

**FIR no. 152/2021**

**PS Connaught Place**

**State Vs. Ashwani Upadhyay**

**U/s 188/268/270/153 A IPC,**

**S. 3 Epidemic Diseases Act &**

**S. 51 (b) DM Act**

In view of the directions of the Hon'ble High Court of Delhi vide order No. 439-470/RG/DHC-2021 dated 22.07.2021, matters are being taken up through video conferencing using Cisco Webex. It is certified that there was no interruption during the proceeding and all the parties were heard.

Present: Sh. Sikhar Mahajan, Ld. APP for the state.

Sh. Vikas Singh, Sh. Sidharth Luthra, Sh. Pradeep Rai, Sh. Gopal Shankar Narayan, Ld. Senior Advocates for the applicant/accused.

Sh. Ashwani Dubey, Sh. Ardhendu Mauli Kumar Prasad, Sh. Nirmal Amabastha, Sh. Manish Kumar, Sh. Rudra Vikram Singh, Sh. Alakh Alok Srivastav, Sh. Jalaj Aggarwal, Sh. Karunesh Kumar Shukla, Sh. Himashu Pathak and Sh. Chandan Kumar Singh, Ms. Shubhangi Jain, Sh. Pankaj Singhal, Ld. Counsels for the applicant/accused.

This is an application for grant of bail to the applicant/accused under Section 437 CrPC (inadvertently mentioned as Section 439 CrPC).

Reply has been filed by the IO wherein the IO has vehemently opposed the bail application on the ground that release of applicant/accused will be prejudicial in maintaining public tranquility and will create further serious law and order situation. There are chances that the applicant/accused will create communal disharmony.

At the very outset, all the offences alleged against the accused, except for offence u/s 153A IPC, are bailable in nature hence, the hearing in the present application is confined to non-bailable offence alleged against the accused.

Sh. Vikas Singh, Ld. Senior Advocate on behalf of applicant/accused submits that this is blatant abuse of power by the Police. Police cannot apprehend anyone indiscriminately. It is submitted that it is an admitted fact that the applicant/accused was

present on the spot in the morning and not at the time of alleged incident relating to hate speech committed u/s 153A IPC. The applicant/accused has left the spot at or around 11.00 am and reached his home around 12:15 pm in Ghaziabad . Ld. Senior Advocate submits that he has seen the video personally and on perusal of the said video it can be seen that the hate speech was made after it rained however, the applicant/accused has left the spot even before the rain started. Ld. Senior Advocate submits that all the offences except for the offence u/s 153 A IPC are bailable. For the purpose of Section 153A IPC, it is imperative that the hate speech should have been made at the instance of a person or the person should have actively participated in making such remarks which promotes enmity between different groups. It is submitted by Ld. Senior Advocate that had the accused been present on the spot at the time of commission of the alleged offence, the accused should have been arrested then and there. Even otherwise, the FIR should have been registered soon after the alleged offence was committed. However perusal of the FIR clearly shows that the FIR was registered belatedly.

Ld. Senior Advocate further submits that the mandate of Section 41A CrPC is violated as neither any notice was served upon the applicant/accused nor any justification for arrest of the applicant/accused is provided as clearly, all the offences alleged are having imprisonment of less than 7 years. Ld. Senior Advocate submits that applicant/accused is being illegally incarcerated and therefore bail should be granted to the applicant/accused forthwith.

Ld. Senior Advocate Sh. Sidharth Luthra supporting the contention of Ld. Senior Advocate Sh. Vikas Singh, submits that it is a clear case of non-compliance of the *Arnesh Kumar judgment* which is applicable in the present case. Ld. Senior Advocate has placed reliance upon the order passed by Hon'ble Supreme Court of India in *Munnavar vs State of MP vide order dated 06.02.2021* wherein the petitioner was released on bail, although interim, due to non-compliance of *Arnesh Kumar judgement*. Ld. Senior Advocate further submits that the case of the applicant/accused is distinct from the other accused person. Ld. Senior Advocate further submits that applicant/accused may be a part of the meeting at particular point of time but that does not imply that he shall be blamed for each and every thing that may have happen in his absence. Hence, the applicant/accused be released.

Countering the submissions made on behalf of applicant/accused, Ld. APP for the state has pointed out two main points of concern as far as the applicant is concerned.

Firstly, Ld. APP for the state points out towards the gravity of offence in the terms of sensitivity of the issue. In this regard, Ld. APP for the state submits that this is the time of a Pandemic wherein large gatherings are not being allowed to prevent spread of Covid-19 Pandemic, the gathering was held without any permission, gathering was held near Parliament during the ongoing Moonsoon Session. It was indeed a sensitive time and place when there was no need to gather, hence the applicant/accused has clearly violated against the guidelines issued to curb the Covid-19 Pandemic and Section 144 CrPC which was applicable at that place during that time. Pointing towards the second point of concern, Ld. APP for the state submits that it is a clear case of involvement of applicant/accused as the event was organized at the behest of the applicant/accused. Ld. APP for the state further submits that the gathering was an unlawful assembly in which the applicant/accused actively participated knowing the common object of that unlawful assembly.

Rebutting the submissions made by Ld. Senior Advocate of the applicant/accused, Ld. APP for the state submits that there is no delay in registration of FIR as it was only after scrutinising the material available, applicant/accused was arrested. Ld. APP for the state further submits that the IO concerned has acted with due diligence in exercise of power conferred to him u/s 41 Cr.PC. Ld. APP for the state further submits that if the applicant/accused was not involved in the commission of offences, he should have acted in a bonafide manner to inform the concerned police officials regarding commission of such offences. To crack nexus and find out all the persons involved in alleged offence, Ld. APP for the state submits that custody of applicant/accused is required for proper investigation of the case.

In rebuttal, Ld. Senior Advocate Sh. Vikas Singh submits that the applicant/accused is not denying that he was not present at the gathering however, the applicant/accused was neither present on the spot at the time of commission of alleged hate speech. Ld. Senior Advocate submits that applicant/accused has credible standing and he is a reputed member of the Bar. He is not going to abscond. The arrest of the applicant/accused is against the rule of law. No involvement of the accused can be seen from the FIR or from the reply of the IO. Even in the viral videos applicant/accused cannot be seen.

Ld. Senior Advocate Sh. Sidharth Luthra countering the submissions of Ld. APP for the state, placing reliance upon the para 12 of the *Arnesh Kumar judgment* and submits that the non bailable offence u/s 153A IPC has maximum imprisonment of three years and

clearly action of the police officials in apprehending the applicant/accused is against the rule of law. It is no doubt that the IO has decretion to arrest the applicant/accused u/s 41 CrPC however, such powers had to be exercised caustiously and in light of the law of the land including the judgments passed by Hon'ble Supreme Court of India and Hon'ble High Courts. Ld. Senior Advocate submits that reliance of Section of 149 IPC by Ld. APP is misplaced as it is only relevant when a person participate in an unlawful assembly knowing the common object of such assembly. It is no where on record that the applicant/accused was present on the spot at the time of commision of offence u/s 153 A IPC. Ld. Senior Advocate, countering the submission of Ld. APP for the state with regard to failure of the applicant/accused in acting in a bonafide manner, refers to Section 39 CrPC wherein the duty to inform about the commision of offence no where enumerates the offences alleged against the applicant/accused. It is not even the case of a man at the wrong place.

Sh. Ardhendu Mauli, Ld. Counsel for the applicant/accused has placed reliance upon guidelines passed by the *Hon'ble Supreme Court of India in Suo Motu Writ Petition (civil) No. 1 of 2020 IN RE : Contagion of Covid-19 Virus in Prisons* to prevent the over crowding of prisons during this pandemic time.

Ld. Senior Advoate Sh. Gopal Shankarnarayan submits that the viral videos are now in public domain and no where it can be seen that applicant/accused was present when the present offence u/s 153A IPC was committed by the applicant/accused. It is further submitted that there is no credible information available with the investigating agency to apprehend. Name of the applicant/accused is being misused by some miscreants due to which the agency had apprehend the applicant/accused. Ld. Senior Advocate submits that no reason has been provided by the investing agency why custody of applicant/accused is required when everything allegedly incriminating is available in public domain no where pointing towards the applicant/accused. Ld. Senior Advocate submits that mere presence of the applicant/accused at one point of time during the gathering cannot be attributed to the whole chain of events happened in active absence of the applicant/accused.

Sh. Ashwani Dubey, Ld. Counsel assisting Ld. Senior Advocates and for the applicant/accused submits that the applicated has acted in bonafide manner and has duly offered the investigating agency for his assistance in the investigation. In this regard, the applicant/accused has also sent e-mails to the Commissioner of Police, Delhi. Ld. Counsel submits that the applicant/accused has deep roots in the society.

Heard both sides at length. Perused the record.

The *Hon'ble Supreme Court in Prahlad Singh Bhati vs NCT Delhi AIR 2001 SC 1444* held that while granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

Indeed it is difficult time for everyone during this pandemic and serious view should be taken against those who violates the guidelines/restrictions to curb this pandemic, yet the offences as far as breach of these guidelines are concerned are bailable in nature, which can be dealt by the Trial Court on merits.

As far as the offence u/s 153A IPC is concerned except for mere assertion, there is nothing on record to show that the alleged hate speech to promote enmity between different groups was done in the presence or at the behest of the applicant/accused. Even during hearing, this Court has inquired from Ld. APP and so far, there is nothing against the accused in the alleged video. It is not the case where there chances that applicant/accused will abscond. Conspiracy is no doubt hatched behind closed doors and that the investigation in the present matter is at nascent stage that however, does not imply that liberty of a citizen be curtailed on mere assertions and apprehension. In *B.P Sharma Vs. Union of India, (2003) 7 SCC 309, Hon'ble Brijesh Kumar, J.* observed that "it is always better, nay, necessary too that the freedom as guaranteed under the Constitution should be allowed to be enjoyed by the citizens to the fullest-possible extent without putting shackles of avoidable cweb of rules and regulations putting check and restrictions in the enjoyment of such freedoms."

As a cumulative effect of the aforesaid discussion this Court is of the considered opinion that the applicant/accused deserves to be released on bail subject to filing of personal bond of Rs. 50,000/- with one surety in the like amount and subject to the following conditions:-

- 1) The applicant shall continue to cooperate with the ongoing investigations and shall join the investigation as and when summoned by the IO;
- 2) The applicant shall not leave the country without the permission of the court;
- 3) The applicant shall scrupulously appear at each and every stage of the proceedings before concerned Court so as not to cause any obstruction or delay to its progress.

Needless to say that nothing observed herein shall have any bearing upon the merits of the case.

In view of the above, present application stands disposed of. Proceedings be sent to the Court concerned through proper channel.

Copy of the order be sent to Ld. Counsel for the applicant/accused through email/whatsapp.

(UDBHAV KUMAR JAIN)

Link MM/PHC/NDD

11.08.2021