

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.441 OF 2021

Nikita Jacob	Applicant
versus	
The State of Maharashtra	Respondent

Mr.Mihir Desai, Senior Advocate, with Mr.Manoj Mohite, Senior Advocate, with Mr.Girish Godbole i/by Mr.Abhishek Yende, Sanjokta Dey and Varun Thokal for applicant.

Mr.H.S.Venegavkar, Special Public Prosecutor, for respondent no.2.
Mr.Swapnil S. Pednekar, APP, for State.

CORAM : PRAKASH D. NAIK, J.

DATE : 17th February 2021

PC :

1. This is an application under Section 438 of Code of Criminal Procedure seeking transit anticipatory bail for a period of four weeks to enable the applicant to approach appropriate Court for reliefs. The applicant is apprehending arrest in connection with CR No.49 of 2021 registered at Special Cell, New Delhi for offences under Sections 124A, 153, 153A, and 120B of Indian Penal Code.

2. The contention of the applicant is that she is a practicing lawyer at Bombay High Court since 2014. She has volunteered in environmental movement which helps to create awareness of various environmental crises and concerns worldwide and helps to create a positive change to the current system and structure in the world today with non-violence means. She was deeply concerned with the recent farm laws. Various environmental movements and activists including the applicant, have been researching and circulating information for raising awareness to encourage peaceful

participation and express solidarity with the protesting farmers who have been protesting since long and have been discussing various ways to support the farmers in the short and long term.

3. Mr.Mihir Desai, Senior Advocate, appearing for applicant submitted that on 11th February 2021 the the Special Cell Unit of Delhi Police accompanied by Constable from local Police Station, visited house of applicant with search warrant and seized personal documents and electric gadgets from the house of applicant. It is submitted that during the search conducted by Special Cell Unit of Delhi Police, search-cum-seizure memo was prepared and the statement of applicant was recorded. It is difficult for her to move to other State without protection under Section 438 of Cr.PC to seek appropriate relief as she has fear of getting arrested in transit on the basis of aforesaid complaint. The applicant is a lawyer who supports environmental causes. The alleged toolkit does not talk about any violence. She has co-operated with investigation. She needs time to move appropriate Court and hence protection be granted u/s 438 of Cr.PC for a period of four weeks. Toolkit came to light after the incident of 26th January 2021 protest. Applicant is not named in FIR. The apprehension of applicant is fortified by the fact that non-bailable warrant has been issued against applicant by the Court at Delhi. Hence, protection as prayed above may be granted for a temporary period.

4. Learned counsel for respondent no.2 Mr.Venegavkar submitted that the application is not maintainable in law. There is no provision to grant such relief u/s 438 of Cr.PC. This Court has no jurisdiction to entertain this application. The officers of respondent no.2 had visited residence of applicant and by following due process of law

search was conducted and her statement was recorded. However, on the next day when the officers visited applicant's residence, she was not available. Hence, warrant of arrest has been issued against applicant. Copy of FIR is produced by him. It is submitted that Section 7 of Cr.P.C constitute territorial divisions. The said provision stipulates that every State shall be sessions division or shall consist of sessions divisions, and every sessions division shall, for the purpose of Code, be a district or consist of districts. The State may after consultation with High Court, alter the limits or the number of such divisions and district and State Government may after consultation with the High Court, divide any district into sub-divisions and may alter the limits or the number of such sub divisions. The powers under Section 438 are exercised by High Court or Sessions Court. In the light of Section 7 of Code, since the offence has occurred in another State, this Court would have no jurisdiction to entertain this application. He adverted to Article 214 of Constitution of India which stated that there shall be a High Court for each State to contend that Courts have jurisdiction over specific territory and not beyond it. The offence is registered in the State of Delhi and for want of jurisdiction, this Court cannot exercise powers u/s 438 of Cr.P.C. It is further submitted that Court has to apply the test whether cause of action has arisen within the jurisdiction of this Court. Merely on account of residence of applicant, this Court cannot invoke jurisdiction to exercise powers u/s 438. No direction as prayed for by the applicant can be granted u/s 438 of Cr.P.C. It is submitted that apart from registration of the offence in another State, non-bailable warrant has been issued against the applicant by the competent Court and therefore this Court will have no jurisdiction to grant any relief. It is submitted that investigation is in

progress. Applicant's involvement is disclosed during investigation. Toolkit is meant for inciting violence. There was violence in the State of Delhi on 26th January 2021. Application may be dismissed.

5. Mr.Venegavkar has relied upon several decisions in support of his preliminary objection about maintainability of this application. Reliance is placed on decision of Supreme Court in **Sandeep Sunilkumar Lohariya Vs. Jawahar Chelaram Bijlani @ Suresh Bijlani and others**¹. It is submitted that the Supreme Court in this decision has expressed shock over the nature of order passed by Madhya Pradesh High Court, granting transit bail to accused. He further submitted that the accused had filed anticipatory bail application in the nature of transit bail without provision under Cr.P.C.. The Supreme Court has further observed that it is difficult to understand as to under what provision and under what authority of law such application was registered by the High Court. He relied upon Full Bench decision of Patna High Court in case of **Syed Zafrul Hassan and others Vs. State**². He submitted that in the said decision the Court has observed that application u/s 438 cannot be entertained in respect of offence which is committed in another State for want of jurisdiction. He also relied upon decision in case of **Shailesh Jaiswal Vs. The State of West Bengal and others**³, where similar view was taken by Calcutta High Court. He then relied upon decision of this Court in the case of **Dr.Augustine Francis Pinto and another Vs. The State of Maharashtra and others**⁴. It is contended that in the said decision this Court has referred to the decision of Supreme Court in the case of Sandeep Lohariya (supra) and other decisions and held

1 Special Leave to Appeal (Cri) No.4829/2013, dated 14-6-2013

2 AIR-1986-Patna-194

3 1998(2)-ALD(Cri)-924

4 ABA No.1599/2017, decided on 14-9-2017

that the jurisdiction for control and enquiry of criminal courts should locale commission of crime and not residence of accused nor place where he might choses to reside and/or found in other part of country. In exercise of jurisdiction of anticipatory bail by High Court or the Court of Sessions beyond the local limits of the jurisdiction is limited to the extent of consideration of a bail within its territorial jurisdiction or for the transitional period and it cannot have jurisdiction to transgress into the local limits of the local jurisdiction of any other High Court or Court of Sessions, which is not under its superintendence and control within whose jurisdiction alleged offence has been committed. The application was rejected on the ground that it is not maintainable. Reliance is also placed on decision of Supreme Court in case of **Navinchandra N. Majithia Vs. State of Maharashtra and others**⁵. It is submitted that the Supreme Court in the said decision has dealt with the issue of cause of action and in the light of observations therein, present application cannot be entertained as no cause of action has arisen within the jurisdiction of this Court.

6. In reply to the objection about maintainability of the application, Mr.Desai submitted that the applicant is seeking temporary protection to enable her to approach appropriate Court for seeking relief. There is imminent apprehension of arrest and till she approaches the Court for seeking further reliefs, she needs to be protected by exercise of powers u/s 438 of Cr.PC. He submitted that the co-accused Shantanu Muluk who was also apprehending arrest in the present case, had preferred similar application before Aurangabad Bench of this Court. Similar objection was raised by the respondents, which has been dealt with by the Court and protection

5 AIR-2000-SC-2966

has been granted to the said applicant for a temporary period. Mr.Desai pointed the decision of this Court in the case of **Javed Anand and another Vs. State of Gujarat and another**⁶. He submitted that in this case the order passed in case of Sandeep Lohariya (supra) and decision of the case of Dr.Augustine Francis Pinto and another (supra) has been considered. Learned counsel pointed out observation of learned Single Judge of this Court in paragraph 7 of this decision, wherein reference is made to observation in paragraphs 9 and 10 of decision in the case of Dr.Augustine Francis Pinto. In paragraph 8 of the said decision observations of Supreme Court in the case of Sandeep Lohariya (supra) were quoted and observed that prima facie the observations therein were made in the facts of that case, considering the fact, that respondent therein had filed transit bail application before Madhya Pradesh High Court after his anticipatory bail application was rejected by Bombay High Court and confirmed on two occasions by Supreme Court. It appears that in that context the Supreme Court had made said observation. The said order dated 14th June 2013 was an interim order and the matter was listed for arguments on 12th July 2013 and finally the matter was disposed of as infructuous since accused had surrendered. In paragraph 10 of the said order reference is made to the decision of Supreme Court in the case of State of Assam Vs. Barak Upatyaka D.U.Karmachari Sanstha (2009)5-SCC-694. Paragraph 21 in the said decision was reproduced. The Apex Court has explained “precedent”, as judicial decision containing a principle, which forms an authoritative element termed as ratio decidendi. An interim order which does not finally and conclusively decide an issue cannot be precedent. In paragraph no.11 of the said decision of Javed Anand (supra) it was observed that generally the powers of High Court in

6 ABA No.627/2018, dated 5-4-2018

anticipatory bail applications are limited to its territorial jurisdiction and the said powers cannot be usurped by disregarding principle of territorial jurisdiction, which is in the interest of the comity of the Courts, however, there may be cases where if the said protection is not granted, the liberty of an individual would be jeopardized. The Court then referred the issue to the Division Bench. However, protection was granted to the applicants therein. Apparently that reference is still pending. Mr.Desai submitted that aforesaid decision was challenged by respondents therein before Supreme Court. He pointed out the order dated 9th April 2018 passed by Supreme Court and contended that the order of this Court was confirmed with observation that being an interim transit bail, it is made clear that it's life as granted by Bombay High Court is limited up to 31st May 2018 and it is for respondent to approach competent forum in the State of Gujarat within the said period for further appropriate reliefs and the forum concerned will consider the matter on its own merits.

7. Mr.Desai then pointed out the order passed by Division Bench of this Court (Coram : S.S.Shinde and M.S.Karnik, JJ.) on 10th December 2020 in Criminal Anticipatory Bail Application (Stamp) No.3041 of 2020. The said application was referred to the Division Bench by learned Single Judge of this Court without relief. The Division Bench has observed that due to paucity of time it is not possible to hear the reference on merits, however, considering the factual matrix of matter, protection as prayed for was granted to the applicants therein. Mr.Desai submitted that although reference was not answered, fact remains that the Division Bench has granted such relief to the applicant therein. He also pointed out the decision in the case of **N.K.Nayar and others Vs. State of Maharashtra and**

others⁷. He submitted that the Division Bench of this Court in this decision has held that interim bail for temporary period can be granted in connection with offence registered in another State. He also relied upon decision of this Court in the case of **Akhlaq Ahmed F. Patel Vs. State of Maharashtra**⁸, wherein the Court has considered the issue relating to exercise of powers u/s 438 where non-bailable warrant was issued against person.

8. Mr.Venegavkar submitted that while granting relief to co-accused Shantanu Muluk, the Aurangabad Bench of this Court has referred to the decision in the case of N.K.Nayar and others (supra). The said decision was considered by this Court in the case of Dr.Augustine Francis Pinto and another (supra) and it was observed that in view of the decision in the case of Sandeep Lahoriya (supra), the view expressed in the case of N.K.Nayar (supra) does not hold the field as of today. He further submitted that this Court in some cases has granted such relief, but issue of maintainability was not raised before the Court.

9. I have perused the documents on record. Both the sides were heard extensively. Offence is being investigated by respondent no.2. Undoubtedly the FIR has been registered at New Delhi. It is not disputed that the applicant is permanent resident of Mumbai. It is also apparent that officers of respondent no.2 had visited residence of applicant and seized her mobile phone and laptop. The seizure memo was recorded and copy has been supplied to the applicant. It is also apparent that the statement of applicant was recorded which indicate that applicant had made herself available. The contention of respondent is that on the next day when the Investigating Officer

7 (1985)-Cri.L.J.-1887

8 1998(2)-Mh.L.J.-932

made attempt to interrogate her, she was not found at her residence. The submission of learned counsel for applicant is that co-operation was extended by the applicant and since there was apprehension of arrest, she moved an application before this Court immediately thereafter. The apprehension is fortified by the fact that non-bailable warrant was issued immediately at the instance of respondent no.2. The relief sought by the applicant in this application is for temporary period u/s 438 of Cr.PC to enable her to approach appropriate Court for appropriate reliefs as provided by law.

10. The respondents has raised preliminary objection about maintainability of this application. The respondent has heavily relied upon the order of Apex Court in the case of Sandeep Loharia. The said decision was considered by this Court in the case of Javed Anand (supra). The decision in the case of Dr.Augustine Francis Pinto and another (supra) was also considered. The said decision was challenged before Supreme Court as referred to hereinabove and the order was confirmed. The Aurangabad Bench of this Court has granted relief to the other accused in this case by order dated 16th February 2021 and while passing the order the Court has considered the decision of Dr.Augustine Francis Pinto and another (supra), as well as Sandeep Lohariya (supra) and the decision of Division Bench of this Court in case of N.K.Nayar and others (supra).

11. In the case of N.K.Nayar (supra), the Division Bench of this Court the issue relating to maintainability was urged before learned Single Judge and the matters were referred to Division Bench. The Court observed that an order of anticipatory bail would have a relevancy to the moment of arrest of concerned person. Consequently this Court would have jurisdiction if a person is likely

to be arrested at a place within jurisdiction of this Court. Reference was made to some of the decisions where similar view was taken. The Court granted relief for a period of one month. Learned counsel for respondent no.2 has contended that in the case of Dr.Augustine Pinto lit is observed that in the light of decision in Sandeep Loharia's case the view expressed in N.K.Nayar's case does not hold the field. It is pertinent to note that the decision in Dr.Augustine Pinto as well as Sandeep Lohariya's case were dealt with in the case of Javed Anand (supra) and in the order passed in the case of Shantanu Muluk delivered on 16th February 2021. In Javed Anand's case, the entire order in the case of Sandeep Lohariya was reproduced and it was observed that said observations were made in the facts of that case. The Court also accepted the submission of learned counsel for applicant by relying upon decision in the case of State of Assam Vs. Barak Upatyaka Dd.U.Karmachari Sanstha (Supra) that the interim order dated 14th June 2013 passed in Lohariya's case is not binding precedent. The said SLP was disposed off subsequently. On perusal of order in Sandeep Lohariya's case, it is evident that the accused was involved in commission of offence under Sections 302, 120B, 34 of IPC. Madhya Pradesh High Court granted transit bail on an application for anticipatory bail. The order was stayed by Apex Court. It was observed that order was passed without notice to State of Maharashtra. Accused had applied for anticipatory bail before High Court of Bombay. Application was rejected. The order of Bombay High Court was upheld by Supreme Court. Another matter was dismissed as withdrawn. The order of High Court was refused to be interfered with and upheld. Second SLP was dismissed. In spite of the said orders Madhya Pradesh High Court had entertained transit bail application. In this context the Apex Court expressed

shock and it was also observed that under what provisions and authority of law such application was registered and whether Bench was appraised about order passed by Bombay High Court. The subsequent order passed by Apex Court in Sandeep Lohariya's case on 1st August 2013 was produced before the Court while deciding application of Shantanu Muluk. Learned Judge in order dated 16th February 2021 has reproduced the said order which reads as under :

“The order passed by the High Court was in regard to a transit bail and the observations made by this Court in the order dated 14th June 2013 were with regard to anticipatory bail and hence the observations made by this Court in the order dated 14th June 2013 or in any other order passed by this Court in these matters, will not prejudice in any way the claim of the respondent no.1 for either temporary or regular bail before the Trial Court or the High Court which may be decided on its own merits. We also make it clear that observations in the order passed by this Court on 14th June 2013 or in any other order in these cases will not cause any prejudice to the claim of any other accused in this matter for anticipatory or regular bail before the High Court or any other appropriate Court.

The Special Leave Petitions as also Criminal Miscellaneous Petitions stand disposed of.

W.P.(Cri.)No.83 of 2013.

List this Writ Petition after two weeks.”

12. I am in agreement with the view expressed by this Court in the case of Javed Anand (supra) and in the case of Shantanu Muluk (supra). Temporary relief to protect liberty and to avoid immediate arrest can be granted by this Court. Generally the powers of High Court in anticipatory bail applications are limited to its territorial jurisdiction. However, as observed in the case of Javed Anand (supra), there may be cases where if protection is not granted, liberty

of an individual would be jeopardized. The real cause of making application under Section 438 is proposed arrest of person. In the present case there is strong apprehension of arrest.

13. The other decisions relied upon by Mr.Venegavkar are in the case of Syed Hassan (supra) and Sailesh Jaiswal (supra). The Courts were considering whether Section 438 of Cr.PC envisages grant of anticipatory bail by High Court or Court of Sessions within country irrespective of local of commission of the offence. It was held that it cannot be done in view of territorial jurisdiction of Courts. The issue of transit anticipatory bail is not under consideration. The decision in the case of Navinchandra (supra) was delivered in different context i.e. with regards to exercise of writ jurisdiction under Article 226 of Constitution of India by any High Court. These decisions were relied upon in the case of Dr.Augustine Pinto (supra). As stated above, the decision in Dr.Augustine Pinto was referred in case of Javed Anand (supra) and in spite of that decision protection was granted by this Court which has been confirmed by Apex Court. The learned Single Judge of this Court had referred Criminal Anticipatory Bail Application No.3041 of 2020 to the Division Bench of this court. Although the reference was not decided, transit anticipatory bail was granted in respect to case registered at Uttarakhand.

14. The investigating agency has sought arrest warrant from concerned Court for arrest of applicant. The residence of applicant was searched on 11th February 2021. The warrant was issued immediately thereafter on 14th February 2021. The respondents had challenged the maintainability of application also on ground that warrant has been issued against applicant and application under Section 438 Cr.PC shall not be entertained. It is pertinent to note

that there is apprehension of immediate arrest. It is a warrant of arrest. The warrant has not been issued in any proceedings after taking cognizance of it. Learned counsel for applicant has placed for consideration decision of this Court in the case of Akhlaq Patel (supra) wherein application under Section 438 of Cr.PC was entertained and relief was granted in respect to non-bailable warrant issued in pending proceedings by learned Magistrate. The objection is devoid of merit.

15. It is also pertinent to note that pending reference the Division Bench of this Court, as stated above, has granted such relief to the applicants therein. Pending the reference the learned Single Judges of this Court had also granted similar relief. Reference can be made to the order dated 22nd December 2018 passed in Nagendra Bhutra Vs. State of Maharashtra (ABA No.1783 of 2018) (2018-SCC Online-Bom-20729), order dated 24th September 2019 passed in ABA No.2074 of 2019 in the case of Bhawanji Gala Vs. State of Maharashtra. The High Court of Karnataka has also granted similar protection in the case of Gameskraft Technologies Pvt. Ltd and others Vs. State of Maharashtra and another delivered in Criminal Petition No.2681 of 2019 on 10th April 2019 (2019-SCC Online-Kar-520). The Delhi High Court in the case of Surya Pratap Singh and another Vs. State of Karnataka and another delivered in Bail Application No.1937 of 2019 on 7th August 2019 (2019-SCC Online-Del-8533) has also granted relief for a temporary period in exercise of powers u/s 438 of Cr.PC. Kerala High Court granted such relief in the case of Ummer Farooque Vs. Union of India in Bail Application No.7384 of 2019 on 22nd October 2019 (2019-SCC Online-Ker-3458).

16. Thus, pending reference also reliefs were granted by this Court

in exercise of powers u/s 438 of Cr.PC. As stated above, the Division Bench has also granted such relief. The decision of Dr.Augustine Francis Pinto and another (supra) and Sandeep Lohariya (supra) was considered by this Court, as stated above. The co-accused who is apprehending arrest in this case, is granted protection by Aurangabad Bench of this Court on 16th February 2021. The applicant has to make arrangements to seek appropriate reliefs in other State. Since the applicant would be ultimately approaching the Court having jurisdiction, it would not be appropriate to make any observation on the merits of the case. In the light of factual matrix of the case protection under Section 438 of Cr.PC can be granted to the applicant for temporary period of three weeks.

17. Hence, I pass following order :

ORDER

- (i) In the event of arrest of applicant in connection with CR No.49 of 2021 registered at Special Cell, New Delhi, the applicant be released on bail on executing PR bond in the sum of Rs.25,000/- with one or more sureties in the like amount;
- (ii) This protection is granted for a period of three weeks from today to enable the applicant to approach the competent Court for seeking appropriate relief ;
- (iii) Anticipatory Bail Application is disposed of.

18. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or e-mail of a digitally signed copy of this order.

(PRAKASH D. NAIK, J.)