

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

14 ANTICIPATORY BAIL APPLICATION NO.237 OF 2022

IMRAN ALI S/O ASHRAF ALI

VERSUS

THE STATE OF MAHARASHTRA

...

Mr. S.N. Lute, Advocate for the applicant

Mr. A.M. Phule, APP for the respondent

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 04th APRIL, 2022

PER COURT :

1 The applicant is apprehending his arrest in connection with Crime No.281/2021 dated 09.06.2021 registered with Jinsi Police Station, Dist. Aurangabad, for the offence punishable under Section 498-A, 323, 504, 506 read with Section 34 of the Indian Penal Code, 1860. The applicant is the husband of the informant. They got married on 09.05.2016 as per Muslim rites. They have twin children aged two years and six months.

2 Heard learned Advocate Mr. S.N. Lute for the applicant and learned APP Mr. A.M. Phule for the respondent. In order to cut short, it can

be said that they have argued in support of their respective contentions.

3 Perusal of the First Information Report would show that the informant is contending that at the time of her marriage her father had given dowry of Rs.1,00,000/-, 7 tola of gold and household utensils. She went for cohabitation and it is stated that she was treated properly for about 3-4 months only. Thereafter, the husband used to assault and abuse her on the count that she is unable to keep the household articles properly. When she disclosed the said fact to her father-in-law, mother-in-law and sister-in-law, they also started saying that she should stay properly in the house. They used to abuse and give pinching words and insult her. The mother-in-law used to abuse her in filthy language and used to give threats that she would be driven out of the house. She was kept starving and on some occasion she was kept outside the house throughout the night. They were also saying that her parents were not given motorcycle at the time of marriage and then after some days they started demanding amount of Rs.5,00,000/- as the material in the cutlery shop was to be purchased. When the informant told the said fact to her father, her father tried to give advice to the accused persons. But the accused continued to harass her. Informant came to Aurangabad for the purpose of delivery on 01.08.2018 and then she delivered the twins. Her husband came to Aurangabad on the next day and told that he would take

her as well as children to home. Thereafter her sister-in-law came to see the children and asked her, as to whether she has made arrangement for the money or not. If she is unable to bring money, then, she should continue to stay with her father's house. Even after two months of delivery the husband and in-laws had not come to fetch her back and, therefore, when she gave phone call to the husband, he told that she should bring amount of Rs.5,00,000/-, then only she would be allowed to cohabit. It is then stated that later on she came to know from her relatives that her husband has performed second marriage on 22.02.2021 and, therefore, she has lodged the report. The applicant has produced on record a copy of complaint application filed by him to Kamargaon Police Station stating that the informant is elder to him and was married earlier, but she had not disclosed the said fact to him. She is medical practitioner by profession. Due to his financial condition and as she was not doing her domestic duties properly, disputes arose. However, she went to her parents house. About three years she has not returned and she is giving threats on the phone and demanding the amount. This complaint application was filed by the applicant with the said Police Station on 10.03.2021.

4 In fact, taking into consideration the allegations in the First Information Report and the sections those have been invoked of the Indian

Penal Code, it is now necessary to see whether the physical custody of the applicant is necessary or rather his arrest itself is necessary. The applicant had approached Sessions Court, Aurangabad along with his parents and sister. Parents and sister have been granted anticipatory bail by the learned Additional Sessions Judge, however, the application of the husband has been rejected on the ground that there are allegations about the second marriage and when there is twins born to the informant from applicant No.1 i.e. present applicant, it amounts to cruelty. In fact, what should be seen by the Sessions Judges/Additional Sessions Judges when the offence alleged is under Section 498-A, 323, 504, 506 read with Section 34 of the Indian Penal Code is required to be revisited, because there cannot be a casual approach while dealing with such kind of applications. Paragraph No.4 of the order passed by learned Additional Sessions Judge covers what was the stand of the prosecution/for investigating agency. It is stated that the nature of the applicants is aggressive and they had treated the informant with cruelty. It is also stated that the applicant No.1 had performed the second marriage and it amounts to cruelty and lastly it is stated that if the applicants are enlarged on bail, there is strong possibility of tampering with the prosecution witnesses, as they are the close relatives. Certainly, these are not the criteria, those are required to be seen, as per the decision in **Arnesh Kumar vs. State of Bihar, 2014(8) SCC 273**. In fact, **Arnesh Kumar** (supra) was the case dealing with

offence under Section 498-A of the Indian Penal Code, but the directions given in the same were equally applicable to the offences in which the punishment is provided up to seven years. Interpretation of Section 41 and 41-A of the Code of Criminal Procedure made by the Hon'ble Supreme Court is binding on all the Courts in the country. After considering the provisions of Section 41 of the Code of Criminal Procedure Hon'ble Supreme Court held thus -

“From a plain reading of the aforesaid provisions, it is evident that a person accused of an offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on his satisfaction that such person had committed the offence punishable as aforesaid. A police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts.

In pith and core, the police officer before arrest must put a question to himself, why arrest? 'Is it really required?' 'What purpose it

will serve' 'What object it will achieve' ' It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses (a) to (e) of clause (1) of Section 41 Cr.PC., 1973."

Thereafter, provisions of Section 41-A of the Code of Criminal Procedure as per Section 6 of the Code of Criminal Procedure, 1973 (Amendment) Act 2008 was considered and while interpreting it, it has been observed that -

"The aforesaid provisions makes it clear that in all cases where the arrest of a person is not required under Section 41(1) Cr.PC., 1973 the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under section 41 Cr.PC., 1973 has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid."

"We are of the opinion that if the provisions of Section 41 Cr.PC., 1973 which authorises the police officer to arrest an accused without

an order from a Magistrate and without a warrant are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. We would like to emphasise that the practice of mechanically reproducing in the case diary all or most of the reasons contained in Section 41 Cr.P.C., 1973 for effecting arrest be discouraged and discontinued.”

The directions were issued in that case and while issuing those directions the purpose for which those directions were given were stated as to ensure that the police officer do not arrest the accused unnecessarily and the Magistrate do not authorize detention casually and mechanically. Further, in the catena of Judgments these directions have been followed and reiterated by Hon’ble Apex Court as well as various High Courts including this Court. Therefore, it is bounden duty of the police officers to observe those directions given in **Arnesh Kumar** (supra), so also, there is equal duty on the Magistrates, before whom the report under Section 167(1) of the Code of Criminal Procedure is filed. It can be further said, taking into consideration those directions that even the learned Sessions Judges as well as Additional Sessions Judges should consider those directions when such an offence is involved and whether the say given by the Investigating Officer is in consonance of Section 41 of the Code of Criminal Procedure and the

directions in **Arnesh Kumar** (supra). Few directions from **Arnesh Kumar** (supra) are reproduced here.

1) All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the Indian Penal Code is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41 of the Code of Criminal Procedure, 1973.

2) All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii) of the Code of Criminal Procedure, 1973.

3) The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding and producing the accused before the Magistrate for further detention.

4)

5) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing.

6)

7)

8)

These directions, therefore, give a clear picture that in each and every case under Section 498-A of the Indian Penal Code arrest is not necessary and the notice of appearance in terms of Section 41-A of the Code of Criminal Procedure has to be served. It will not be out of place to mention here itself that in this case no such notice under Section 41-A of the Code of Criminal Procedure appears to have been given to the applicant uptill now.

5 Further, reliance can be placed on the three Judge Bench decision of the Hon'ble Apex Court in **Social Action Forum for Manav Adhikar and another vs. Union of India Ministry of Law and Justice and others, AIR 2018 SC 4273**. The said petition was preferred under Article 32 of the Constitution of India seeking directions to the respondents to create an enabling environment for married women subjected to cruelty to make informed choices and to create a uniform system of monitoring and systematically reviewing incidents of violence against women under Section 498-A of the Indian Penal Code including their prevention, investigation, prosecution and rehabilitation of the victims and their children at the Central, State and District levels. The decision in **Rejesh Sharma and others vs. State of U.P. and another, AIR 2017 SC 3869** was also considered, which appears to have been rather objected for diluting the rigours of the offence under

Section 498-A of the Indian Penal Code. In this case the directions given in **Arnesh Kumar** (supra) were reiterated. So also, other decisions were considered, such as – **Joginder Kumar vs. State of U.P.**, (1994) 4 SCC 260, **D.K. Basu vs. State of W.B.**, (1997) 1 SCC 416, **Nilabati Behera vs. State of Orissa**, (1993) 2 SCC 746, **State of M.P. vs. Shyamsunder Trivedi**, **Lalita Kumari vs. Government of Uttar Pradesh**, (2014) 2 SCC 1, **Suresh Seth vs. Commissioner, Indore Municipal Corporation**, (2015) 13 SCC 287 and then modification in the directions issued in **Rajesh Sharma** (supra) were directed in **Social Action Forum** (supra).

6 The observations in **Joginder Kumar** (supra) are important, which are -

“No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence.

There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave the Station without permission would do.”

Those directions in **Rajesh Sharma** (supra) appears to have not been followed in the present case. The committee which is to be constituted as per the said directions has to give the report and the opinion and direction No.19-G provides that till report of committee is received no arrest should normally be effected. When there are such directions not only in one i.e. **Rajesh Sharma** (supra) but also reiterating the same in the three Judge Bench decision for action is of **Arnesh Kumar** (supra), it cannot be said to be an empty formality for the investigating agency or even the prosecution to raise objection.

7 At the cost of repetition, it can be said that even at the time of dealing with the bail application under Section 438 of the Code of Criminal Procedure the Sessions Judge or Additional Sessions Judge, whoever is dealing with the matter, should consider whether all these directions and ratios laid down in **Arnesh Kumar** (supra), **Rajesh Sharma** (supra) and **Social Action Forum** (supra) are followed in any case or not. There cannot be simple rejection of the application on any ground.

8 Now, turning to the fact of the case, in the First Information Report it is stated that the present applicant has performed second marriage and it amounts to cruelty and the informant and the applicant have children aged 2 ½. On this count the learned Additional Sessions Judge has come to the conclusion that there is prima facie evidence against the applicant. In fact, only on this basis there cannot be the rejection of the application, for the simple reason that, that does not require physical custody for the purpose of investigation. Secondly, if at all we are supposed to prima facie look into the ingredients of the offence under Section 498-A of the Indian Penal Code, then, what Section 498-A of the Indian Penal Code requires is that the husband or his relatives would have subjected the woman to cruelty and the explanation explains word “cruelty”, which is divided into two parts – (a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman. Here, the contents of the First Information Report do not show that the informant felt that she should commit suicide or the act of the applicant was of such grave injury, mental or physical or that act is danger to life, limb or health of the woman i.e. informant herein. Whether performance of the second marriage, that too, by a person professing Muslim religion would amount to cruelty or not will have to be considered by the Trial Court, but at this prima facie stage, it can be

said that it will not. As regards part (b) in the Explanation, explaining the word “cruelty” is concerned, it prescribes that the harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. Here, in this case, it is alleged that she was asked to bring amount of Rs.5,00,000/-. But, that ground was not considered by the learned Additional Sessions Judge for rejection of the bail application of the present applicant. Further, as per the First Information Report that amount was demanded by the co-accused persons also; yet, those co-accused have been granted bail by the concerned Court. How the segregation of the acts has been done, is not made clear. Merely because the applicant is the husband of the informant, taking into consideration the allegations, it cannot be said that he will not be entitled to get the anticipatory bail, but the co-accused, against whom similar allegations are made, would be entitled to the bail. No doubt, this Court is not sitting in appeal as against the order passed by the learned Additional Sessions Judge, but time and again, this Court has observed that if proper criteria are adopted by the learned Sessions Judges as well as Additional Sessions Judges and the rejection of the bail is not mechanical, then, it would reduce the burden of this Court.

9 As per **Joginder Kumar** (supra) there should be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Here, this element is missing. It is also to be noted that the Courts should not get carried away with the desire of a party to see the other behind bars. It may be sometimes to settle the personal score and, therefore, the Courts should be on guard as to whether really the arrest is necessary. Only prima facie case against the person is also not a criterion to be looked into. But together with whether the arrest is necessary and as stated in **Arnesh Kumar** (supra), not only the police officer but also the learned Additional Sessions Judge or Additional Sessions Judge dealing with an application under Section 438 of the Code of Criminal Procedure should question 'why arrest', 'is it really require', 'what purpose it will serve', 'what object it will achieve'. Therefore, those observations in **Arnesh Kumar** (supra) will have to be considered by such Courts.

10 In view of the aforesaid discussion, the interim protection granted earlier to the applicant deserves to be confirmed. Accordingly, it is confirmed. Hence, following order.

ORDER

1 Application stands allowed.

2 The ad-interim protection, granted by this Court earlier to applicant vide order dated 23.03.2022, is hereby confirmed and made absolute. In other words, if the applicant is not formally arrested, in the event of arrest of the applicant viz. **Imran Ali s/o Ashraf Ali** in connection with Crime No.281/2021 dated 09.06.2021 registered with Jinsi Police Station, Dist. Aurangabad, for the offence punishable under Section 498-A, 323, 504, 506 read with Section 34 of the Indian Penal Code, 1860, he be released on PR. Bond of Rs.30,000/- (Rupees Thirty Thousand only) with two solvent sureties of Rs.15,000/- (Rupees Fifteen Thousand only) each.

3 Applicant shall not indulge in any criminal activity nor he should tamper with the evidence of the prosecution, in any manner.

4 Applicant shall cooperate with the investigation and shall attend Jinsi Police Station, Dist. Aurangabad, on every Monday between 10.00 a.m. to 02.00 p.m., till filing of charge sheet.

(**Smt. Vibha Kankanwadi, J.)**