the provision of Sections 82 and 83 Cr.P.C. are provisional in nature, learned counsel then refers to the definition of absconder and relies on the judgment of **Sunil Clifford Daniel Vs. State of Punjab** reported in (2012) 11 SCC 205.

Learned counsel for the petitioner next relies on the Constitution Bench judgment of the Hon'ble Supreme Court in the case of **Gurbaksh Singh Sibbia etc. Vs. The State of Punjab**, reported in **AIR 1980 SC 1632** to submit that an anticipatory bail application is maintainable even after filing of charge-sheet or till the person is not arrested. Learned counsel next submits that the case of **Gurbaksh Singh Sibbia (Supra)** emanated from the judgment of the Punjab and Haryana High



Court which rejected the application for anticipatory bail after summarizing eight legal propositions and all the eight proposition were considered threadbare by the Hon'ble Apex Court and were repelled, further the Hon'ble Apex Court considered the concept of anticipatory bail as incorporated in the Cr.P.C. by virtue of 41st report of Law Commission. Learned counsel in order to show how important is the concept of personal liberty of an individual as recorded in **Gurbaksh Singh Sibbia (Supra)** case relied on paragraphs '15', '21' and '26' of the judgment which are as follows:-

“15. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory bail within a strait-jacket. While laying down cast iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guidelines and cannot compel



blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the Court, by providing that it may grant bail “if it thinks fit”. The concern of the Courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the Courts by law

21. The High Court says in its fourth proposition that in addition to the limitations mentioned in S. 437, the petitioner must make out a “special case” for the exercise of the power to grant anticipatory bail. This, virtually, reduces the salutary power conferred by S. 438 to a dead letter. In its anxiety, otherwise just, to show that the power conferred by S. 438 is not “unguided or uncanalised”, the High Court has subjected that power to a restraint which will have the effect of making the power utterly unguided. To say that the applicant must make out a “special case” for the exercise of the power to grant anticipatory bail is really to say nothing. The applicant has undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a “special case”. We do not see why the provisions of S. 438 should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable. A wise exercise of judicial power inevitably takes care of the



evil consequences which are likely to flow out of its in temperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hall mark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

26. We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of S. 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. S. 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in S. 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in S. 438 must be saved, not jettisoned. No doubt can linger after the decision in *Maneka Gandhi* (1978) 1 SCC 248: (AIR 1978 SC 597) that in order to meet the challenge of Art. 21 of the Constitution, the procedure established by law for depriving a person of



his liberty must be fair, just and reasonable. S. 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein.”

Learned counsel for the petitioner next relies on the case of **Bharat Chaudhary And Another vs. State Of Bihar And Another** reported in **(2003) 8 SCC 77** and submitted that Hon’ble Supreme Court held that even after taking cognizance of complaint by trial court or after filing of charge-sheet by police, a person can move an application for anticipatory bail under Section 438 of the Cr.P.C., as Section 438 Cr.P.C. nowhere prohibits the court concerned from granting anticipatory bail in an appropriate case. Learned counsel next very emphatically submits that the Hon’ble Supreme Court has held that the anticipatory bail can be granted at anytime so long as the applicant has not been arrested, as held in the case of **Ravindra Saxena vs. State Of Rajasthan** reported in **(2010) 1 SCC 684**, thus submits that in view of the judgments aforesaid it can be safely construed that maintainability of an application under Section 438 Cr.P.C. does not lie at the mercy of an Investigating Officer or any other consideration including



provisions of Cr.P.C.

Learned counsel for the petitioner next submits that the Constitution Bench judgment of the Hon'ble Supreme in **Gurbaksh Singh Sibbia (*Supra*)** is still holding the field and was reiterated recently in the Constitution Bench judgment in the case of **Sushila Aggarwal and Others vs State (NCT of Delhi) And Another** reported in **(2020) 5 SCC 1**, it is submitted that the Hon'ble Supreme Court in the case of Sushila Aggarwal was considering the question, as to what should be the extent of period of protection granted to a person under Section 438 Cr.P.C. and life of anticipatory bail. The Hon'ble Supreme Court taking note of 203rd report of Law Commission along with other previous reports overruled the judgment in the case of **Salauddin Abdulsamad Shaikh vs The State of Maharashtra** reported in **(1996) 1 SCC 667** and **Adri Dharan Das vs State of West Bengal** reported in **(2005) 4 SCC 303** which laid down restrictive condition or term limiting grant of anticipatory bail. Learned counsel for the petitioner next relies on the judgment in the case of **Bharat Petroleum Corporation Limited and Another vs N.R. Vairamani & Others** reported in **(2004) 8 SCC 579** to submit that the Hon'ble Supreme Court has observed that the judgments of the court should not be cited like



a Euclid's Theorem and the slight change in the facts of case would make a sea difference in the judgment of the Court. In the same breath, learned counsel further submits that the learned A.P.P. perhaps has not properly appreciated the judgment of the Hon'ble Supreme Court in the case of **Lavesh vs State (Nct of Delhi) (Supra)** and **State of Madhya Pradesh Vs. Pradeep Sharma (Supra)** since the learned A.P.P. submitted that in view of the aforesaid judgments, the anticipatory bail application is not maintainable when process under Sections 82 and 83 of the Cr.P.C. has been issued. Learned counsel next submits that on close scrutiny of the aforesaid two judgments, it would manifest that it nowhere bars maintainability of an application under Section 438 of the Cr.P.C. if a person is absconding in fact it takes care of justifiability of an application under Section 438 of the Cr.P.C. as per provision of Section 438 Cr.P.C. itself. Learned counsel further submits that on closer scrutiny of judgment of **Lavesh vs State (NCT of Delhi) (Supra)** it would manifest that the Hon'ble Supreme Court had declined to grant relief after issuance of the process under Section 82 Cr.P.C. on the ground of entitlement and merit and not on the grounds of maintainability. Learned counsel refers to the relevant paragraph of the judgment of **Lavesh vs State (NCT of Delhi) (Supra)** to



buttress her arguments

“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”

Learned counsel for the petitioner further draws the attention of the Court to Section 438 of the Cr.P.C. which refers to the possibility of applicant to flee from justice and consequences of fleeing from justice would lead to an irresistible conclusion that the accused is absconding or concealing himself from the investigating agency, hence if there is any chance of the accused fleeing from justice then definitely he is not entitled for anticipatory bail. Learned counsel next submits that based on **Lavesh vs. State (NCT of Delhi) (Supra)** the judgment in the case of **State of Madhya Pradesh Vs. Pradeep Sharma (Supra)** was pronounced. Learned counsel further submits that both the judgments nowhere bar the maintainability of an application under section 438 Cr.P.C. in



wake of a person being declared absconder under Section 82 Cr.P.C., more so when Constitution Bench of the Hon'ble Supreme Court, as aforesaid, has categorically held that anticipatory bail is maintainable even after filing of charge-sheet or until the person is not arrested. Learned counsel further submits that from scheme of Cr.P.C. it would manifest that proceedings under Sections 82 and 83 of the Cr.P.C. are provisional in nature and subject to the provisions under Section 84 of the Cr.P.C. (at the instance of any person other than proclaimed offender having interest in the attach property) Section 85 of the Cr.P.C. (at the instance of proclaimed offender himself) and Section 86 of the Cr.P.C. (appeal against the order under Section 85 Cr.P.C. rejecting application for restoration of attach property). It is next submitted that even Section 84(4) Cr.P.C. gives power to the objector to institute a suit to establish the right which he claims in respect of the property in dispute, learned counsel thus submits that the aforesaid provisions renders the proceedings under Section 82 and 83 of the Cr.P.C. provisional in nature, hence on basis of transient provision, the right of personal liberty of an individual to seek anticipatory bail cannot be curtailed, thus on this ground also anticipatory bail is maintainable under Section 438 Cr.P.C. even if a person is



declared proclaimed offender under Section 82 Cr.P.C.

Learned counsel for the petitioner lastly submits that an important facet of the present case cannot be overlooked, it is submitted that the learned A.P.P. has vehemently submitted about non-maintainability of the present anticipatory bail application in view of the fact that process under Section 82 of the Cr.P.C has been issued declaring the petitioner an absconder, as such the petitioner during the course of investigation had concealed himself from the investigation agency but the fact is that the petitioner much prior to the issuance of the process under Section 82 of the Cr.P.C had already subjected himself to the remedy available in law by filing an application for anticipatory bail. Learned counsel submits that process under Section 82 Cr.P.C was issued on 13.12.2021, when the petitioner on 02.07.2021 itself had moved before this Court for seeking anticipatory bail and much prior to approaching this Court, the petitioner in June 2021 itself had moved before the learned District Court seeking anticipatory bail which was rejected on 16.06.2021, learned counsel thus submits that if the process under Section 82 Cr.P.C was issued during pendency of his application of anticipatory bail, can it be even remotely suggested that the petitioner was absconding. Learned counsel



thus submits that it would be a travesty of justice if an anticipatory bail application is rejected merely because during pendency of the anticipatory bail application the petitioner was declared absconder, when the law on the issue stands well settled that an accused is entitled to anticipatory bail even after filing of charge-sheet or before he is arrested as submitted earlier.

After hearing the learned counsel for the petitioner and learned A.P.P. for the State, the Court comes to a considered conclusion that anticipatory bail application is maintainable even after issuance of process under Section 82 of the Cr.P.C further the Hon'ble Supreme Court in the case of **Gurbaksh Singh Sibbia (*Supra*)** has very clearly laid that anticipatory bail application is maintainable even after filing of charge-sheet or till the person is not arrested, thereafter another Constitution Bench judgment of the Hon'ble Supreme Court in the case of **Sushila Aggarwal and Others vs State (NCT of Delhi) and Another (*supra*)** had also placed reliance on the **Gurbaksh Singh Sibbia (*Supra*)**. Further from the scheme of Cr.P.C. it *prima-facie* appears that Section 82 of the Cr.P.C. is resorted to only when an accused is trying to flee from justice and Section 83 Cr.P.C. is an additional provision to create more pressure on



the accused to surrender since the provision provides for attachment of property but then the said attachment of property is not final and it is subject to Sections 84, 85 and 86 of the Cr.P.C., as aforesaid, further if on objection the attachment order is recalled then definitely it will be presumed that the petitioner no longer is an absconder because abscondence is a precondition for issuance of an order under Section 83 of the Cr.P.C. thus *prima-facie* it appears that Sections 82 and 83 are provisions which are provisional in nature and as such a valuable right like personal liberty as enshrined in Article 21 of the Constitution of India cannot be taken away based on a transient provision. The Court is also in agreement with the submission made by the learned counsel for the petitioner that even Section 438 of the Cr.P.C. nowhere bars anticipatory bail application on the ground of issuance of process under Section 82 Cr.P.C. thus the Court holds that anticipatory bail application is maintainable even after issuance of process under Section 82 of the Cr.P.C. though the accused on merits may not be entitled to seek relief based on his conduct leading to issuance of process under Section 82 but then definitely maintainability of an anticipatory bail application after issuance of process under Section 82 is definitely not barred.



At this stage, the learned counsel for the petitioner submits that as far as merit and entitlement of the case with respect to the petitioner is concerned, it is brought to the notice of the Court in view of the submissions made on merits aforesaid, it is submitted that the informant in the F.I.R. alleges that this petitioner assaulted her by an iron rod causing fracture of her left hand but the *fardbyan* of the informant which was recorded in the hospital on 31.02.2021 at 12:10 PM, there she does not even remotely suggest that this petitioner had assaulted her leading to fracture of her left hand.

Learned counsel next submits that since, as submitted aforesaid, there appears to be grave contradictions in the F.I.R. instituted at 11:00 am and the *fardbyan* recorded at 12:10 pm as such the petitioner deserves to be enlarged on anticipatory bail.

Considering the submissions made by the learned counsel for the petitioner and the fact that the petitioner is a person with clean antecedent, the petitioner above-named, in the event of his arrest or surrender before the learned Court below within a period of six weeks from today, be released on anticipatory bail on furnishing bail bonds of Rs. 10,000/- (Rupees Ten Thousand) each with two sureties of the like amount each to the satisfaction of the learned court below where



the case is pending/successor court in connection with
Bahadurpur P.S. Case No. 191 of 2021 subject to the conditions
as laid down under Section 438 (2) of the Cr.P.C.

(Satyavrat Verma, J)

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