

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

ANTICIPATORY BAIL APPLICATION NO.1137 OF 2021

FARDIN ABBAS JAHAGIRDAR @ FARDIN RAFIK SHAIKH AND OTHERS

VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

...

Mr. Shaikh Mazhar A. Jahagirdar, Advocate for applicants

Mr. N.T. Bhagat, APP for the respondent No.1

Mr. C.T. Jadhav, Advocate for the respondent No.2

...

WITH

ANTICIPATORY BAIL APPLICATION NO.1138 OF 2021

ZAHIR ABBAS JAHAGIRDAR

VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

...

Mr. Shaikh Mazhar A. Jahagirdar, Advocate for the applicant

Mr. N.T. Bhagat, APP for the respondent No.1

Mr. C.T. Jadhav, Advocate for the respondent No.2

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 31st JANUARY, 2022

PRONOUNCED ON : 22nd FEBRUARY, 2022

ORDER :

1 The applicants in both the applications are apprehending their arrest in connection with Crime No.291/2021 dated 19.05.2021 registered with Shrirampur City Police Station, Dist. Ahmednagar, for the offence punishable under Section 143, 147, 354, 354-A, 323, 504, 506 of the Indian Penal Code, 1860 and under Section 12 of the Protection of Children from Sexual Offences Act, 2005.

2 It will not be out of place to mention here that initially the said offence was registered under only Sections of the Indian Penal Code and the Section of the Protection of Children from Sexual Offences Act was not added. All the applicants in Anticipatory Bail Application No.1137 of 2021 were arrested on 20.05.2021 at about 10.52 a.m. and they were produced before the Magistrate and thereafter the Magistrate had released them on bail on 21.05.2021. However, thereafter it is stated by the prosecution that taking into consideration the fact that the daughter of the informant, whose hand was caught hold of and with whom acts were committed amounting to outraging of her modesty, is a minor, it would attract Section 12 of the POCSO Act and, therefore, application was filed before the learned Magistrate on 09.08.2021 for cancellation of the bail granted to the

applicants. On the said application the learned Judicial Magistrate First Class has passed the order on 23.08.2021 that Investigating Officer to proceed as per law. Therefore, the applicants are apprehending arrest in view of the addition of the section and, therefore, they had approached the learned Special Judge/Additional Sessions Judge, Shrirampur under Section 438 of the Code of Criminal Procedure, however, their application has been rejected. Hence, they have approached this Court.

3 As regards the applicant in Anticipatory Bail Application No.1138 of 2021 is concerned, he was not arrested earlier, but since he has not been attributed any role, he had also approached learned Special Judge/Additional Sessions Judge for grant of anticipatory bail, but that was also rejected.

4 Heard learned Advocate Mr. Shaikh Mazhar A. Jahagirdar for applicants, learned APP Mr. N.T. Bhagat for the respondent No.1 and learned Advocate Mr. C.T. Jadhav for the respondent No.2, in both matters.

5 It has been vehemently submitted on behalf of the applicants that perusal of the First Information Report would show that those allegations were made since beginning, which are in respect of the minor girl, but her age was not mentioned in the First Information Report. Those

provisions of the POCSO Act appears to have not been invoked. There was no hurdle for the Investigating Officer to inquire, as to what is the age of her daughter. Nothing new is transpiring on its own and, therefore, this addition of the Section under POCSO Act will not give any right to the Investigating Officer to take the applicants in custody. On the day of the alleged incident, the applicant in Anticipatory Bail Application No.1138 of 2021 had gone to Wadodara, Gujrat State, as he is in the transport business. He has produced on record receipt book, whereby he had paid fine for entering to city inspite of pandemic situation. Still his name has been included. No specific role is attributed against him. He deserves to be released on anticipatory bail.

6 The learned APP submitted that taking into consideration the addition of the Section under POCSO Act, definitely, investigation will have to be made and, therefore, the physical custody of the applicants is necessary.

7 The learned Advocate appearing for the respondent No.2 strongly opposed the application and submitted that the informant's husband had purchased the land from the applicants and the possession of the agricultural land has been handed over. She had gone along with her daughter, son, father-in-law and relatives to the field. The accused persons came. They manhandled the informant as well as her daughter. Applicant

Fardin had caught hold of her hand and thereafter by pulling her veil (odhani), he done the act of outraging the modesty, so also, behaved in such a way with informant, which is amounted to outraging of modesty. Further, the bail granted to the applicants by the learned Magistrate has not been cancelled by a specific order. The applications deserve to be rejected.

8 It will not be out of place to mention here that both the sides were directed to make submissions as to the position of law in respect of whether addition of Section, which would be non bailable would *per se* require cancellation of bail granted earlier to the accused persons. Thereupon the learned Advocate appearing for the applicants has relied on the decision in **Pradeep Ram vs. The State of Jharkhand and others, (2019) 17 SCC 326 : AIR 2019 SC 3193**, wherein after discussing the earlier decisions the Hon'ble Apex Court has concluded thus -

“29. In view of the foregoing discussions, we arrive at following conclusions in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added :

(i) The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested.

(ii) The investigating agency can seek order from the court under Section 437(5) or 439(2) of Code of Criminal Procedure for arrest of

the accused and his custody.

(iii) The Court, in exercise of power under Section 437(5) or 439(2) of Code of Criminal Procedure, can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The Court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-cognizable offences which may not be necessary always with order of cancelling of earlier bail.

(iv) In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it need to obtain an order to arrest the accused from the Court which had granted the bail.”

8.1 Further reliance has been placed on the decision of this Court by learned APP in **Nana @ Narsing Vishwarasrao Nayak and others vs. The State of Maharashtra, Criminal Writ Petition No.222 of 2021** with companion matter, wherein the regular bail granted to the petitioners therein was cancelled under Section 439(2) of the Code of Criminal Procedure with the addition of offences under MCOC Act. This Court after relying upon **Pradeep Ram** (supra) held that the impugned order therein may be proposed in ignorance of **Pradip Ram** (supra) but no illegality could be found in that

order rejected the writ petitions, but it was clarified that impugned order should be read as granting permission to the Investigating Officer to arrest the petitioners.

9 Taking into consideration the initial First Information Report, it can be seen that the acts so alleged (which now are stated to be amounting to offence under Section 12 of the POCSO Act) were already pleaded and it were considered as offence under the Indian Penal Code. The age of the daughter of the informant was not got clarified by the person who recorded the First Information Report and, therefore, it appears that the Sections under POCSO Act were not invoked. The First Information Report was lodged on 19.05.2021. But then the application for cancellation of bail was filed by the Investigating Officer before the learned Judicial Magistrate First Class, Shrirampur on 09.08.2021. The prosecution is not explaining as to why there was no investigation on the point of age of the daughter of the informant. Surprising enough, it is to be noted from the police papers that her statement appears to be recorded on 22.05.2021 itself and in that she has given her age as 17 years. Still 09.08.2021 the Investigating Officer had not added Section 12 of the POCSO Act. There is absolutely no explanation for this inaction on the part of the Investigating Officer. On the contrary, it appears that he is now trying to blame the applicants. In view of the position

of law, as aforesaid, in **Pradeep Ram** (supra) as well as **Nana Nayak** (supra) permission was required to be sought by the Investigating Officer for arrest of the applicants, who were already released on bail by learned Judicial Magistrate First Class. Instead of giving clear permission the learned Judicial Magistrate First Class has stated that the Investigating Officer to proceed as per law. Such orders should not be passed by the Courts of law which would create confusion in the minds of either the law implementing authorities or even common people. The order should be clear. Now, it will have to be treated that though the application was for cancellation of bail by the said Act, the Investigating Officer wanted to seek permission to arrest the applicants and, therefore, the apprehension in the mind of applicants in Anticipatory Bail Application No.1137 of 2021 appears to be genuine and, therefore, their application under Section 438 of the Code of Criminal Procedure was maintainable.

10 On the merits of the case, the addition of Section under POCSO Act has not made much difference. The same Acts were also considered by the learned Judicial Magistrate First Class when bail was granted to the applicants. It can be seen that civil suit appears to have been filed by the husband of the informant against the applicants and application under Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908 appears to have been

allowed on 12.11.2019. The fact remains is, even as per the informant her husband is stated to have got agreement to sell which is a notarized document from the applicants. In specific words it is stated that sale deed is not still executed. The question then remains, as to whether only on the basis of notarized document, whether the possession could have been parted with legally by the applicants. The important fact to be considered by this Court is in respect of that civil suit is that civil dispute is pending. The physical custody of the applicants is not required for the purpose of investigation, for the addition of the Section.

11 As regards the applicant in Anticipatory Bail Application No.1138 of 2021 is concerned, the additional charge under POCSO Act is not against this applicant, but against another persons and, therefore, his physical custody is also not required. Therefore, the applications deserve to be allowed. Hence, following order.

ORDER

1 Both applications stand allowed.

2 The ad-interim protection, granted by this Court earlier to applicants in both matters vide order dated 28.09.2021, is hereby confirmed

and made absolute. In other words, if the applicants are not formally arrested, in the event of arrest of the applicants viz. 1) **Fardin Abbas Jahagirdar @ Fardin Rafik Shaikh**, 2) **Khurshida Roshan Shaikh**, 3) **Ayyaj Anwar Shaikh** and 4) **Azhar Jafar Shaikh** (in A.B.A. No.1137 of 2021) and applicant viz. **Zahir Abbas Jahagirdar** (in A.B.A. No.1138 of 2021), in connection with Crime No.291/2021 dated 19.05.2021 registered with Shrirampur City Police Station, Dist. Ahmednagar, for the offence punishable under Section 143, 147, 354, 354-A, 323, 504, 506 of the Indian Penal Code, 1860 and under Section 12 of the Protection of Children from Sexual Offences Act, 2005, they be released on P.R. of Rs.30,000/- (Rupees Thirty Thousand only) each with two solvent sureties of Rs.15,000/- (Rupees Fifteen Thousand only) each.

3 Applicants shall not indulge in any criminal activity nor shall tamper with the prosecution evidence, in any manner.

4 They should cooperate with the investigation and shall remain present before the Investigating Officer, as and when called.

(Smt. Vibha Kankanwadi, J.)