

101

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Crl. Misc. No. M-60058 of 2023

Date of Decision: November 30, 2023

Baby

.....Petitioner

versus

State of Punjab and another

.....Respondents

CORAM: HON'BLE MR.JUSTICE HARPREET SINGH BRAR

Present:- Mr. Rajesh Kapila, Advocate
for the petitioner

Ms. Navreet K. Barnala, AAG Punjab

Harpreet Singh Brar, J. (Oral)

1. Prayer in the present petition under Section 438 Cr.P.C. is for grant of anticipatory bail to the petitioner in a complaint case No. N.I.Act/737/2020 dated 23.12.2020 titled as "Tarsem Lal vs. Baby" under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'NI Act') (Annexure P-1) in which she has been declared a proclaimed person vide order dated 03.02.2022(Annexure P-2).

FACTUAL BACKGROUND

2. The petitioner and her husband entered into an agreement to sell land measuring 2 marlas bearing khasra no. 36/3 Red(32-0) situated in village Jammu Kalyari, H.B. No. 235, Tehsil and District Pathankot, on which a residential house is constructed, with the respondent-complainant. The said property is registered in the name of husband of the petitioner- Mukesh Kumar. According to the

agreement, consideration amount was fixed at Rs. 5,50,000/-, out of which the respondent paid Rs. 2,50,000/- as earnest money. Thereafter, the petitioner and her husband avoided executing the said agreement to sell. The respondent approached the Court of Civil Judge (Junior Division) where, vide judgment and decree dated 27.07.2018, the registered owner of the suit property was directed to return the earnest money of Rs 2,50,000/- at the rate of interest of 6% p.a. from the date of execution till filing of the civil suit and 8% p.a thereafter till realization to the respondent along with cost of Rs. 18,480/-.

3. In order to discharge their legally enforceable liability, the petitioner issued a cheque bearing no. 015181 dated 13.10.2020 for an amount of Rs. 3,20,000/- in favour of the respondent. The cheque was presented on 23.10.2020 for encashment but the same was dishonoured vide memo dated 26.10.2020 with the remarks- 'Funds insufficient.' Thereafter, the respondent served a legal notice dated 19.11.2020 upon the petitioner. However, the petitioner failed to pay the cheque amount within the stipulated 15 days after the receipt of the legal notice leading the respondent to file a complaint under Section 138 of the NI Act on 23.12.2020 before the Chief Judicial Magistrate, Pathankot.

4. The petitioner was ordered to be summoned to face trial for 10.03.2021. However, the petitioner did not turn up and bailable warrants of arrest were ordered to be issued for 29.04.2021. On 29.04.2021, yet again the petitioner failed to turn up, even though the bailable warrants were duly served upon her through her sister-in-law Rita Devi, and non-bailable warrants of arrest were ordered to be issued against her for 04.10.2021. The non-bailable warrants were received back with the report that per the information received from the husband of the petitioner, the petitioner had gone to Himachal Pradesh. Consequently, proclamation under Section 82 Cr.P.C. was ordered to be issued against her for

03.02.2022. On the recording the statement of serving official and after the expiry of the statutory period of 30 days, the petitioner was declared to be a proclaimed person.

CONTENTIONS

5. Learned counsel for the petitioner *inter alia* contends that the petitioner has been falsely implicated by respondent No. 2. The petitioner is under no financial liability towards respondent No. 2. Infact the cheque was given by her husband as security to respondent No. 2. The petitioner is illiterate lady and she was never served with any summons of the complaint and without execution of warrants of arrest, learned Judicial Magistrate 1st Class has declared the petitioner as proclaimed person vide order dated 03.02.2022 (Annexure P-2). Learned counsel for the petitioner further contends that without following the procedure as laid down under Section 82 Cr.P.C. the aforementioned order is illegal and not sustainable in the eyes of law. The petitioner approached the learned Sessions Court, Pathankot for grant of anticipatory bail but the same was dismissed by learned Additional Sessions Judge, Pathankot vide order dated 04.11.2023 (Annexure P-3).

6. Per contra learned State counsel opposes the grant of anticipatory bail to the petitioner on the ground that once the petitioner has been declared a proclaimed person by invoking the provisions of Section 82 Cr.P.C., as the petitioner failed to turn up in Court in spite of being served through her sister-in-law Rita Devi, the grant of anticipatory bail would not be maintainable in view of the law laid down by the Hon'ble Supreme Court in ***Lavesh v. State (NCT of Delhi)*, (2012) 8 SCC 730** and ***Vipan Kumar Dhir v. State of Punjab and another*, 2021 (4) R.C.R. (Criminal) 378**.

OBSERVATION AND ANALYSIS

7. Having heard learned counsel for the parties and after perusing the record of the case, with the consent of the parties, the present case is taken up for final disposal.

8. Now, this Court would like to examine the implication of the judgments passed in *Lavesh (supra)*, *Vipan Kumar Dhir (supra)* in the light of facts and circumstances of the present case.

9. A two Judge bench of the Hon'ble Supreme Court in *Lavesh (supra)*, speaking through Justice P. Sathasivam, held as follows:

“10. ... Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code is not entitled the relief of anticipatory bail.”

In *Vipan Kumar Dhir's case (supra)*, a three-judge bench of Hon'ble Supreme Court, speaking through Justice Surya Kant, made the following observations:

“12. In the case in hand, the High Court seems to have been primarily swayed by the fact that the Respondent Accused was 'co operating' with investigation. This is, however, contrary to the record as the Respondent Accused remained absconding for more than two years after being declared a proclaimed offender on 23.04.2018. She chose to join investigation only after securing interim bail from the High Court. She kept on hiding from the Investigating Agency as well as Magistrate's Court till she got protection against arrest from the High Court in the 2nd round of bail proceedings.

13. *Even if there was any procedural irregularity in declaring the Respondent Accused as an absconder, that by itself was not a justifiable ground to grant pre-arrest bail in a case of grave offence save where the High Court on perusal of case diary and other material on record is, prima facie, satisfied that it is a case of false or overexaggerated Such being not the case here, the High Court went on a wrong premise in granting anticipatory bail to the Respondent Accused.*

14. *The ground of parity with co-accused Daksh Adya invoked by the High Court is equally unwarranted. The allegations in the FIR against the Respondent Mother in Law and her younger son Daksh Adya are materially different. It is indubitable that some of the allegations against all the family members are common but there are other specific allegations accusing the Respondent Accused of playing a key role in the alleged offence. The conduct of the Respondent Accused in absconding for more than two years without any justifiable reason should have weighed in mind while granting her any discretionary These facts put her on a starkly different pedestal than the co-accused with whom she seeks parity. We are, thus, of the considered view that the High Court has wrongly accorded the benefit of parity in favour of the Respondent Accused. It has to be borne in mind that the deceased met with a tragic end within three months of her While it is too early to term it an offence under Sections 302 or 304B I.P.C., but the fact remains that a young life came to an abrupt end before realizing any of her dreams which were grimly. She died an unnatural death in her matrimonial home. The Respondent Accused is the mother-in-law of the deceased. The Investigating Agency, therefore, deserves a free hand to investigate the role of the Respondent Accused, if any, in the unnatural and untimely death of her daughter in law.”*

10. A perusal of the factual scenario in **Vipan Kumar Dhir (supra)** would show that a young woman suffered unnatural death in her matrimonial home. In

Lavesh (supra), the Hon'ble Supreme Court has put a caveat that when the accused is declared as proclaimed offender, 'normally,' anticipatory bail should not be granted. The Black's Law dictionary defines 'normally' as "rule; regularly; according to rule, general custom." When an extraordinary case is made out, a deviation from normal is not only permissible but also warranted.

11. The genesis of the dispute revolves around agreement to sell dated 24.09.2015 which has culminated into a judgment and decree dated 27.07.2018 passed by learned Civil Judge (Jr. Div.), Pathankot in favour of respondent No. 2-complainant. The present complaint under Section 138 of the NI Act came to be lodged against the petitioner-accused on dishonour of cheque for the amount of Rs. 3,20,000/- issued by her in compliance of judgment and decree dated 27.07.2018.

12. The Magna Carta of the year 1215, one of the earliest charters of human rights, also recognised the inherent value of personal liberty and made provisions to protect the same. The relevant provision is reproduced as under:

"No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land. To no-one will we sell or deny of delay right or justice."

A three Judge bench of the Supreme Court of United States made observations prohibiting deprivation of personal liberty, in as far back as 1876, in **Munn v. Illinois decided on 01.10.1876** and opined that the term 'life' is not merely limited to animal like existence and its protection extends to all faculties through which life is enjoyed.

CrI. Misc. No. M-60058 of 2023

13. The Hon'ble Supreme Court has categorically and consistently held over a myriad of judgments that a person cannot be deprived of his life and liberty except in accordance with procedure established by law which has been further interpreted as a procedure that is just, fair and reasonable. The Constitution of India not only bestows the right to equality upon women but also, by virtue of Article 15, encourages and empowers the State to take measures of positive discrimination in favour of women.

Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth:

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

14. In light of the constitutional scheme, special provisions have been made under Section 154, 160, 309, 357B, 357C, 437 of the Cr.P.C. to protect the rights of women. In keeping with the principles enshrined in the Constitution, the Courts are required to be more empathetic and considerate towards women when the question of curtailment of liberty arises since it is not just the woman who suffers but so does her family.

15. Many women who commit cognizable offenses are poor and illiterate. In many cases, they have children to take care of, and there are many instances when the children have no other option but are to live in prisons with their mothers. A two Judge bench of the Hon'ble Supreme Court in ***Satender Kumar Antil vs Central Bureau Of Investigation, (2022) 10 SCC 51*** has taken cognizance of their plight and held that in cases pertaining to women, the Court is expected to show some sensitivity. Speaking through Justice M.M. Sundresh, the following observations were made:

“51. Proviso to Section 437 of the Code mandates that when the accused is under the age of sixteen years, sick or infirm or being a

woman, is something which is required to be taken note of. Obviously, the court has to satisfy itself that the accused person is sick or infirm. In a case pertaining to women, the court is expected to show some sensitivity. We have already taken note of the fact that many women who commit cognizable offenses are poor and illiterate. In many cases, upon being young they have children to take care of, and there are many instances when the children are to live in prisons. The statistics would show that more than 1000 children are living in prisons along with their mothers. This is an aspect that the courts are expected to take note of as it would not only involve the interest of the accused, but also the children who are not expected to get exposed to the prisons. There is a grave danger of their being inherited not only with poverty but with crime as well.

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58. Section 437 of the Code empowers the Magistrate to deal with all the offenses while considering an application for bail with the exception of an offense punishable either with life imprisonment or death triable exclusively by the Court of Sessions. The first proviso facilitates a court to conditionally release on bail an accused if he is under the age of 16 years or is a woman or is sick or infirm, as discussed earlier. This being a welfare legislation, though introduced by way of a proviso, has to be applied while considering release on bail either by the Court of Sessions or the High Court, as the case may be. The power under Section 439 of the Code is exercised against an order rejecting an application for bail and against an offence exclusively decided by the Court of Sessions. There cannot be a divided application of proviso to Section 437, while exercising the power under Section 439. While dealing with a welfare legislation, a purposive interpretation giving the benefit to the needy person being the intendment is the role required to be played by the court. We do not wish to state that this proviso has to be considered favourably in all cases as the application depends upon the facts and circumstances contained therein. What is required is the consideration per se by the court of this proviso among other factors.” (emphasis supplied)

16. Furthermore, the offence under Section 138 of the NI Act is punishable with imprisonment which may be extend to two years and is bailable in nature. The petitioner in the present case is an illiterate woman and subjecting her to pre-trial detention would be too harsh and not proportional to the punishment prescribed for the said offence.

17. A two Judge bench of the Hon'ble Supreme Court in ***Moti Ram and others v. State of M.P. 1978 AIR (Supreme Court) 1954***, speaking through Justice Krishna Iyer, made the following observations:

“13. The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.”

18. Further, unnecessary incarceration would also negatively impact an individual's reputation, especially that of a woman. In ***Sukhwant Singh v. State of Punjab 2009(4) R.C.R(Criminal) 868***, a two Judge bench of the Hon'ble Supreme Court has opined that reputation is a valuable personal asset and a facet of an individual's right to life as enshrined in Article 21 of the Constitution.

19. A perusal of the impugned order dated 04.11.2023(Annexure P-3), whereby petitioner's application for anticipatory bail was dismissed by the learned trial Court, indicates that bailable warrants are shown to have been served upon the petitioner on 29.04.2021 through her sister-in-law namely Rita Devi. The learned counsel for the petitioner has categorically contended that the petitioner and her sister-in-law Rita Devi are not on talking terms. As such service of the petitioner was never effected before declaring her as proclaimed person. This Court in the

judgment passed in *Major Singh @ Major v. State of Punjab 2023(3) R.C.R (Criminal) 406* has held that the Court is first required to record its satisfaction before issuance of process under Section 82 Cr.P.C. and non-recording of satisfaction itself makes such order suffering from incurable illegality. In *Sonu v. State of Haryana 2021(1) R.C.R(Criminal) 319*, this Court has held that the conditions specified in Section 82(2) Cr.P.C. for the publication of a proclamation against an absconder are mandatory. Any non-compliance therewith cannot be cured as an irregularity and renders the proclamation as nullity. The petitioner has shown sufficient cause for her absence from the Court. Moreover, the provisions of Section 82 of Cr.P.C. do not create an embargo on the power of this Court to grant anticipatory bail to a proclaimed person, therefore this Court is of the opinion that the petitioner deserved the concession of anticipatory bail, in view of observations made by the Hon'ble Supreme Court in *Satender Kumar Antil (supra)*.

CONCLUSION

20. In view of the above discussion, the present petition is allowed. The petitioner is directed to appear before the learned trial Court within two weeks and on her doing so, the learned trial Court shall admit her to the bail on furnishing bail bonds/surety bonds to its satisfaction.

Nothing observed herein shall be construed as expression of opinion of this Court on merits of the case and the trial Court shall proceed without being prejudiced by the observations of this Court.

(HARPREET SINGH BRAR)
JUDGE

November 30, 2023

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Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No