

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

930 ANTICIPATORY BAIL APPLICATION NO.1195 OF 2022

1. SURESH JAGANNATH THORAT
2. YOGESH SHANTARAM JOSHI @ PAPPU GURU
3. BHAUSAHEB BABURAO DIGHE
4. SUNIL JAGANNATH THORAT
5. MUKESH VITHAL KAKAD

VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

WITH

CRIMINAL APPLICATION NO.3092 OF 2022
IN ABA/1195/2022

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Advocate for Applicants : Mr. V. D. Sapkal (Senior Counsel) i/b
Mr. Sapkal Sandip R.

G. P. for Respondents-State : Mr. D. R. Kale.

Advocate for Complainant to assist APP : Mr. A. D. Ostwal.

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CORAM : S. G. MEHARE, J.

DATE : 15.09.2022

PER COURT :-

1. Heard the learned Senior Counsel for the applicants, the learned Government Pleader for the respondents-State and learned counsel for the Complainant at length.

2. The primary argument of the learned Senior Counsel for the applicants is that the sections applied against the applicants are punishable for less than seven years, Section 41-

A of the Criminal Procedure Code (in short, 'Cr.P.C.') and guidelines issued by the Hon'ble Supreme Court in *Arnesh Kumar's* case have not been followed and complied with in this case. Secondly, he argued that the F.I.R. does not disclose the commission of the offence. There are no allegations of use of the revolver. Section 3/25 of the Arms Act would also not attract for the reasons that applicant No.1 Suresh Thorat has a license to possess the revolver. He also argued that there are no allegations of assault. In the F.I.R., the description of the alleged revolver has not been given. The report is the outcome of the comments passed by the brother of the Complainant on the live discussion on TV9 Marathi by the then Revenue Minister. He argued that after his comments on live T.V. by his brother, some people went to the Police Station, and on their report, a non cognizable offence was registered against him. Applicant No.1 Suresh Thorat is the distant brother of the then Revenue Minister. He has also contested the election from another constituency against Mr. V. K. Patil. There was one day delay in lodging the first information report. The applicants have not committed any offence. However, a false crime has been registered against them due to political rivalry and with a political motive. The F.I.R. is the counterblast against the complaint made by the applicants and other villagers against

the brother of the Complainant for making the comments or deformation on the social media of the M.L.A. and the then Revenue Minister. He has also vehemently argued that since the F.I.R. is silent about even attempting to commit any of the offences as alleged. Hence, the custodial interrogation of either of the applicants is not essential.

3. The learned Senior Counsel Mr. Sapkal for the applicants also vehemently argued that recently the Hon'ble Apex Court in the case of *Satender Kumar Antil Vs. Central Bureau of Investigation* reported in *A.I.R. Online 2022 S.C. 956* has reiterated the duties imposed upon the Investigating Officer and the directions issued by the Hon'ble Supreme Court in the case of *Arnesh Kumar* as regards the arrest in the cases of the offences punishable for less than seven years or up to the seven years. He read the judgment in detail and reiterated that there is nothing on record before the Court that the Investigating Officer has followed Section 41-A of the Cr.P.C. He has also referred to paragraph No.73 of the said judgment and vehemently argued that failure to comply with Sections 41 and 41-A results in the entitlement of bail to the accused. He also referred to the direction 'c' issued in paragraph No.73 that "the Courts will have to satisfy themselves on the compliance of

Section 41 and 41-A of the Code. Any non-compliance would entitle the accused to grant of bail." In the circumstances, he argues that the Investigating Officer failed to comply with the provisions of Sections 41 and 41-A of the Cr.P.C. On the face of the F.I.R., the prosecution has no case for custodial interrogation. The prosecution also did not produce material before the Sessions Court satisfying the Court that Section 41-A of the Cr.P.C has been complied with as regards the present applicants. Hence, the application deserves to be allowed.

4. The learned Government Pleader, Mr. Kale, for the respondents/State, has strongly opposed the application. Reading the F.I.R., he would argue that all the applicants were present on the spot of the incident. Barely having a licence to possess the revolver does not bar applying Section 3/25 of the Arms Act. The Investigating Officer wants to know which pistol/revolver applicant No.1, has used in committing the crime. For that purpose, his custody is essential. The Complainant was residing in the field. A large number of people went to his field and committed serious offences. The other offences are non-bailable. The applicants have spread terror in the locality. They are influential persons. They may

tamper with the prosecution witnesses. Hence, they are not entitled to anticipatory bail.

5. As far as Section 41-A of the Cr.P.C. is concerned, he advanced the argument that when the Investigating Officer is satisfied that the arrest of the accused is essential for the proper investigation, he need not to issue a notice as contemplated under Section 41-A of the Cr.P.C. Referring the case of *Satenadar Kumar* relied upon by the learned Senior Counsel, he has further argued that when the Investigating Officer does not want to arrest the accused for the offences punishable for less than seven years or up to the seven years, then and then only he is bound to record the reasons for not arrest in writing. Where any such reasons are not written in writing, it must be presumed that the Investigating Officer has reasonable grounds, as contemplated under Section 41 of the Cr.P.C., for arrest, though the offence is punishable for less than seven years or up to seven years. He has produced the papers, including the case diaries, and added that a notice under Section 41(1) of Cr.P.C. have been issued to only a few accused. That goes to show that the Investigating Officer has applied the mind of whose arrest is essential and to who's not. The applicants cannot take advantage by incorrectly interpreting

Sections 41 and 41-A of the Cr.P.C. Considering the gravity of the offence and the way in which it has been committed, the applicants are not entitled to anticipatory bail.

6. Learned counsel appearing for the complainant, Mr. Ostwal has also argued that the brother of the complainant was a Journalist. He published an article in the newspaper "*Pudhari*" on 06.07.2022 about sand mafias of the village. That was the real cause for committing the crime, not the comments he had, passed on live T.V. The F.I.R. reveals that the brother of the complainant was not at home whom they were searching. Therefore, all the accused ought to have left the spot of the incident. However, they threatened the complainant and his parents instead of leaving the spot. They were bowing before the accused, begging for their lives. The applicants have accepted their presence on the spot of the incident. He has vehemently argued that the learned counsel appearing for the applicants did not attach the copy of the say of the Additional Public Prosecutor before the Sessions Court in the application for anticipatory bail. He has referred to the said reply on page 50 of his application. Referring to the said reply, he has pointed out that the Additional Public Prosecutor has categorically made the statement before the Sessions Court on how and why

the police custody of the present applicants is essential. It has also placed on record the handicap certificate of the father of the Complainant and argued that he is 100% blind. Referring to the said certificate, he has tried to argue that the accused/applicants have not shown mercy for such a blind person. He has also argued that Section 41-A of the Cr.P.C. in the case at hand is not essential to follow. He prayed to dismiss the application.

7. In reply, the learned Senior Counsel Mr. Sapkal has argued that the reply of the learned APP before the learned Sessions Court does not reflect that the station diary was placed before the Sessions Court. It is not the case diary but the reply of learned APP opposing the bail application.

8. The F.I.R. reveals that around 50 to 60 persons went to the house of the Complainant. He was on his duty at the relevant time. His father called him on the phone. The accused were holding iron rods, sickles and axe. He asked them, "why they had come there". They started threatening and rushed at him. So, he ran into the home. At that time, applicant No.1 Suresh was standing there with the revolver in his hand. His mother and sister-in-law were weeping loudly and bowing before him.

Some of the co-accused caught hold of him in the home, and applicant No.1 Suresh pointed the revolver at his head and asked where his brother was. He wanted to kill him. He abused them and his journalist brother in filthy language. He also stated that he wanted to cut his body into pieces and throw it in the river and threatened to kill him. On the basis of this report, Police Station Sangamner registered a crime bearing No.0336 of 2022 for the offences punishable under Sections 143, 147, 149, 452, 323, 504, 506 of the I.P.C. read with Section 3/25 of the Arms Act.

9. The F.I.R. is silent about the use of the revolver. The applicant has submitted a licence for holding the revolver, and it is renewed up to 31.12.2023. The prosecution has applied Section 3/25 of the Arms Act. Section 25 of the Arms Act provides for the punishment for certain offences under the Arms Act. Section 3 of the said Act provides that no person shall acquire, have in his possession, or carry any firearm or ammunition unless he holds in this behalf a licence issued in accordance with the provisions of the said Act and rules made thereunder. It also provides that a person may, without holding a licence, carry any firearm or ammunition in the presence, or under the written authority, of the holder of the licence for

repair or renewal of the licence or for use by such holder. Punishment for carrying or possessing any firearm in contravention of Section 3 of the Arms Act is for the term which shall not be less than two years which may extend to five years, and shall also be liable to fine.

10. The question herein has been raised seriously is whether *prima facie* Section 3/25 of the Arms Act would be applied in this case. The licence has been issued to the applicant in Form III. The license was issued to applicant No.1 to acquire, possess and carry the firearm for protection. In view of the licence granted to him for protection, the use of the weapon is restricted to his protection only. Section 96 of the I.P.C. provides for the right of the private defence. It has been provided therein that nothing is an offence which is done in the exercise of the right of private defence. The Hon'ble Supreme Court, in the case of ***State of U.P. Vs. Ram Swarup and another, A.I.R. 1974 SC 1570***, has observed that when the accused himself goes with the gun to attack the victim and the victim in his self-defence, re-attack the accused by killing the victim. The accused cannot plead the right of his defence.

11. Herein the case, the allegations are very specific that accused No.1 with the other accused went to the house of the Complainant. None of the family members of the applicants was armed with weapons. The Complainant or his family members were not aggressive, nor was there any situation in which the applicants feared danger to their lives due to the acts of the Complainant and his family members. The licence was not granted to misuse the firearm, and the breach of the purpose for which the firearm licence is issued is an offence. Considering the circumstances in totality, applicant Suresh Thorat has no reason to point the gun at the head of the Complainant. The conduct of the applicant reveals that he has misused the revolver. In the circumstances and use of the revolver, it would not be appropriate to accept at this juncture that Section 3/25 of the Arms Act would not attract.

12. As far as Section 41 and 41-A are concerned, the Hon'ble Supreme Court, in the case of *Arnesh Kumar* has issued the guidelines on when the accused should or should not be arrested, when the notice under Section 41-A of the Cr.PC. should have been issued to the accused by the Investigating Officer. Both these sections have been interpreted by the

Hon'ble Supreme Court and reiterated in the case of *Satender Kumar*, cited *supra*. Paragraphs Nos.21, 22, and 23 of the said judgment have been reproduced as follows :

"21. Section 41 under Chapter V of the Code deals with the arrest of persons. Even for a cognizable offense, an arrest is not mandatory as can be seen from the mandate of this provision. If the officer is satisfied that a person has committed a cognizable offense, punishable with imprisonment for a term which may be less than seven years, or which may extend to the said period, with or without fine, an arrest could only follow when he is satisfied that there is a reason to believe or suspect, that the said person has committed an offense, and there is a necessity for an arrest. Such necessity is drawn to prevent the committing of any further offense, for a proper investigation, and to prevent him/her from either disappearing or tampering with the evidence. He/she can also be arrested to prevent such person from making any inducement, threat, or promise to any person according to the facts, so as to dissuade him from disclosing said facts either to the Court or to the police officer. One more ground on which an arrest may be necessary is when his/her presence is required after arrest for production before the Court and the same cannot be assured."

"22. This provision mandates the police officer to record his reasons in writing while making the arrest. Thus, a police officer is duty-bound to record the reasons for arrest in writing. Similarly, the police officer shall record reasons when he/she chooses not to arrest. There is no requirement of the aforesaid procedure when the offense alleged is more than seven years, among other reasons."

"23. The consequence of non-compliance with Section 41 shall certainly inure to the benefit of the person suspected of the offense. Resultantly, while considering the application for

enlargement on bail, courts will have to satisfy themselves on the due compliance of this provision. Any non-compliance would entitle the accused to a grant of bail."

13. It is clear from Section 41 that even for a cognizable offence, an arrest is not mandatory. However, if any of the conditions contemplated under clause 'a' to 'e' is available, and the Investigating Officer is satisfied that the accused has committed the cognizable offence, he may arrest him without a warrant. Proviso after clause 'e' of Section 41 is very specific that in all cases where the arrest of the person is not required under the provisions of said Sub Section, the Police Officer has to record the reasons in writing for not making the arrest. The words of the said proviso are very specific, and it appears that the Police/Investigating Officer has to record the reasons if he does not want to arrest the accused, though the grounds mentioned in clauses 'a' to 'e' of Section 41(1) are available. The Hon'ble Supreme Court, in paragraph 23 of the above case, has also cleared that the consequences of non-compliance with Section 41 shall certainly inure to the benefit of the person suspected of the offence. Resultantly, while considering the application for enlargement on bail, the Courts will have to satisfy themselves that on the due compliance of this provision. Any non-compliance would entitle the accused to grant bail.

14. The Hon'ble Supreme Court, in the above-cited case, has reproduced paragraphs Nos.7.1, 7.2, 8.4, 11.5 and 11.6 from the case of ***Arnesh kumar Vs. State of Bihar*** reported in ***A.I.R. 2014 SC 2756***, and those are extracted as below :

"7.1. From a plain reading of the aforesaid provision, 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."

"7.2. The law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. The law further requires the police officers to record the reasons in writing for not making the arrest."

"8.4. In fine, when a suspect is arrested and produced before a Magistrate for authorizing detention, the Magistrate has to

address the question whether specific reasons have been recorded for arrest and if so, prima facie those reasons are relevant, and secondly, a reasonable conclusion could at all be reached by the police officer that one or the other conditions stated above are attracted. To this limited extent the Magistrate will make judicial scrutiny."

"11.5. 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."

"11.6. Notice of appearance in terms of Section 41-A CrPC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the district for the reasons to be recorded in writing."

15. Referring to these paragraphs, the learned Senior Counsel for applicants vehemently argued that the Investigating Officer did not follow the mandates of the Hon'ble Supreme Court. No doubt, the discretion granting bail is to be exercised from the touchstone of presumption of innocence and the said safeguards provided under Section 41 since an arrest is not mandatory. The Hon'ble Supreme Court, in the above case, has also observed that if the discretion is exercised to effect such an arrest, there shall be procedural compliance.

16. Lastly, he has also referred to paragraph No.73 of the above judgment, which mandates that the Courts will have to satisfy themselves on the compliance of Section 41 or 41-A of the Cr.P.C. Any non-compliance would entitle the accused to grant of bail.

17. The Investigating Officer has submitted his say opposing the bail application on various grounds. It is also a ground that since the day of the incident, the present applicants are absconding. If they were released on anticipatory bail, there would be no investigation about the sickles, axe, iron rod and revolver. Since the incident is arising out of political rivalry, there may be a danger to the life of the Complainant, and the possibility of serious offence cannot be ruled out. Since the revolver is used in the crime, an investigation is to be made about the said revolver.

18. As observed in paragraph No.22 of the judgment of *Satender Kumar* cited supra, it is mandatory for the Police Officer to record reasons while making the arrest, and he is bound to record his reasons for arrest in writing. There appears substance in the argument of the learned Government Pleader

that it is not the mandate of the law to record the reasons in writing for not arresting the accused for the offence, which is punishable for less than seven years or up to seven years.

19. Examining the record, it appears that all the accused were present on the spot of the incident. Therefore, the complaint can be said to be reasonable, as provided under Section 41(1)(b) of the Cr.P.C. There was material for the Police Officer to satisfy that the arrest of the applicants was necessary. No doubt, applicants belong to a political party and are active politicians. The possibility of tampering with prosecution witnesses cannot be ruled out; therefore, ground contemplated under Section 41(1)(ii)(b) and (c) was also available. The record further reveals that the Investigating Officer has issued the notices under Section 41-A of the Cr.P.C. to a few of the co-accused whose arrest was unnecessary to his satisfaction.

20. Perusal of the record, the chequered history of the offence, and the use of the firearm without any circumstances available to use it for private defence or self-defence. The applicants being influential and belonging to the political parties, the Court is of the view that this is not a fit case for

granting anticipatory bail. Hence, the application stands dismissed.

21. Criminal Application No.3092 of 2022 is allowed.

(S. G. MEHARE, J.)

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