

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3901 of 2021**

Arising Out of PS. Case No.-302 Year-2020 Thana- SURSAND District- Sitamarhi

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1. RAJEEV KUMAR Son of Ram Sagar Mahto, Resident of Village- Radhapur, P.S.- Sursand, District- Sitamarhi.
 2. Ram Yatan Kushwaha @ Ram Yatan Mahto Son of Ram Sagar Mahto, Resident of Village- Radhapur, P.S.- Sursand, District- Sitamarhi.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Uma Kant Tiwary
For the Respondent/s : Mr.Sadanand Paswan

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

CAV ORDER

6 31-08-2022 The learned counsel for the appellants 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 appellants as well as the learned Special Public Prosecutor for the State and the learned counsel for the informant.

This appeal has been preferred on behalf of the appellants under Section 14 (A) (2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for setting aside the order dated 08.04.2021 passed by the learned Additional Sessions Judge-cum-Special Judge, SC/ST (POA) Act, Sitamarhi in A.B.P. No. 2162 of 2020/01 of 2021, arising



out of Sursand P.S. Case No. 302 of 2020 registered for offence punishable under sections 341, 323, 504, 506, 427, 379/34 of the Indian Penal Code and sections 3 (1) (r) (s) SC/ST (POA) Act, whereby the prayer for anticipatory bail of the appellants has been rejected.

The brief fact of this case is that the informant Bechan Baitha made allegation that on 29th of September, 2020 at about 3:00-4:00 P.M. when his son Rajnish Ranjan was at his shop, his brother gave him Rs.20,000/- to purchase kerosene oil and other articles. It was seen by appellant no. 2. Appellant no. 2 revealed this fact to co-accused Ravi Shankar Thakur. Against Ravi Shankar Thakur, the informant has already lodged Sursand P.S. Case No. 167 of 2020. It is alleged further that in the meantime, Ravi Shankar Thakur armed with pistol, appellant no. 2 armed with iron rod, Ajit Kumar armed with sword and 8-10 other persons armed with lathi, rod etc. came to the informant's shop, abused and assaulted his son. Ravi Shankar Thakur and appellant no. 2 with the help of other accused persons abused the informant's son by calling his caste name and assaulted him and looted away Rs.20,000/- from his shop at the point of pistol and they also destroyed his shop and threatened to withdraw the earlier case. When the informant was told about the occurrence



by his son and other co-villagers and they were considering to inform the senior officials about the occurrence, the appellants and other accused persons named in the FIR along with 50-60 persons armed with pistol, sharp cutting weapons, iron rod, danda, etc., came at his house at about 7:00-7:30 P.M., surrounded his house and began to damage the articles. The informant and his family members raised hue and cry and protested the miscreants, whereupon co-accused Ravi Shankar Thakur, appellant no. 2 and co-accused Ajit Kumar had broken the main door to his house, entered inside his house and thereafter, they abused them by calling their caste name. Co-accused Prem Shankar Thakur ordered the miscreants to destroy the articles of the informant and also to commit rape upon his *Bahu-Beti*. The accused Ravi Shankar Thakur and Ram Yatan Kushwaha (appellant no. 2) pushed down his *bhabhi* Ruma Kumari and committed rape on her. His brother Bishnu Baitha came there to rescue his wife, but Ravi Shankar Thakur inflicted sharp edged weapons and he suffered injury on his head. Appellant no.2 inflicted rod blow on the head of his brother with intention to kill him, due to which his brother sustained head injury. Accused Arun Kumar inflicted knife blow on the forehead of his brother with intention to kill, due to



which his brother sustained injury on his forehead and other accused persons assaulted his brother with *lathi*, *danda*, etc.

The learned counsel for the appellants has submitted that the appellants are innocent and they have falsely been implicated in this case due to dirty village politics. He has submitted further that there is no specific allegation of inflicting assault against appellant Rajeev Kumar. The father of appellant Rajeev Kumar has filed Title Suit No. 232 of 2008 against the informant Bechan Baitha which is still pending. He has also submitted that there is enmity between both the parties and the informant was making pressure on the appellants to withdraw the aforesaid title suit. The informant has already lodged Sursand P.S. Case No. 44 of 2018 as well as Sursand P.S. Case No. 303 of 2018.

On the other hand, the learned counsel for the informant as well as the learned Special Public Prosecutor has submitted that the witnesses in paragraph 9, 10, 11 and 12 have fully supported the prosecution case. The accused persons, including the appellants, committed atrocities upon the members of scheduled castes and there is also allegation of rape upon appellant no. 2. They have submitted further that the appellants absconded during the course of investigation and the process



under section 82 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') has been issued against them, as such, they are not entitled to the privileges of anticipatory bail. In support of his submissions, the learned Special Public Prosecutor has 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 Lavesha 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 appellants has submitted 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 way.

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 Aggrawal* 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 was 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 period of 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 is 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.

The learned counsel for the informant as well as the learned Special Public Prosecutor has also submitted that the present case has been lodged also under the provisions of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and as per provisions of section 18 of that Act, anticipatory bail petition is also not maintainable.



It has been argued on behalf of the appellants 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*) did 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 and consequently the appeal is dismissed.

Office shall ensure that all defects are removed by the appellants 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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