

A.F.R.

Neutral Citation No. - 2023:AHC:170754

Court No. - 72**Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S
438 CR.P.C. No. - 1907 of 2023**Applicant :-** Kusum Devi And Another**Opposite Party :-** State of U.P. and Another**Counsel for Applicant :-** Ghanshyam Das Mishra, Abhishek Kumar
Mishra, Chandrakesh Mishra, Umesh Panday**Counsel for Opposite Party :-** G.A., Ved Prakash Shukla**Hon'ble Krishan Pahal, J.**

1. List has been revised.
2. Heard Sri Daya Shankar Mishra, learned Senior Counsel assisted by Sri Abhishek Kumar Mishra, learned counsel for the applicants, Sri Ved Prakash Shukla, learned counsel for the informant and Sri Sunil Kumar, learned A.G.A. for the State as well as perused the material placed on record.
3. The present anticipatory bail application has been filed on behalf of the applicants in Case Crime No.75 of 2022, under Section 306 IPC at Police Station- Naini, District Prayagraj with a prayer to enlarge them on anticipatory bail.

PROSECUTION STORY:

4. The deceased, who happens to be the husband of the informant, is stated to be a Marine Engineer and had left his job and started doing the contract job at Prayagraj as his father had fallen ill and was bed ridden, but the said money earned used to be transferred to the account of his ailing father, as such his family was dependent on the money being given to them by his father Balram Mishra, who has subsequently expired. Out of the said wedlock, there is a five year old daughter. The deceased is

stated to have committed suicide in the night of 5/6.01.2022 and the informant could reach the house of her in-laws on 07.01.2022 from Ahmedabad. The behaviour of her in-laws was not proper, as such she left her in-laws house after *Terahawi* of her husband and she received a WhatsApp message from the mobile of the father-in-law which was being used by her husband, whereby a suicide note was sent to her. The FIR was instituted on 19.02.2022 at Police Station Naini at Prayagraj as such.

RIVAL CONTENTIONS:

(Arguments on behalf of applicants)

5. Learned Senior Counsel has argued that the applicants were granted anticipatory bail till the submission of report under Section 173(2) Cr.P.C. by the Sessions Judge, Prayagraj and have not misused the opportunity granted earlier on.

6. Learned Senior Counsel has vehemently argued at Bar that no ingredients of Section 306 I.P.C. are fulfilled as there is no overt act assigned to the applicants and even Section 107 I.P.C. is not attracted in the present case as the applicants, who are the ladies, have not abetted the deceased to commit suicide. Learned Senior Counsel has further stated that the co-accused Manohar Mishra has been granted regular bail by this Court vide order dated 17.07.2023 passed in Criminal Misc. Bail Application No.29923 of 2023 and the very said order categorically indicates that the ingredients of Section 306 I.P.C. are not fulfilled. Learned Senior Counsel has further stated that the applicants, being ladies, are also entitled for anticipatory bail as no purpose shall be fulfilled by sending them behind the bars.

7. Their reputation in the society shall stand tarnished and there is no likelihood of them tampering the evidence as the final report (charge-sheet) has already been submitted. They are ready to cooperate in the trial as they have already cooperated during investigation.

8. Learned Senior Counsel has further stated that there is no eye-witness of the said incident. The said FIR has been lodged after a delay of more than a month, as such the said inordinate delay is also a valid ground for grant of anticipatory bail to the applicants.

9. Learned Senior Counsel has further stated that the judgment of this Court passed in **Shivam vs. State of U.P. and Another**¹, is *per-incuriam* as it has not laid down any law as it is not a ratio that has to be relied, rather the reference of paragraph 43(8) is only *obiter-dicta*.

10. Learned Senior Counsel has placed reliance on the judgment of Apex Court passed in the case of **Kamlesh & Anr. vs. The State of Rajasthan & Anr.**², whereby it has been opined that a petition U/s 438 Cr.P.C. is very much maintainable even after dismissal of an application filed U/S 482 Cr.P.C.

11. Learned Senior Counsel has further placed reliance on paragraph nos.10 and 11 of the judgment of this Court passed in **Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No.57 of 2023 (Vijay Pal Prajapati vs. State of U.P.)**, whereby much reliance has been placed on the judgment of **Kamlesh (supra)**, which are quoted as under:-

“10. In Kamlesh and another versus State of Rajasthan and another, 2019 SCC OnLine SC 1822, the Hon'ble Supreme Court was deciding a Criminal Appeal filed against an order passed by Rajasthan High Court whereby an application for grant of anticipatory bail was rejected by the High Court only on the ground that petition under Section 482 Cr.P.C. praying for quashing of FIR, has already been rejected. The Hon'ble Supreme Court held that: -

“5. We are of the view that the order of the High Court cannot be sustained. High Court ought to have considered the application on merits. The fact that petition under Section 482 Cr.P.C. was dismissed for quashing was not conclusive and could not be the reason for rejecting the application.”

11. Therefore, the law is clear that the dismissal of the applicant's application under Section 482 Cr.P.C. would not be a bar against consideration of the merits of his application for anticipatory bail.”

1 2021 SCC OnLine All 264

2 2019 SCC OnLine SC 1822

12. Learned Senior Counsel has further placed reliance on the judgment of Apex Court passed in **Petition(s) For Special Leave to Appeal (Crl.) No.6057 of 2021 (Vinod Kumar Sharma & Anr. vs. State of Uttar Pradesh & Anr.)**, whereby it is stated that the order to the accused to surrender and apply for regular bail includes anticipatory bail also.

13. Learned Senior Counsel has also placed reliance on paragraph nos.11 and 12 of the judgment of this Court passed in **Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No.8059 of 2023 (Dr. Rajni Tripathi vs. State of U.P.)**, whereby the anticipatory bail was granted to the delinquent therein even after the application under Section 482 Cr.P.C. was disposed of and much reliance was made on the judgment of **Vinod Kumar Sharma and Another vs. State of Uttar Pradesh and Another**³.

14. Learned Senior Counsel has also placed reliance on the judgment of this Court passed in **Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No.4560 of 2023 (Udit Arya vs. State of U.P.)**, whereby even after the proceedings under Section 82 Cr.P.C. were taken up against the delinquent therein, the anticipatory bail of the accused was allowed.

(Arguments on behalf of informant/State)

15. Per contra, learned counsel for the informant and learned A.G.A. have vehemently opposed the anticipatory bail application on the ground that the applicants have not come with clean hands as they have already relinquished the opportunity granted under Section 482 Cr.P.C. and the present case is squarely hit by paragraph 43(2), (8) and (10) of the judgment of this Court passed in **Shivam (supra)**.

16. Learned counsel for the informant has also placed reliance on the judgment of Apex Court passed in the case of **Prem Shankar Prasad vs. State of Bihar & Anr.**⁴, whereby it is categorically opined that after the proceedings under Sections 82 and 83 Cr.P.C. have been undertaken

³ 2022 1 Crimes (SC) 193

⁴ 2021 AIR (SC) 5125

against the delinquent, the application under Section 438 Cr.P.C. is not maintainable.

17. Learned counsel for the informant has further stated that in the present case, already the proceedings under Sections 82 and 83 Cr.P.C. are complete on 18.01.2023 and they have also failed in the application filed under Section 482 Cr.P.C. No.3934 of 2023, as such the applicants are not entitled for anticipatory bail.

CONCLUSION:

18. As far as the judgment of Apex Court passed in the case of **Kamlesh (supra)** is concerned, the said case law does not apply to the present case as in the said case, the F.I.R. was challenged in the petition under Section 482 Cr.P.C. as is the practice at Rajasthan High Court, as such even after the petition challenging the F.I.R. is concerned, the application under Section 438 Cr.P.C. is very much taken up and decided by this Court. Herein, the applicants had challenged the final report (charge-sheet) and failed.

19. As far as the judgment of **Vijay Pal Prajapati (supra)** is concerned, the said judgment also cannot be considered applicable to the present case as it is based on the judgment of the Apex Court passed in **Kamlesh (supra)**. The said judgment also does not carry any force as far as the case of the applicant is concerned and is *per-incuriam*.

20. Learned Senior Counsel for the applicants has also placed reliance on the judgment of **Vinod Kumar Sharma (supra)**, whereby it has been opined that the word 'regular bail' includes the provisions of Section 438 Cr.P.C. The said argument hold good and it is very true that even if the order for regular bail is passed, the anticipatory bail can be taken up, but the said case law also do not apply to the present case as we have to see the case on his own merits and the said judgment of this Court passed in the case of **Dr. Rajni Tripathi (supra)** has been placed on the said

judgment of Apex Court passed in the case of **Vinod Kumar Sharma (supra)**. Thus, they do not apply to the present case.

21. The judgment of this Court passed in **Udit Arya (supra)** also does not apply to the present case as in that case of dowry death, the cause of death was chronic illness and she had died in her parental house. Only the order under Section 82 Cr.P.C. was issued that too a few days before filing of the anticipatory bail application. The proceedings were not complete. No case under Section 304-B I.P.C. was made out, as such an exception was drawn. In the present case, the proclamation under Sections 82 and 83 Cr.P.C. was completed on 18.01.2023 itself and a period of more than six months have passed and herein, the deceased has committed suicide within the precincts of the house of the applicants, as such this case law also does not hold good to the present case and the exception cannot be drawn here. The applicants are named in the FIR.

22. The eminent jurist Benjamin N. Cardozo, a former Judge of Supreme Court of America, in his book '**The Nature of the Judicial Process**', has stated that the precedents cannot be applied in any given dispute without some element of discretion, for which Judges must take responsibility. He says 'most Judges are inclined to say that what was once thought to be the exception is the rule, and what was the rule is the exception now'. The relationship between logic and experience is important in the context of invoking precedents.

23. After hearing learned counsel for the parties and taking into consideration paragraph 43(2), (8) and (10) of the judgment of this Court passed in **Shivam (supra)** and also the facts of the case, I do not find it a fit case to grant anticipatory bail to the applicants.

24. The present anticipatory bail application is hereby found devoid of merits and is accordingly **rejected**.

25. However, it is provided that if the applicants appear before the court below and apply for regular bail, their prayer for bail shall be considered and decided in accordance to law as expeditiously as possible.

Order Date :- 24.08.2023

Ravi Kant

(Krishan Pahal, J.)