

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.48128 of 2021

Arising Out of PS. Case No.-141 Year-2021 Thana- TAJPUR District- Samastipur

NILA DEVI @ NILA Wife of Shankar Sah, Resident of Village - Srirampur
Ayodhya, P.S.- Pusa, Distt. - Samastipur.

... .. Petitioner/s

Versus

The State of Bihar.

... .. Opposite Party/s

with

CRIMINAL MISCELLANEOUS No. 56851 of 2021

Arising Out of PS. Case No.-141 Year-2021 Thana- TAJPUR District- Samastipur

1. AJAY KUMAR S/o Shankar Sah, R/o Village - Srirampur Ayodhya, P.S. - Pusa, Distt. - Samastipur.
2. SHANKAR SAH S/o Late Acchelal Sah, R/o Village - Srirampur Ayodhya, P.S. - Pusa, Distt. - Samastipur.

... .. Petitioner/s

Versus

THE STATE OF BIHAR.

... .. Opposite Party/s

Appearance :

(In CRIMINAL MISCELLANEOUS No. 48128 of 2021)

For the Petitioner/s : Ms. Madhuri Kumari

For the Opposite Party/s : Mr. Shailendra Kumar

Mr. Bharat Bhushan

For the informant : Mr. Dharendra Kumar

(In CRIMINAL MISCELLANEOUS No. 56851 of 2021)

For the Petitioner/s : Ms. Madhuri Kumari

For the Opposite Party/s : Mr. Yogendra Kumar

**CORAM: HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY**

CAV ORDER

4 05-09-2022 The learned counsel for the petitioners is directed to

remove all the defects, if any, pointed out by the office within

one month.

I have already heard the learned counsel for the



petitioners as well as the learned counsel for the informant and the learned Additional Public Prosecutor for the State.

The petitioners apprehend their arrest in connection with Tajpur(Waini O.P.) P.S. Case No. 141 of 2021 registered for offence punishable under sections 419 and 420/34 of the Indian Penal Code.

The informant Rajeev Kumar has made allegation that on 20.01.2017, petitioner Nila Devi and her husband Shankar Sah, who were already known to the informant, came to his house and expressed their intent to sell their house for consideration money of Rs.25,50,000/-(Twenty five lacs fifty thousand). They also assured him to return the money and in case they returned the money, the deed of Kewala was to be returned to them. The papers of sale deed were prepared and the deed was registered. The petitioner Arun Kumar Kanth is the writer of that deed. Later, on, the informant came to know that the land, which was purchased by him, has already been mortgaged by the petitioner Nila Devi and her husband in favour of the State Bank of India and without disclosing this fact the petitioners became successful in executing sale deed and thereby cheated the informant.

At the very outset, the learned counsel for the



informant has stated that the process under sections 82 and 83 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code) has been issued against the petitioners in this case and in the light of recent decision of Hon'ble Apex Court, the petitioners are not entitled to the privileges of anticipatory bail. In support of his submissions the learned counsel for the informant and the learned Additional Public Prosecutor have relied upon a recent decision of Hon'ble Supreme Court, reported in *AIR 2021 SC 5125, Prem Shankar Prasad vs. the State of Bihar and another*. The Hon'ble Supreme Court, in paragraph No. 7.3 of the above-noted decision, has observed as follows:

“7.3 ...Recently, in Lavesb v. State (NCT of Delhi) [(2012) 8 SCC 730], this Court, (of which both of us were parties) considered the scope of granting relief under [Section 438](#) vis-à-vis to a person who was declared as an absconder or proclaimed offender in terms of [Section 82](#) of the Code. In para 12, this Court held as under: (SCC p. 733)

“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.”

It is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail. Thus the High Court has committed an error in granting anticipatory bail to respondent No.2-accused ignoring the proceedings under Section 82-83 of Cr.P.C.”

The learned counsel for the petitioners by relying upon the decision of Hon’ble Apex Court, reported in *PLJR 2020 (1) 524 (SC), Sushila Aggarwal And Others vs State (NCT of Delhi) And Another*, has submitted that merely because the issuance of process under section 82 or 83 of ‘the Code’ does not preclude the petitioners from getting the benefit of anticipatory bail. The learned counsel for the petitioners has submitted further that recently the Hon’ble Coordinate Bench



of this Court has considered the above-mentioned decision of the Hon'ble Apex Court in Criminal Miscellaneous No. 38750 2021, *Santosh Yadav @ Santosh Kumar Yadav Versus The State of Bihar* and vide order dated 04.07.2022, the coordinate Bench has been pleased to hold that merely because the issuance of the process under section 82 or 83 of 'the Code', the valuable statutory right given to a citizen by way of section 438 of 'the Code', cannot be taken away and the valuable right like personal liberty which has been enshrined in Article 21 of the Constitution of India, cannot be taken away.

The coordinate Bench has considered the decisions of the Hon'ble Supreme Court in *Gurbaksh Singh Sibbia etc. Vs. The State of Punjab*, reported in *AIR 1980 SC 1632* and *Sushila Aggarwal and Others vs State (NCT of Delhi) And Another*, reported in *(2020) 5 SCC 1* and *Bharat Petroleum Corporation Limited and Another vs N.R. Vairamani & Others*, reported in *(2004) 8 SCC 579*.

In these decisions, the entitlement of an accused to be released on anticipatory bail when the process under section 82 or 83 of 'the Code' has been issued, was not the subject matter in any of the above-mentioned cases. In *Gurbaksh Singh Sibbia* case (*supra*), it was held that anticipatory bail application



is maintainable even after filing of the charge sheet or till the person is not arrested whereas in *Sushila Aggarwal* case (*supra*) the matter in issue was as to what should be the life span of an anticipatory bail, whether an accused who has been enlarged on anticipatory bail can get this benefit only till submission of the charge sheet or till the conclusion of the trial. The matter was referred to the Hon'ble Constitutional Bench, as there were two divergent opinion in *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. The Hon'ble Constitutional Bench of Supreme Court in *Sushila Aggarwal* case (*supra*) has been pleased to hold that the right of anticipatory bail of an accused does not extinguish on submission of charge sheet and the privilege or protection granted under section 438 of 'the Code' shall extend till conclusion of the trial.

Now it has to be seen whether a person who is declared absconder is entitled for anticipatory bail or not? If a person is declared absconder under section 82 of 'the Code', it means that the court which declared him as absconder has reason to believe that he has absconded or is concealing himself. There are two ingredients or pre-requisites of declaring an



accused as an absconder. First ingredient is that a warrant should have been issued against that person and second, the Court must be of the opinion that the accused has absconded or is concealing himself. Sub-section 1 of section 82 of 'the Code' is being extracted hereinbelow:-

“If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.”

The order under section 82 of 'the Code' is a judicial order pronounced by a court of competent jurisdiction. When the order is passed under section 82 of 'the Code' by a court of competent jurisdiction, it means that the court was of the opinion that the accused was concealing himself or absconding. Until or unless this order is set aside by the superior court, there is presumption that the person against whom the process under section 82 of 'the Code' has been issued, is concealing himself or absconding. Though the order is transitory in nature and



subservient to provisions under sections 83, 84, 85 and 86 of 'the Code' even then its judicial sanctity is not indefeasible unless it is judicially reviewed by the superior authorities in hierarchy.

Now the point remains to be considered whether a person, who is absconding or concealing himself and fleeing away from the justice, should be given the benefit of anticipatory bail under section 438 of 'the Code'? Section 438 of 'the Code' provides a statutory right to a person who has reason to believe that he may be arrested on accusation of having committed a non-bailable offence to file petition for his pre-arrest bail, before the High Court or the Court of Session. A person, who is fleeing away from justice and has been declared as absconder by a judicial order promulgated by a competent court, how can he say that there is apprehension of his arrest, without making himself available to the process of justice. In my view, he is certainly not entitled for anticipatory bail. He is under obligation to make himself available to the authority where his appearance is required and bypassing that authority if he comes before the superior court with a prayer of anticipatory bail, he is not entitled for that. In my view, he should submit himself to the court/authority where his presence is required and the appellant instead of making himself available before the learned court below or before the investigating authorities, they want a protective blanket of anticipatory bail over



their head, which cannot and should not be given.

It has been argued on behalf of the petitioners that anticipatory bail petition was filed before issuance of process under section 82 of 'the Code'. In this respect, my humble view is that the above-mentioned decisions of Hon'ble Supreme Court in the case of *Lavesh v. State (NCT of Delhi)* (*supra*) and in the case of *Prem Shankar Prasad vs. the State of Bihar and another* (*supra*) does not make any distinction whether anticipatory bail petition is filed before or after passing of order under section 82 of 'the Code'. Merely because the appellants have preferred anticipatory bail petition prior to order passed under section 82 of 'the Code', it does not *ipso facto* make themselves entitled to the privileges for anticipatory bail.

On the above-mentioned observations, the petitioners are not entitled for privileges of anticipatory bail. Accordingly, it is rejected.

Office shall ensure that all defects are removed by the petitioners within the stipulated time mentioned hereinabove, failing which, the matter shall be brought to the notice of this Court.

(Nawneet Kumar Pandey, J)

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