

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

ANTICIPATORY BAIL APPLICATION NO. 89 OF 2023

Azam Barkat Khan ...Applicant

vs.

The State of Maharashtra ...Respondent

Mr. Deepak Talwar a/w Mr. Ritesh Karkera i/by Suvarna Joshi -
Advocate for the Applicant

Mr. H. J. Dedhia - APP for the Respondent-State

API Vitthal Badhe – Narpoli Police Station

CORAM : S. M. MODAK, J.

DATE : 03rd APRIL, 2023

P. C. :-

1. Heard learned APP and also learned Advocate for the Applicant.

2. Read all the orders passed by this Court on 12/01/2023, 16/03/2023 and 24/03/2023. In fact both the sides have addressed the Court on the point of the merits of the application that is to say what are the allegations in the F.I.R. and what are the materials against the Applicant and otherwise how the Applicant is not entitled for anticipatory bail.

3. In addition to that, there is a contention raised about non compliance of the direction given by the Hon'ble Supreme Court in

the case of *Arnesh Kumar Vs. State of Bihar and Anr.*¹ and he relied upon the observations made by the Hon'ble Supreme Court in the case of *Satender Kumar Antil Vs. Central Bureau of Investigation and Anr.*² and more specifically para no. 23. The said order is dated 11/07/2022.

4. Today one more order passed by the Hon'ble Supreme Court in the case of *Satender Kumar Antil Vs. Central Bureau of Investigation and Anr.* dated 21/03/2023 is placed on record by the learned Advocate for the Applicant. He read over some of the observations. My attention is also invited to the observations in para no. (v) page no. 10 of the said order. It was clarified that the observations enunciated qua bail would equally apply to anticipatory bail cases also. It is also submitted by Mr Talwar that as on today he is not having any instructions from the Applicant to file any fresh proceedings in respect of breaches of these orders.

5. Learned APP with all his experience tried to explain how there was an attempt made to comply with the provisions of the Section 41 (A) of the Criminal Procedure Code and law laid down by the Hon'ble Supreme Court. He invited my attention to following facts:-

¹ Criminal Appeal No. 1277 of 2014 dated 02/07/2014 (SC)

² 2022 Live Law (SC) 577

- (a) A notice under Section 160 of the Criminal Procedure Code given to the present Applicant dated 06/11/2020 page no. 43 (this was given prior to the registration of the offence)
- (b) F.I.R. is registered on 23/03/2022.
- (c) First notice dated 17/08/2022 was given by quoting the provision of the Section 41 (1)(A) of the Criminal Procedure Code to the Applicant.
- (d) Filing of the ABA before the court of the additional sessions judge and its rejection on 20/09/2022.
- (e) The first order dated 12/01/2023 passed in the present Anticipatory Bail Application (Coram :- A. S. Karnik, J).

6. Learned APP explained that notice under Section 160 of the Criminal Procedure Code was given prior to the registration of the offence. Whereas first notice dated 17/08/2022 was given after registration of the offence. It is true that in *Arnesh Kumar (supra)* the Hon'ble Supreme Court has observed that Section 41-A notice has to be given within two weeks form the date of institution of the case.

7. Learned APP tried to explain me that the F.I.R. was registered on 23/03/2022 and the present Applicant has been named therein. However there is a delay in issuing of notice dated

17/08/2022 due to the covid situation.

8. The investigating Officer Mr. Vitthal Badhe is present. After taking instructions, he submitted that in spite of all these events, now they are ready to give 72 hours notice, if they came to conclusion that arrest is required. My attention is invited to the similar submission made as recorded in the order dated 23/11/2022 in respect of co-accused Rupesh Anabhavane, wherein this Court has directed to give 72 hours notice to the Applicant.

9. By way of reply, he submitted that notice dated 17/08/2022 is not final notice but there are two more notices given by the Police to the applicant. They are as follows:

(i) Dated 18/01/2023, thereby intimating the Applicant that this is 72 hours notice and asking him to remain present on 22/01/2023. (There is grievance raised that this notice was given even though there are certain observations by this Court in the order dated 12/01/2023 while directing the Applicant to give attendance before investigating officer and also directing not to take coercive steps.) The contention is that in spite of this observation, notice dated 18/01/2023 is given. The Applicant has replied through his advocate on 21/01/2023.

(ii) The notice dated 21/01/2023. It mentions that the

earlier notice dated 18/01/2023 was given because the Police have not received the interim direction dated 12/01/2023.

10. It is true that the legislatures have put restrictions on the power of the police officers to arrest in respect of certain contingencies which are mentioned in Section 41(1) of the Criminal Procedure Code. Whereas Section 41-A of the Criminal Procedure Code mentions that if Police wants to arrest they can do so by giving notice to the concern person. The intention behind is that the person will get an opportunity to seek redress from the Court if he will get advance notice. This is applicable when the punishment is upto to seven years. In this case, the punishment is upto seven years.

11. There is further emphasis that even all these notices can notbe considered as valid notices as they were not given within two weeks from the date of institution of the case as observed in the case of *Arnesh Kumar (supra)*. The said contention is correct. So if observation as reproduced above are not followed, what are the consequences need to be seen.

12. In the order passed in the case of *Satender Kumar Antil (supra)* produced today mentions that the earlier observations are also applicable in case of anticipatory bail.

13. Learned Advocate wants to contend that the observation in para no. 23 of the order dated 11/07/2022 in case of ***Satender Kumar Antil (Supra)*** only will come into play and resultantly the Applicant is entitled to benefit of the anticipatory bail.

14. I feel that readiness shown by learned APP to give 72 hours notice can be accepted. I feel that for non compliance of Section 41-A of the Criminal Procedure Code in this case, the Applicant cannot be granted anticipatory bail automatically. I do not feel that the submissions made by Mr. Talwar are the correct interpretation of the observations of Hon'ble Supreme Court. The reason is that in case of regular bail the person is already arrested. So he does not have a chance to approach the Court prior to his arrest, if the provisions of law and the observations are not complied with and natural consequence is grant of bail. Whereas in case of Anticipatory bail the accused can get chance to approach the Court if advance notice is given. So I am inclined to accept the submission made by learned APP.

15. This is not the end of the matter. In all these correspondences referred above, API V. B. Badhe of Narpoli Police Station has signed the notices. It includes notice dated 17/08/2022, notice dated 18/01/2023 and notice dated 21/01/2023. This Court

is not aware whether the provisions of law and observations are not deliberately not followed or with some intention it may be any reason. So this court feels that the investigation of this offence may not be in safe hands considering the interest of justice which also includes the protection of the right of the accused persons. However this Court is aware about limitation.

16. For these circumstances, it can be only be said that let learned APP be communicate to the Commissioner of the Police about observations made in the said order. In view of that following order is passed:-

ORDER

- (i) Let the investigating officer of this crime to issue 72 hours notice to the Applicant once he will come to the conclusion that arrest is required.
- (ii) He can do so only after following relevant provisions of law.
- (iii) With these observations, application is disposed of.

[S. M. MODAK, J.]