

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ANTICIPATORY BAIL APPLICATION NO.193 OF 2022

Santosh S/o Kondiba Sawant

...APPLICANT

VERSUS

- 1) The State of Maharashtra,
- 2) X Y Z

...RESPONDENTS

...
Mr.G.L. Deshpande Advocate h/f. Mr. U.A. Khekale
Advocate for Applicant.
Mr.A.M. Phule, A.P.P. for Respondent No.1 – State.
Mr.S.B. Ghatol Patil Advocate for Respondent No.2.

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CORAM: SMT. VIBHA KANKANWADI, J.

DATE OF RESERVING ORDER : 28th MARCH 2022

DATE OF PRONOUNCING ORDER : 19th APRIL 2022

ORDER :

1. This is an application for anticipatory bail in Crime No.126 of 2021, registered with Pundlik Nagar Police Station, Aurangabad, District-Aurangabad for the offence punishable

under Sections 498-A, 354-A, 323 read with Section 34 of the Indian Penal Code and Sections 8 and 12 of the Protection of Children from Sexual Offences Act (for short "POCSO Act"). The First Information Report (for short "FIR") was registered on 26th March 2021. Subsequently, Section 376, 354-B of the Indian Penal Code were added. Similarly, Sections 3, 4, 7, 8, 9(M)(L), 10, 12, 16 and 17 of the POCSO Act were also added.

2. The informant is the wife of the applicant. It is alleged that marriage of the informant was performed with the applicant on 16th May 2007. Daughter was born out of the wedlock in 2008 and presently she is aged about 12 years. The applicant had illicit relations with the co-accused Meena. Informant's husband (applicant), Meena and her friend Anna Pan-tapriwala used to visit house of the informant. She was made to drink liquid and while she was unconscious her husband and Meena used to disrobe her. They used to pour drops of wax of burning candle on her private part. On demand of water, accused applicant used to pass urine in her mouth. She was subjected to harassment. The husband used to put lizard on her person to scare her. The co-accused Anna Pan tapriwala and Meena used to disrobe daughter of the informant and outrage her modesty by touching her private part. The applicant husband used to have physical

relations with Meena in presence of informant and daughter. Father-in-law and mother-in-law harassed her. Applicant was suspecting her character and threatening that videos would be made viral. It has been further alleged by the informant that the applicant misbehaved with his own daughter and sexually harassed her and therefore, later on the offence under the POCSO Act has been added.

3. Investigation is now complete and charge-sheet has been filed on 4th June 2021.

4. The applicant had approached this Court by filing Anticipatory Bail Application No.882 of 2021 and it came to be rejected, by giving detail order on 20th October 2021. Still, it appears that applicant has not been arrested and therefore, this is another application by the applicant.

5. Learned Advocate for the applicant submitted that practically there may not be change in circumstances as regards the facts of the case are concerned when the earlier application filed by the applicant came to be rejected on on 20th October 2021, however, after the rejection of his application, the applicant had gone to Pundlik Nagar Police Station by taking a

letter in writing on 25th January 2022 and he had given a copy of the same to the Police Commissioner also. However, he has not been arrested by the Investigating Officer (for short "I.O.") for the reasons best known. In fact the applicant was not having any alternative and therefore, with the copies of documents of his defence he had approached the Commissioner of Police. It was told to him that he should approach the Pundlik Nagar Police Station. He, therefore, went to Police Station on 25th January 2022 around 8.00 p.m. to 9.00 p.m. The I.O. was not available and therefore, he was asked to come on the next day after 12.00 noon. Accordingly, on next day he went to the said Police Station between 12.00 noon to 1.00 p.m., however, on that day also the I.O. was not available. The concerned officer told him to come on 27th January 2022. He then again visited the same Police Station twice between 12.00 noon to 2.30 p.m. on 27th January 2022. Again the I.O. was not available and the officer on duty gave the Mobile Number of the I.O. Accordingly, the applicant had immediately called the I.O. from the Mobile of *Chaiwala* and requested that he should be allowed to surrender. However, the I.O. told him that she will call him when ever required. Applicant had gone to Pundlik Nagar Police Station again on 28th January 2022, as charge-sheet was filed against him under

Section 299 of the Code of Criminal Procedure i.e. by showing him absconding. On that day Mrs. Meera Chavhan, the I.O. was available in the Police Station. Applicant had met her personally, however, instead of taking in custody and accepting his representation, he was asked to leave the Police Station. She told him that she would call him when required. Under these circumstances when the Police themselves do not require the custody of the applicant, this can be said to be the fit case where applicant can be released on anticipatory bail. The CCTV footage from the CCTV cameras of the Police Station would made it clear that how many times the applicant had visited the Police Station and this fact is told by the applicant on oath. Learned Advocate therefore, submitted that the applicant is ready to co-operate with the investigation and since custody of the applicant is not required, he be released on anticipatory bail.

6. Taking into consideration the contents of the application above said, the I.O. was directed to file affidavit, so also the Police Inspector, Pundlik Nagar Police Station was asked to file affidavit regarding arrangements made about CCTV cameras, its back up etc. The affidavit of the I.O. shows that she is denying the allegations against her and also the fact that the applicant had gone to the Police Station with his representation on so

many dates. She also states that if the applicant had *bona fide* intention to surrender before the Police Officer or the learned Sessions Court, then he would have followed the due process and it was simple. Though the applicant states that he had made attempts to surrender before the Sessions Court by filing application, it is hard to believe that the Sessions Court would not have passed any order on that application. Some documents have been created by the applicant. When the alleged representation for surrender has been addressed by him to Police Inspector, Pundlik Nagar Police Station, there was no occasion for him to go to the Office of the Police Commissioner and get acknowledgement stamp on that document. The CCTV footage does not show that the applicant had ever come to the Police Station for surrender. The I.O. says that she was absolutely on duty on all those dates mentioned by the applicant in his application. Secondly, the Police Inspector of the Pundlik Nagar Police Station states that the directions given by the Apex Court as well as Government Resolution have been fully adopted. There are 11 cameras installed inside and outside Pundlik Nagar Police Station. As per the software, the backup is for one year and the storage capacity is 10 TB. He has produced a Pen Drive of the CCTV footage in a sealed packet of the relevant dates.

7. Learned APP strongly opposed the application for anticipatory bail and submitted that there is absolutely no change in the circumstances. This Court, by detail order dated 20th October 2021, has rejected the earlier anticipatory bail application filed by the applicant and therefore, this Court cannot, once again, have a re-look at the allegations and the grounds made.

8. At the outset, it is to be noted that the charge-sheet was filed before the Special Court on 4th June 2021 and this Court had rejected the earlier anticipatory bail application filed by the applicant i.e. Anticipatory Bail Application No.882 of 2021 on 20th October 2021. That means entire charge-sheet was before this Court when it has rejected the earlier anticipatory bail application. Now, there is absolutely no change in the circumstances. All the documents which were forming part of the charge-sheet were considered by this Court and it was opined that this is not a fit case where the extra ordinary discretionary relief should be granted to the applicant. In addition to whatever has been said by this Court earlier, it can be said that the applicant is the husband of the informant and father of the victim girl. If we consider the contents of the FIR, statement of

the informant under Section 164 of the Code of Criminal Procedure, statement of the victim under Section 161 as well as 164 of the Code of Criminal Procedure and also the other witnesses to whom there was immediate disclosure, it would show that the allegations against the applicant are very much serious. The same cannot be brush aside just on the ground canvassed by the applicant that the informant was suspicious in her nature. That defence will have to be proved by the applicant at the time of trial. The acts amounting to offence under Section 354-A, 376-A, 376-B of the Indian Penal Code and under the provisions of POCSO Act are very much serious in nature, which need not be reproduced. Therefore, when there is no change in the circumstances, and from the available evidence on record, there is no reason for this Court to take a different view than it was taken earlier when the earlier anticipatory bail application was rejected.

9. What is bothering is that according to the applicant he had made attempts to surrender before the Commissioner of Police, Sessions Court as well as I.O., however, none of them accepted his surrender. This by itself is surprising. First of all when his earlier anticipatory bail application was rejected on 20th October 2021, then why he waited till 25th January 2022 to surrender, is a

question which he has not answered. If he had the intention to surrender then he would have surrendered immediately after the rejection of the first application. According to him, he had gone to the Court of Special Judge on 24th January 2022 and filed application in Special Case No.310 of 2021 for his surrender, however, no order is passed. Interestingly, the applicant has not filed the affidavit of his Advocate through whom he had made that application before the learned Special Judge, stating that such application was in fact filed through him by the applicant but it was not accepted by the Special Court. The copy of the said application allegedly filed, is made available but it is to be noted that it is not signed by the applicant. Merely something written in the form of the application will not be sufficient in this case. How all the three authorities could say no for the surrender of the applicant is a mystery and therefore, rather it casts doubt over the statements made by the applicant himself. Secondly, his representation – cum – surrender memo dated 25th January 2022 was addressed to the Police Inspector, Pundlik Nagar Police Station but the acknowledgement is of the Office of the Police Commissioner. How the things can go simultaneously. If the Police Inspector, Pundlik Nagar Police Station or I.O. would have refused to accept the same, then only he could have gone to the

Police Commissioner to give the copy of the same. There appears to be some intentional act on the part of the applicant.

10. No doubt, now there is word against word i.e. of the applicant as well as the I.O. Though Police Inspector by his affidavit has stated about the CCTV system that has been installed in the Police Station, but neither the I.O. nor the Police Inspector has taken care to produce on record the transcript of the CCTV footage of the relevant dates and time. Mere production of the Pen Drive is not sufficient. It is not appended by certificate under Section 65-B of the Indian Evidence Act. The way the things had been handled by the Police Inspector as well as the I.O., needs to be deprecated. Only after the order was passed, the I.O. has filed affidavit-in-reply, when the allegations against her were made in the application itself.

11. By separate affidavit-in-reply respondent No.2 / informant has stated that the allegations raised by the applicant that he was not arrested by the Police authorities, are after thought. The charge-sheet itself contains documents in the form of entries in the general diary that many times attempts were made to search the present applicant but he could not be found. When the opportunity was available to the I.O., she ought to have

explained as to why she has not undertaken the process under Sections 82 and 83 of the Code of Criminal Procedure against the present applicant. Time and again this Court has observed that provisions of Section 299 of the Code of Criminal Procedure are in fact enabling provisions and it does not give any authority or power to the I.O. to file charge-sheet in absence of the accused. That provision rather empowers the Court to record the evidence in absence of an absconding accused. Process in respect of absconding accused will have to be then followed. The fact still remains that the applicant is not explaining as to where he was till filing of the charge-sheet and when no evidence to that effect has been produced, it will have to be stated that he is absconding. Therefore in view of ***Lavesh vs. State (NCT of Delhi), 2012 (8) SCC 730*** and also in view of ***Prem Shankar Prasad vs. The State of Bihar and another, AIR 2021 S.C. 5125***, it will have to be held that an absconding accused is not entitled to the discretionary relief under Section 438 of the Code of Criminal Procedure. The only difference is that the applicant appears to be not a declared absconder by adopting procedure under Sections 82 and 83 of the Code of Criminal Procedure, but then there were attempts made to arrest him and general diary entries support the fact. The analogy, therefore, can be applied

in the present case. In view of these facts the application deserves to be rejected.

12. Accordingly, the Application is rejected.

[SMT. VIBHA KANKANWADI , J.]

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