



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (APPP) NO. 1937 OF 2024 IN
CRIMINAL APPLICATION (ABA) NO. 742 OF 2024

Abdul Wakil Parvez s/o Haji Rafiq and another Vs State of Maharashtra

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr. A.A. Naik, Senior counsel with Mr. R.R. Deo, counsel for the applicants.
Mr. H.N.Prabhu, APP for non-applicant/State.
Mr. P.S. Tiwari, counsel for Assist to Prosecution.

CORAM : URMILA JOSHI-PHALKE, J.

DATED : 23/10/2024.

1. By this application, complainant is seeking permission to engage the counsel to assist the prosecution.
2. In view of the reasons mentioned in the application, permission is granted to complainant to assist the prosecution
3. The criminal application (APPP) No. 1937/2024 is **disposed of.**
4. Apprehending the arrest at the hands of police in connection with Crime No. 713/2024 registered with police station Panchpaoli Police Station for the offence punishable under Sections 318(4), 318(2), 75(1), 78(1), 79, 315(2) and 352(3) read with Section 3(5) of the Bhartiya Nyaya Sanhita, 2024, the applicants approached this Court for grant of pre-arrest bail.

5. The crime is registered on the basis of a report lodged by the victim on an allegation that applicant No. 1 is the Vice President of one Quidwai High School and Cultural Society, whereas applicant No. 2 is the Principal of the said society. They were running the entire administration of the said High School. The informant was working as a teacher on a contract basis in the said High School. The applicant Nos. 1 and 2 assured her that they would give her a permanent job in the school and demanded Rs. 20 Lacks in cash for the same. Similarly, they have demanded an amount of Rs. 9 Lacks from another teacher on a contractual basis. The said amount of Rs. 20 Lacks from the informant and Rs. 9 Lacks from the other teacher has been accepted by both the applicants; however, they have not given any appointment to the informant as a permanent teacher.

6. It is further alleged that when the applicant found that an advertisement was issued for a post on which the applicant was promised to be appointed, she was assured that, after a demonstration was conducted, she would be appointed on the same post. However, she came to know that some other person was appointed in her place therefore, she made an inquiry, and when she received a phone call from applicant No. 1, who communicated with her in filthy language and also abused her sexually and made colored remarks. Therefore, the informant felt humiliated. The applicant also visited the shop of her husband on 22/08/2024 and threatened him. On the basis of said report,

police have registered the crime against the present applicant.

7. Learned Senior Counsel Mr. A.A. Naik for the applicant submitted that there are two factions in the institutions, and the dispute is going on between these two factions. The other factions have filed Writ Petition No. 4940/2024, wherein the relief is granted by the Division Bench of this Court by directing that the joining of the newly appointed candidates shall be subject to the outcome of a hearing, which is to be conducted by the Deputy Director of Education. He submitted that as far as the allegation of obtaining money is concerned, which appears to be an unlawful contract, the FIR cannot be registered for the said unlawful contract. He further submitted that as far as the sexual remarks are concerned, for which the punishment up to one year is provided. He submitted that, even accepting the allegation as it is, the offences punishable are imprisonment less than seven years, and therefore there should be a compliance by issuing the notice under Section 35(3), which is absent here.

8. He placed reliance of the Hon'ble Apex Court in the case of *Satender Kumar Antil Versus Central Bureau Of Investigation & Anr.* [2022 LiveLaw (SC) 577]. He submitted that even it is accepted that the amount is obtained by the present applicants for providing the job, it is an unlawful

contract, and which cannot be used to recover the amount by filing the report.

9. He further placed reliance on the decision of the Apex Court in the case of *Deepak Kumar Shrivastava and another Vs State of Chhattisgarh and others [2024 SCC OnLine SC 158]*, wherein the Hon'ble Apex Court held that after reading of the entire material on record which clearly reflects that it was totally an unlawful contract between the parties where money was being paid for securing a job in the government department or private sector. Apparently, a suit for recovery could not have been filed for the said purpose and even if it could be filed, it could be difficult to establish the same where the payment was entirely in cash.

10. It is further observed by the Hon'ble Apex Court that from the factual matrix warrant of closer reflection, prima facie, the conduct exhibited by the parties involved appears tainted with suspicion, casting a shadow over the veracity of their claims. The report from the previous inquiry reflects a convoluted landscape and unveils a trail of unethical, may be even criminal, behavior from both parties. The unexplained inordinate delay in bringing these allegations to the police's attention despite knowledge of the previous inquiry raises even more doubts and adds a layer of scepticism to the authenticity of the claims.

11. He submitted that similar is the case in the present matter also, it is an unlawful contract, and there is no material to show that the present applicant has paid money to the applicants. Moreover, the offences leveled against the applicants are punishable with less than seven years, and the Hon'ble Apex Court specifically held that in the absence of compliance, the applicants are entitled for released on bail. In view of the above, the application deserves to be allowed.

12. Learned APP strongly opposed the said application on the ground that not only the informant but the various persons came forward and alleged that present applicants have obtained money from them for providing a job, and they were duped. She also placed on record the transcriptions of the communication between the informant and the applicant No. 1 to show that there were sexually colored remarks by the present applicant and submitted that, considering the above said allegation, the application deserves to be rejected.

13. Learned counsel for the complainant reiterated the said contentions and submitted that, considering the fact that various persons are duped by obtaining the money, the cognizance of the act of the present applicants requires to be taken into consideration, and therefore, their custodial interrogation is required for the interrogation purpose. In view of that, the application deserves to be rejected.

14. Having heard learned counsel for the applicant and learned APP for the State, as well as counsel for the

complainant. Perused the investigation papers. Admittedly, the informant as well as witnesses, namely Aisha Tanwar, state that the amount was paid by them for obtaining the job. In view of observations of the Hon'ble Apex Court, the amount is paid for the unlawful contract, and the entire amount was paid in cash. Admittedly, except the bare words of the victim as well as other witnesses, there is no other material to show that they have paid any amount for obtaining the job. Though the investigating officer has collected the various documents and recorded the statements of the witnesses, except the bare statements of the informant and the witnesses, there is no other material to show that the said amount was received by the applicant. However, investigation is at the initial stage. Considering the custodial interrogation of the present applicants is concerned, which is not required, because this is not the recovery proceedings and for the recovery amount, the applicants cannot be sent to the police custody for recovery of the said amount.

14. Moreover, as far as the compliance under Section 35(3) is concerned, which admittedly not complied by the investigating officer, not only in *Satender Kumar Antil* referred (supra) but in a subsequent decision, the Hon'ble Apex Court has reiterated about the compliance of Section 35(3) [Section 41 under Chapter V of the Cr.PC]. It is specific observations of the Hon'ble Apex Court that Section 41 under Chapter-V 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.

15. It is further observed that the 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.

16. 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.

17. Thus, in the light of the observation of the Hon'ble Apex Court guidelines, it is obligatory on the part of the investigating officer to issue the notice by recording the reasons for what purpose the arrest is required, or even if arrest is not required, they have to assign the reason why the arrest is not required. After repeated guidelines issued by the Hon'ble Apex Court, it appears that the investigating officer is not following the same.

18. Considering the allegation as it is, as observed earlier, the contract between the present applicant and the informant is an unlawful contract. In view of the observation of the Hon'ble Apex Court, the FIR came to be lodged regarding the unlawful nature of the contract, and it appears to be an attempt to criminal prosecution for recovery of the amount. At this stage, it would be harsh to say that this criminal offence is registered only to recover the amount, but considering the nature of the transaction between the informant and the present applicant, it appears that amount was paid against the involvement of contract.

19. The applicant No. 1 is 86 years old and suffering from the heart ailment. As well as it appears from the record that there are two fractions who want to control the institution, and the litigation are filed to obtain the control of the said institution. There are directions of this Court to the Deputy Director of Education to follow the procedure while making the appointment, and the appointment is subject to

the outcome of the said petition. Considering the entire investigation papers, as already been observed that the custodial interrogation of the present applicants is not required, and no grounds are made out for what purpose the custodial interrogation is required. There is non-compliance under Section 35(3) BNSS, in view of the observations of the Hon'ble Apex Court, in case of non-compliance, which inure the applicants to release on bail. In view of that, application deserves allowed. Accordingly, I proceed to pass the following order.

- a] The criminal application is allowed.
- b] In the event of arrest, in connection with Crime No. 713/2024 registered with police station Panchpaoli Police Station for the offence punishable under Sections 318(4), 318(2), 75(1), 78(1), 79, 315(2) and 352(3) read with Section 3(5) of the Bhartiya Nyaya Sanhita, 2024, the applicant ***(a) Abdul Wakil Parvez s/o Haji Rafiq (2) Majid Khan Jabbar Khan Pathan*** shall be released on anticipatory bail, on executing PR Bond in the sum of Rs.25,000/- each with one solvent surety in the like amount.
- c] The applicant No. 1 shall produce his mobile phone before the investigating officer for investigation purpose and the said period shall

be considered as his custody for the purpose of Section 23(2) of BNSS.

- d] The applicants shall attend the concerned police station once in a week on Sunday between 10.00 a.m. to 01.00 p.m. and shall cooperate with the investigating agency.
- e] The applicants shall not induce, threat or promise any witnesses who are acquainted with the facts of the case.
- f] The applicants shall surrender their passport if they are having and shall not leave the jurisdiction of Nagpur District without prior permission of the Court.

The criminal application is **disposed of**.

[URMILA JOSHI-PHALKE, J.]