

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.61212 of 2023

Arising Out of PS. Case No.-42 Year-2019 Thana- AMAUR District- Purnia

1. Md. Kaisar Son Of Riyasuddin Resident Of Village- Kharaiya, P.S.- Amour, Distt- Purnea
2. Bibi Sanjari Wife Of Md. Kaisar Resident Of Village- Kharaiya, P.S.- Amour, Distt- Purnea
3. Md. Taiyab @ Tohpha Son Of Late Rustam Resident Of Village- Kharaiya, P.S.- Amour, Distt- Purnea
4. Bibi Phurki @ Bibi Firoja Khatoon Wife Of Md. Taiyab @ Tohpha Resident Of Village- Kharaiya, P.S.- Amour, Distt- Purnea
5. Md. Haidar Son Of Late Firoz Resident Of Village- Kharaiya, P.S.- Amour, Distt- Purnea
6. Dilkash @ Bilkesh Begum Wife Of Md. Haidar Resident Of Village- Kharaiya, P.S.- Amour, Distt- Purnea
7. Chikiwa @ Wasik Son Of Md. Islam Resident Of Village- Kharaiya, P.S.- Amour, Distt- Purnea
8. Phurgo @ Phargi @ Furgo Khatoon Wife Of Md. Islam Resident Of Village- Kharaiya, P.S.- Amour, Distt- Purnea

... .. Petitioner/s

Versus

The State of Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s : Mr. Mritunjay Kumar, Advocate
For the Opposite Party/s : Mr. Nawal Kishore Prasad, APP

CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL ORDER

3 06-12-2023 Heard Mr. Mritunjay Kumar, learned counsel

 appearing on behalf of the petitioners and the learned APP for

 the State.

2. The petitioners are apprehending their arrest in connection with Amour P.S. Case No. 42 of 2019 registered for the offence punishable under Sections 341, 323, 379 and 504/34 of the Indian Penal Code wherein, the police after investigation



submitted charge-sheet under Sections 147, 149, 341, 323, 324, 504 and 307/34 of the Indian Penal Code vide Final Report No. 147 of 2019, however, the learned Judicial Magistrate, 1st Class, Purnea has taken cognizance of the offence under Sections 147, 149, 341, 323, 324, 504 and 307/34 of the Indian Penal Code.

3. The prosecution case is based upon the written report filed by the informant alleging therein that on 12.04.2019 at about 07:30 AM, despite being objected by the informant, petitioner no. 1 forcibly tied cow in the field of Maszid and started abusing him. On being objected, the petitioner no. 1 pushed him down and started assaulting. Whereupon, all the accused persons, including the petitioners, rushed to the place of occurrence and all of them started assaulting the informant. In the meantime, when the son of the informant and his elder brother came in his rescue and tried to pacify the quarrel, the petitioners and others also assaulted them by means of *lathi*, *bricks and khanti*. Whereafter, Md. Kaisar, Md. Taiyab, Tohpha and Haidar were forcibly taking them to their house in order to kill. The accused persons also snatched the valuables, however, having heard their cry, the villagers assembled there and on noticing them, the accused persons fled away. It is also alleged that they also took away 30 bags of cement, which were kept for



construction of Maszid.

4. It is submitted on behalf of the petitioners that admittedly the alleged occurrence is said to have taken place on 12.04.2019, while the present case has been instituted on 26.04.2019, after a delay of 14 days, but without assigning any plausible explanation. He further submits that as per the narratives of the FIR, it is apparent that none has sustained any injury but subsequently the informants have produced a manufactured injury report, showing two of the injuries sustained to Abu Harera is dangerous for the life. Further, the injury sustained to Abu Zafar are found to be simple in nature and similar to Abu Sabha. He submitted that initially the FIR has been instituted only under Sections 341, 323, 379 and 504/34 of the Indian Penal Code considering the fact that none has sustained any serious injury and even during the course of investigation, the Investigating Officer has not found any injury dangerous to the life of any accused persons, but subsequently the learned Court has taken cognizance for the offence under Section 307/34 and other allied Sections of the Indian Penal Code and thus, the necessity for the present application.

5. He further submits that taking note of the aforesaid facts, the petitioners were allowed the benefit of Section 41 (A)



of the Cr.P.C., however, the petitioners after having found the order taking cognizance passed by the learned Judicial Magistrate, 1st Class, Purnea they filed their application for grant of anticipatory bail, which stood rejected vide order dated 28.04.2023 as not maintainable in the light of the observation given by the Hon'ble High Court in the case of ***Mahendra Prasad Singh Vs. The State of Bihar*** reported in ***2004 (3) PLJR 491***; the petitioners were directed to surrender before the Court concerned within a fortnight from the date of the receipt of the order and seek regular bail.

6. While the application of the petitioners was pending consideration before the learned Sessions Judge as well as this Court the process under Sections 82 and 83 of the Cr.P.C. have been issued.

7. Taking note of the aforesaid fact, learned counsel for the State as well as the informant submitted that the present anticipatory bail application is not at all maintainable in view of the judgment of the Hon'ble Supreme Court in the case of ***Lavesh Vs. State (NCT of Delhi)*** reported in ***(2012) 8 SCC 730***, ***The State of Madhya Pradesh Vs. Pradeep Sharma*** reported in ***(2014) 2 SCC 171***, ***Jarasindhu Chaubey Vs. Amresh Chaubey*** reported in ***(2012) 12 SCC 455*** and ***Prem Shankar Prasad Vs.***



The State of Bihar and Anr. reported in ***AIR 2021 SC 5125***.

8. Referring to the aforementioned judgments, the learned counsel for the State as well as informant submitted that once the process under Sections 82 and 83 of the Cr.P.C. has been issued against the petitioners, the instant anticipatory bail is rendered not maintainable.

9. After having carefully heard the parties, it appears from the record that admittedly during the investigation the petitioners have been allowed the benefit under Section 41 (A) of the Cr.P.C. and thus, the petitioners cannot be said to be the persons, who are evading the law. It would be worth observing here that in the case of ***Gurbaksh Singh Sibbia Vs. The State of Punjab*** reported in ***AIR 1980 SC 1632***, the Apex Court has held that an anticipatory bail is maintainable even after filing of charge-sheet or till the person is not arrested. The aforesaid judgment has been reiterated and reaffirmed by the Constitution Bench of the Apex Court in the case of ***Sushila Aggarwal and Ors. Vs. State (NCT of Delhi) and Anr.*** reported in ***(2020) 5 SCC 1***. It would be further apt to observe that in case of ***Bharat Chaudhary and Anr. Vs. State of Bihar and Anr.*** reported in ***(2003) 8 SCC 77***, the Hon'ble Supreme Court has held that even after taking cognizance of a complaint by trial Court or after



filing of charge-sheet by police, a person can move an application for anticipatory bail under Section 438 of the Cr.P.C., as it nowhere prohibits the Court concerned from granting anticipatory bail in an appropriate case.

10. This Court cannot lose sight of the fact that in the case in hand, the facts are somewhat different from others, as of the facts of the cases, the judgment of which have been relied upon on behalf of the opposite parties: In the present case, the petitioners were allowed the benefit of Section 41 (A) of the Cr.P.C., and thus, in no stretch of imagination, they can be said to be absconder. It goes without saying that at any point of time, once the accused persons apprehend their arrest in connection with a non bailable offence, they may approach to the High Court or the Court of Session that in the event of arrest, they shall be released on bail. It has been submitted before this Court that the process under Sections 82 and 83 of the Cr.P.C. have been issued, once the petitioners have had already submitted their jurisdiction to the Court of learned Sessions for grant of their anticipatory bail, taking note of the fact that cognizance has been taken for the offence under Section 307/34 and other allied Sections of the Indian Penal Code.

11. It would be beneficial to quote the relevant extract



of the judgment/order passed by a co-ordinate Bench of this Court in the case of ***Santosh Yadav @ Santosh Kumar Yadav Vs. The State of Bihar*** in ***Cr. Misc. No. 38750 of 2021***, wherein, the learned co-ordinate Bench has been pleased to hold as follows:

*After hearing the learned counsel for the petitioner and learned A.P.P. for the State, the Court comes to a considered conclusion that anticipatory bail application is maintainable even after issuance of process under Section 82 of the Cr.P.C further the Hon'ble Supreme Court in the case of **Gurbaksh Singh Sibbia (Supra)** has very clearly laid that anticipatory bail application is maintainable even after filing of charge-sheet or till the person is not arrested, thereafter another Constitution Bench judgment of the Hon'ble Supreme Court in the case of **Sushila Aggarwal and Others vs State (NCT of Delhi) and Another (supra)** had also placed reliance on the **Gurbaksh Singh Sibbia (Supra)**. Further from the scheme of Cr.P.C. it prima-facie appears that Section 82 of the Cr.P.C. is resorted to only when an accused is trying to flee from justice and Section 83 Cr.P.C. is an additional provision to create more pressure on the accused to surrender since*



the provision provides for attachment of property but then the said attachment of property is not final and it is subject to Sections 84, 85 and 86 of the Cr.P.C., as aforesaid, further if on objection the attachment order is recalled then definitely it will be presumed that the petitioner no longer is an absconder because abscondence is a precondition for issuance of an order under Section 83 of the Cr.P.C. thus prima-facie it appears that Sections 82 and 83 are provisions which are provisional in nature and as such a valuable right like personal liberty as enshrined in Article 21 of the Constitution of India cannot be taken away based on a transient provision. The Court is also in agreement with the submission made by the learned counsel for the petitioner that even Section 438 of the Cr.P.C. nowhere bars anticipatory bail application on the ground of issuance of process under Section 82 Cr.P.C. thus the Court holds that anticipatory bail application is maintainable even after issuance of process under Section 82 of the Cr.P.C. though the accused on merits may not be entitled to seek relief based on his conduct leading to issuance of process under Section 82 but then definitely maintainability of an anticipatory bail application after issuance of process under



Section 82 is definitely not barred.

12. It is also to be noted that the issue with regard to the maintainability of the anticipatory bail application, in case the accused persons have been allowed the benefit of 41(1) of the Cr.P.C. has been duly considered in the case of ***Gauri Shankar Roy Vs. The State of Bihar with Mamta Devi Vs. The State of Bihar*** reported in (2015) 3 PLJR 618, wherein, the learned co-ordinate Bench while explaining the term arrest, custody and bail has explicitly distinguish the police bail and the notice issued by the Investigating Officer under Section 41 (A) of the Cr.P.C. and held in paragraph nos. 44, 45 and 46 as follows:-

44. Section 41A of the Code operates in a situation where there is no arrest and prescribes the course of option to be adopted by a police officer in case he decides not to arrest any person. Till the time any person is not arrested, he is entitled to maintain an application for grant of anticipatory bail subject to, of course, the applicability of any other law to the contrary.

45. Merely appearing before a police officer in compliance of a notice and giving an undertaking to abide by the terms of the notice under Section 41A of the Code would not render any person in a deemed police custody and



thereby oust the applicability of Section 438 Cr.P.C.

46. If the logic of non-maintainability of anticipatory bail application under Section 438 Cr.P.C. on the score is to be accepted, then startling anomaly resulting in serious consequences would arise and virtually Section 438 of the Cr.P.C. will become otiose because in all cognizable cases either there has to be arrest or there has to be no arrest or there has to be a notice by the police officer. In case there is arrest, jurisdiction under Section 438 Cr.P.C. is automatically ousted and in case of non arrest, the requirement of notice is there and if issuance of notice and appearing in pursuance thereof is deemed to be in police custody, then also Section 438 Cr.P.c. would be ousted. This can certainly never be the legitimate interpretation of the scope of Section 41A Cr.P.C.

13. Considering the materials discussed hereinabove and the settled proposition of law, this Court finds that the present application for grant of anticipatory bail on behalf of the petitioners in the aforenoted facts is maintainable. So far the merit of the case is concerned, it is needless to observe that apart from admitted land dispute relating to construction of Maszid and general and omnibus allegation, there is a long delay in lodging of the FIR and taking note of the aforesaid



facts, the petitioners were allowed the benefit of 41 (A) of the Cr.P.C., coupled with the fair antecedent of the petitioners, let the above named petitioners, be released on bail, in the event of their arrest or surrender before the learned Court below within a period of four weeks from today, on furnishing bail bonds of Rs. 10,000/- (Rupees ten thousand) **each** with two sureties of the like amount each to the satisfaction of learned Judicial Magistrate, 1st Class, Purnea in connection with Amour P.S. Case No. 42 of 2019, subject to the condition as laid down under Section 438 (2) of the Cr.P.C.

(Harish Kumar, J)

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