

IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 22ND DAY OF JUNE 2021

BEFORE

THE HON'BLE MR. JUSTICE SHIVASHANKAR AMARANNAVAR

CRIMINAL PETITION No.101022/2021

BETWEEN:

SRI. RAMAPPA @ RAMESH
S/O. DHARMANNA MADAR
AGE. 38 YEARS, OCC. COOLIE,
R/O. KALHALLI VILLAGE, TAL. JAMAKHANDI,
DIST. BAGALKOTE 587101.

...PETITIONER

(BY SRI.SRINAND A PACHHAPURE, ADVOCATE)

AND

THE STATE OF KARNATAKA
THROUGH RANGE FOREST OFFICER,
BANAHATTI, BAGALKOTE DIVISION,
NOW REP. BY STATE PUBLIC PROSECUTOR,
HIGH COURT OF KARNATAKA DHARWAD,
BENCH AT DHARWAD 580011.

... RESPONDENT

(BY SRI.RAMESH CHIGARI, HCGP)

THIS CRIMINAL PETITION IS FILED U/S 438 OF CR.P.C., SEEKING TO GRANT ANTICIPATORY BAIL TO THE PETITIONER IN BANAHATTI ROR CRIME NO.33/2020-21 REGISTERED FOR THE OFFENCES PUNISHABLE UNDER SECTION 80, 84, 86 AND 87 OF KARNATAKA FOREST ACT, 1963, RULE 144 AND 145 OF KARNATAKA FOREST RULES, 1969 AND SECTION 379 OF IPC, BY THE RESPONDENT RANGE FOREST OFFICER, BANAHATTI RANGE, BAGALKOTE DIVISION, PENDING ON THE FILE OF COURT OF SENIOR CIVIL JUDGE AND JMFC, BANAHATTI.

THIS PETITION BEING HEARD AND RESERVED FOR PRONOUNCEMENT OF ORDERS ON 11.06.2021, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

This petition is filed by the petitioner under Section 438 of The Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.', for brevity) seeking bail in Banahatti ROR Crime No.33/2020-21 of Range Forest Officer, Banahatti Range, Bagalkote Division, registered for the offences punishable under Sections 80, 84, 86 and 87 of Karnataka Forest Act, 1963, Rule 144 and 145 of Karnataka Forest Rules, 1969 (hereinafter referred to as the 'Act, for brevity) and Section 379 of IPC.

2. It is the case of the prosecution that Forest Officials registered a case in ROR No.33/2020-21 on 19.11.2020 for the offences

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punishable under Sections 80, 84, 86 and 87 of the Act, 1963, Rule 144 and 145 of Karnataka Forest Rules, 1969 and Section 379 of IPC against the unknown accused persons. During the course of investigation, the Investigating Officer has issued notice under Section 41-A of Cr.P.C., calling upon the petitioner to appear before him for investigation. The said notice is dated 13.01.2021. The petitioner has not appeared before the Investigating Officer in response to the notice as he has apprehension that if he appears before the I.O, there is likelihood of he being arrested. The petitioner apprehending his arrest has filed Crl.Misc.No.5063/2021 seeking bail and the same came to be rejected by I Addl. District and Sessions Judge, Bagalkot to sit at Jamkhandi, by order dated 29.04.2021.

Therefore, the petitioner is before this Court seeking anticipatory bail.

3. Heard the learned counsel appearing for the petitioner and the learned High Court Government Pleader for the respondent-State.

4. Learned counsel for the petitioner would contend that the petitioner apprehending his arrest, when he visit the Investigating Officer in compliance of notice under Section 41-A of Cr.P.C. The counsel for petitioner by referring to clauses of Section 41(A) contends that the police officer, if he is of the opinion that he ought to arrest, he has to record the reasons. He further pointing out Section 41-A (4), as the petitioner has failed to comply with the terms of notice, the Investigating Officer may arrest him for the offences mentioned in

the notice, if petitioner has not obtained any orders by the competent Court. He would contend that the decision in the case of **Jerry Paul Vs. State of Karnataka**, reported in **2021(1) Kar. L.J., 550**, is not applicable to the case on hand. In that case, the Investigating Officer had filed charge sheet and he had not obtained permission under Section 173(8) of Cr.P.C., for further investigation and therefore the person who received the notice under Section 41-A of Cr.P.C., has no apprehension of arrest. He would contend that whenever a notice has been served under Section 41-A Cr.P.C., the noticee apprehends his arrest and on that point he places reliance on a decision of the Patna High Court in the case of **Gauri Shankar Roy and Others Vs. The State of Bihar**, reported in **2015 (3)**

PLJR 618, it contains elaborate discussion over the Section 41, 41-A of Cr.P.C., and paragraph No.22 thereof, it is evident that issue has properly been answered. The paragraph No.22 is quoted as below;

"22. From perusal of the scheme of Section 41 Cr.P.C. as it stands now after being substituted by Code of Criminal Procedure (Amendment) Act 2008 (5 of 2009), it transpires that the power of arrest available to a police officer in connection with commission of a cognizable offence may be categorized under three heads - (a) under the first head, the Police officer has been conferred a power to arrest any person who has committed a cognizable offence in his presence. This power is without any qualification, exception and prerequisites. The only sine qua non is commission of a cognizable offence in presence of a police officer; (b) the second category of the case have been mentioned under Section 41(1)(b). In this class, those cases are included which are punishable with imprisonment for a term which may be less than seven years or which may extend to seven years

whether with or without fine and the police officer has received a reasonable complaint, or a credible information regarding any one having committed such offence or a reasonable suspicion exists that any one has committed such a cognizable offence. The power to arrest for the offence under this category is, however, not absolute and unqualified. In order to exercise the power of arrest in these category of cases, the police officer must have a reason to believe on the basis of complaint, information or suspicion that any person has committed the said offence and the police officer should be satisfied that such arrest is necessary in terms of any or all of the grounds as mentioned under Section 41(1)(b)(ii)(a,b,c,d,e) of the Code."

Hence, he further contends that the petitioner apprehending his arrest by the Investigating Officer prays for grant of anticipatory bail.

5. Per contra, learned High Court Government Pleader contended that as the arrest of the petitioner is not required under the provisions of 41(1), the Investigating Officer has issued notice under Section 41-A of Cr.P.C., directing the petitioner to appear before him for enquiry. Therefore, there is no any apprehension of arrest. The Sessions Court placing reliance of the decision in the case of Jerry Paul (*supra*) has rightly rejected the petition of the petitioner seeking anticipatory bail. Hence, the petition seeking anticipatory bail is not maintainable.

6. Having regard to the submission made by the learned counsel for the petitioner and the learned High Court Government Pleader and on the points urged the legal issue that arises in the present case is;

Whether an application for anticipatory bail under Section 438 of Cr.P.C., is maintainable on behalf of a person who has never been arrested to but has been noticed by the police officer under Section 41-A of Cr.P.C?

7. Chapter V of Cr.P.C. deals with 'arrest' of persons. Section 41 Cr.P.C. provides for the exigencies and circumstances under which a police officer may arrest any one without warrant. The provisions of Section 41 of the Code are being reproduced for better appreciation of the issue involved. Section 41 reads as follows:

41. When police may arrest without warrant

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely :-

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary -

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing: Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

(ba) against whom credible information has been received that imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence.

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonable suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 365; or

(i) for whose arrest any requisition, whether written or oral, has been

received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition

(2) Subject to the provisions of Section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.

8. From perusal of the scheme of Section 41 Cr.P.C. as it stands now after being substituted by Code of Criminal Procedure (Amendment) Act 2008 (5 of 2009), it transpires that the power of arrest available to a police officer in connection with commission

of a cognizable offence may be categorized under three heads - (a) under the first head, the Police officer has been conferred a power to arrest any person who has committed a cognizable offence in his presence. This power is without any qualification, exception and prerequisites. The only sine qua non is commission of a cognizable offence in presence of a police officer; (b) the second category of the case have been mentioned under Section 41(1)(b). In this class, those cases are included which are punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine and the police officer has received a reasonable complaint, or a credible information regarding any one having committed such offence or a

reasonable suspicion exists that any one has committed such a cognizable offence. The power to arrest for the offence under this category is, however, not absolute and unqualified. In order to exercise the power of arrest in these category of cases, the police officer must have a reason to believe on the basis of complaint, information or suspicion that any person has committed the said offence and the police officer should be satisfied that such arrest is necessary in terms of any or all of the grounds as mentioned under Section 41(1)(b)(ii)(a,b,c,d,e) of the Code.

9. To put it straight, the legal position which emerges is that in the events of commission of cognizable offences punishable up to 7 years of the imprisonment, for arresting any person, there has to be a

reasonable belief of the police officer coupled with the existence of any one or more of the circumstances rendering the police officer to satisfy himself that such arrest is necessary. The proviso appended to the relevant provision issues a command to the police officer to record his satisfaction in case he decides not to arrest any person in connection with the allegation of commission of the offence.

10. What emerges from the new scheme of the Code and the amendments to Section 41 is that under both the circumstances i.e. when he decides to arrest or when he decides not to arrest, there has to be a satisfaction of the police officer which satisfaction, of course, is judicially reviewable. In event of arrest, the police officer has to record about what reasons to believe he had for coming to a conclusion

that the person has committed the offence and further more he is also required to record as to under what exigencies, the arrest was necessary. The exigencies have been provided under Section 41(1)(b)(ii) (a-e) of the Cr.P.C.

11. Thus, in the event police officer decides not to arrest any person notwithstanding the fact that there are credible information or suspicion of him having committed such offence, then also the police officer is required to record reasons in writing for not making the arrest. The further course of action in cases where the police officer decides not to arrest any person has been provided under Section 41A Cr.P.C. which reads as follows:

"41A. Notice of appearance before police officer.- (1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of Section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded,

the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

12. Here it would be relevant to elaborate the objects and reasons and the legislative intent behind the introduction/insertion of Section 41A of the Cr.P.C. (inserted by Act 5 of 2009). After going through the statement of objects and reasons vis-à-vis the insertion of Section 41A of the Cr.P.C., it becomes clear that the legislature intended to make it compulsory for the police to record reasons for making an arrest, as well

as for not making an arrest in respect of a cognizable offence for which the maximum punishment is upto seven years, hence Section 41 was amended and proviso to Section 41 was inserted by Act 41 of 2010, whereas Section 41A of Cr.P.C. was inserted to make it compulsory for the police to issue a notice in all such cases where arrest is not required to be made under clause (b) of sub-section (1) of the amended Section 41. It was also suggested that the unwillingness of a person who has not been arrested to identify himself and to whom a notice has been issued under Section 41A would be a ground for his arrest.

13. Hence, under the new provision of Section 41A of Cr.P.C., it is mandated that the police will not arrest the accused for crimes that are punishable with less than 7 years.

Instead, the police can issue a notice informing the accused person/persons that he/they should appear at the police station for investigation.

14. The insertion of Section 41A Cr.P.C., pertaining to issuance of 'Notice of Appearance', is in line with the Right of Life and Liberty of the citizens and seeks to help to bring down the number of arrests, which in turn would decongest the crowded Indian Jails. Simultaneously, the innocents too can feel secure in case they stand a chance of exposure to implication in fake cases.

15. The amendment provides that the police officer shall, instead of arresting the person concerned, issue a notice of appearance, asking him to cooperate with the

police officer in the probe. No arrest will be made in a non-cognizable offence except under a warrant or order of Magistrate. The amendment provides that the reasons for arrest should be sound and recorded in writing by the police officer. Where such a notice is issued to any person, it shall be the duty of that person to comply with it and arrest can be made only if the person fails to do so. Yet, here it is important to remember that mere failure to comply with the terms of the notice is not sufficient ground to arrest a person and the police officer must record reasons, if the need for arrest arises.

16. The import of the said provision of Section 41A Cr.P.C. is that normally where an accused has been named in the F.I.R., credible information has been received or reasonable

suspicion exists and the offence is punishable with upto 7 years imprisonment, the arrest of the accused may not be necessary at the initial stage and his attendance may be secured by issuing a notice to him to appear before the police officer. In such cases, it would be advisable to arrest the accused only after sufficient evidence of his involvement in the crime has been collected and the charge sheet needs to be submitted. Under Section 170(1) Cr.P.C., it has been provided that on completion of investigation, if sufficient evidence has been collected, the accused shall be forwarded in custody to the Magistrate concerned, unless he has been released on bail (if the offence was bailable), in which event security may be taken for his appearance before the Magistrate.

17. With regard to the ambit of provision under Section 41A of the Cr.P.C., the Apex Court, in the case of **Arnesh Kumar Vs. The State of Bihar**, reported in **AIR 2014 SC 2756** has held in paragraph No. 12 in the following words:-

"12. Aforesaid provision makes it clear that in all cases where the arrest of a person is not required under Section 41(1) Cr.P.C., the police officer is required to issue notice directing the accused to appear before him at a specified place and time. Law obliges such an accused to appear before the police officer and it further mandates that if such an accused complies with the terms of notice he shall not be arrested, unless for reasons to be recorded, the police officer is of the opinion that the arrest is necessary. At this stage also, the condition precedent for arrest as envisaged under Section 41 Cr.P.C. has to be complied and shall be subject to the same scrutiny by the Magistrate as aforesaid."

18. The conclusion which emerges from the conjoint reading of Section 41 and 41A of the Code is as follows: In connection with allegation of commission of offence punishable up to 7 years with or without fine, the police officer can arrest – (i) only if he has reasons to believe regarding commission of the offence by the person concerned, coupled with (ii) the existence of one or more of the circumstances provided in the Section rendering arrest necessary.

19. In case the police officer decides not to arrest, he has to record the reasons to that effect and thereafter is mandatorily required to issue notice to the person concerned under section 41A(1). The noticee is required to comply with the terms of the notice and till the time the noticee observes and adheres to the

undertaking under the notice, he shall not be arrested unless for the reasons to be recorded, the police officer is of the opinion that he ought to be arrested. The use of word 'shall' in Section 41A(1) of the Code reflects that the provision is mandatory in nature.

20. Where there is any failure on the part of the noticee to comply with the terms of the notice, it is always incumbent upon the police officer to arrest the noticee subject to such orders as may have been passed by a competent court in this behalf. The use of the term 'subject to such orders' is of significance as the legislature is not expected to waste the words or use them casually without any intention of a specific interpretation being given to them. The term subject to such orders as may have been passed refers to orders

relating to grant of anticipatory bail which the noticee may have obtained interregnum the issuance of notice and before actual arrest.

21.1. Section 41A of the Cr.P.C. which was inserted by Act 5 of 2009 was made effective from 01.11.2010 and was introduced by the Legislature for purposes of giving notice of appearance to a person who's arrest is not required under provisions of Section 41(1) of Cr.P.C., directing the person against whom a reasonable complaint has been made or credible information has been received or reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the Notice.

21.2. Under Section 41A (2) of the Code the person concerned to whom the Notice has been issued is duty bound to comply with the terms of notice.

21.3. Section 41A (3) stipulates about the person who complies with the Notice, shall not be arrested unless for reasons recorded by the police that he ought to be arrested and one of such contingencies when such person can be arrested as stipulated under Section 41A (4) which prescribes the arrest of such person if he fails to comply the terms of Notice or is unwilling to identify himself, then the police officer subject to such orders as may have been passed by a competent court, may arrest him for the offences mentioned in the Notice.

22. Hence, a person gets apprehension of being arrested in two situations:- firstly when a 'Notice' is issued to him under Section 41A (1) of the Code and secondly, after complying the terms of 'Notice' the police officer forms an opinion that such person ought to be arrested or in a situation, such person fails to comply the terms of 'Notice' or is unwilling to 'identify' himself.

23. In all the above three situations such person can maintain an anticipatory bail application as Section 41A of the Code does not stipulate the specific condition of notice of appearance.

24. 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.

25. Section 41A of the Cr.P.C. defers the arrest until and unless sufficient evidence is collected, so as to produce or forward the accused to the custody of the court. The apprehension of arrest, thus, does not completely vanish away on the issuance of notice of appearance under Section 41A of the Cr.P.C., and hence, the question being raised in maintainability of an application under Section 438 Cr.P.C., during the pendency of notice being issued under Section 41A Cr.P.C. or during the compliance of the terms of such

notice, is completely unwarranted and is not in tune with the provisions of law. The apprehension of arrest always does exist even after issuance of notice of appearance under Section 41A Cr.P.C. and under such circumstance the Courts cannot evade to entertain an application under Section 438 Cr.P.C.

26. In **Jerry Paul's** case (supra), the coordinate bench of this Court has held that once notice has been issued under Section 41-A of Cr.P.C., that itself makes it clear that arrest of the petitioner is not required. In the said case, the notice under Section 41-A of Cr.P.C. has been issued after filing the charge sheet. The Investigating Officer even had not obtained permission for further investigation under Section 173(8) of Cr.P.C. In that

circumstances, it is held that there is no threat of arrest of the noticee, who has received notice under Section 41-A of the Act. In the case on hand, the investigation is still in progress and petitioner has been issued with notice under Section 41-A of Cr.P.C., for enquiry with regard to Banahatti ROR Crime No.33/2020-21, for offences under Section 80, 84, 86 and 87 of Karnataka Forest Act, 1963 and Section 379 of IPC, whereunder, the motorcycle and two sandalwood billets have been seized. The offences under Section 86 and 87 of the Karnataka Forest Act, 1963, are punishable with imprisonment for 10 years. Therefore, there is an apprehension of arrest of the petitioner since the Investigating Officer may collect evidence and record reasons against the petitioner and may arrest him.

More so the petitioner has not complied notice issued under Section 41A. Therefore, the petitioner is entitled for grant of anticipatory bail with conditions.

27. In the result, the petition filed under Section 438 of Cr.P.C., is allowed. In the event of arrest of petitioner in Banahatti ROR Crime No.33/2020-21 by the Range Forest Officer, Banahatti, Bagalkote Division, registered for the offences punishable under Sections 80, 84, 86 & 87 of Karnataka Forest Act, 1963, Rule 144 and 145 of Karnataka Forest Rules, 1969 and Section 379 of IPC, the petitioner shall be released on bail subject to certain terms and conditions.

- i. The petitioner shall execute a personal bond for a sum of Rs.1,00,000/- (Rupees One Lakh Only) with one

surety for the like sum to the satisfaction of the Investigating Officer.

- ii. The petitioner shall voluntarily appear before the Investigating Officer within fifteen days from today.
- iii. The petitioner shall co-operate with the investigation and make himself available for interrogation whenever required.
- iv. The petitioner shall not directly or indirectly make any inducement, threat or promise to any witness acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer.
- v. The petitioner shall not obstruct or hamper the Police investigation and not to play mischief with the evidence collected or yet be collected by the Police.

- vi. The petitioner shall mark his presence before the Police station concerned on second Sunday of every month between 10 a.m. to 2 p.m. for a period of six months from the date of this order.

**Sd/-
JUDGE**

RM