2024(3) eILR(PAT) SC 1

[2024] 3 S.C.R. 421 : 2024 INSC 202

Srikant Upadhyay & Ors.
v.
State of Bihar & Anr.

(Criminal Appeal No. 1552 of 2024)

14 March 2024

[C.T. Ravikumar* and Sanjay Kumar, JJ.]

Issue for Consideration

Whether there could be any bar on the Trial Court for proceeding u/s. 82 Cr.P.C., merely because an anticipatory application for bail has been filed or because such an application was adjourned without passing any interim order.

Headnotes

Code of Criminal Procedure, 1973 – s.438 and s.82 – Application for anticipatory bail was filed in November 2022 and brought up for hearing on 04.04.2023, on which it was dismissed – Meanwhile, proclamation was issued u/s. 82 Cr.P.C. on 04.01.2023 and thereafter process u/s.83 Cr.P.C. was initiated on 15.03.2023 – The core contention of the appellants is that the rejection of the application for anticipatory bail without considering the application on merits for the reason of issuance of proclamation u/s. 82, Cr.P.C., is unsustainable – Propriety:

Held: In view of the proviso u/s. 438(1), Cr.PC, it cannot be contended that if, at the stage of taking up the matter for consideration, the Court is not rejecting the application, it is bound to pass an interim order for the grant of anticipatory bail – In short, nothing prevents the court from adjourning such an application without passing an interim order – The appellants cannot be heard to contend that the application for anticipatory bail filed in November, 2022 could not have been adjourned without passing interim order – At any rate, the said application was rejected on 04.04.2023 –Pending the application for anticipatory bail, in the absence of an interim protection, if a police officer can arrest the accused concerned how can it be contented that the court which issued summons on account of non-obedience to comply with its order for appearance and then issuing warrant of arrest cannot proceed further in terms of the provisions u/s. 82, Cr.PC, merely because of the pendency of an application for anticipatory bail –

* Author

If the said position is accepted the same would be adopted as a ruse to escape from the impact and consequences of issuance of warrant for arrest and also from the issuance of proclamation u/s. 82, Cr.PC, by filing successive applications for anticipatory bail – It is made clear that in the absence of any interim order, pendency of an application for anticipatory bail shall not bar the Trial Court in issuing/proceeding with steps for proclamation and in taking steps u/s. 83, Cr.PC, in accordance with law. [Para 23]

Code of Criminal Procedure, 1973 – s. 438 and s.82 – Various orders by trial Court – Issuance of non-bailable warrants – Disobedience by the conduct – Proclamation issued u/s. 82 – Appellants sought pre-arrest bail – Whether appellants were entitled to pre-arrest bail:

Held: The facts would reveal the consistent disobedience of the appellants to comply with the orders of the trial Court – They failed to appear before the Trial Court after the receipt of the summons, and then after the issuance of bailable warrants even when their co-accused, after the issuance of bailable warrants, applied and obtained regular bail – Though the appellants filed an application, which they themselves described as "bail-cum-surrender application" on 23.08.2022, they got it withdrawn on the fear of being arrested – Even after the issuance of non-bailable warrants on 03.11.2022 they did not care to appear before the Trial Court and did not apply for regular bail after its recalling – It is a fact that even after coming to know about the proclamation u/s. 82 Cr.PC., they did not take any steps to challenge the same or to enter appearance before the Trial Court to avert the consequences – Considering the conduct of the appellants, there is no hesitation to hold that they are not entitled to seek the benefit of pre-arrest bail. [Para 16]

Code of Criminal Procedure, 1973 – s.82 – Non-attendance in obedience to proclamation u/s. 82 Cr.P.C. – Filing of an anticipatory bail application through an advocate – Whether filing of such application through advocate could be treated as appearance before the Court:

Held: The view taken by the Gujarat High Court in Savitaben Govindbhai Patel & Ors. v. State of Gujarat is approved that filing of an anticipatory bail through an advocate would not and could not be treated as appearance before a court by a person against whom such proceedings (u/ss.82/83 of Cr.P.C.) are instituted. [Paras 19 and 20]

Case Law Cited

Lavesh v. State (NCT of Delhi), [2012] 7 SCR 469 **: (2012) 8 SCC 730;** *State of Madhya Pradesh v. Pradeep Sharma,* [2013] 12 SCR 772 **: (2014) 2 SCC 171 – relied on.**

Savitaben Govindbhai Patel & Ors. v. State of Gujarat, **2004 SCC OnLine Guj 345 – approved.**

Prem Shankar Prasad v. State of Bihar and Anr., [2021] 6 SCR 1176 **: (2022) 14 SCC 516;** *HDFC Bank Ltd. v. J.J.Mannan & Anr.,* [2009] 16 SCR 590 **: 2010 (1) SCC 679 – referred to.**

Shrenik Jayantilal Jain and Anr. v. State of Maharashtra Through EOW Unit II, Mumbai, **[2014 SCC Online Bom 549] – referred to.**

List of Acts

Penal Code, 1860; Code of Criminal Procedure, 1973; Prevention of Witch (Daain) Practices Act, 1999.

List of Keywords

Anticipatory bail; Pre-arrest bail; Issuance of proclamation; Adjournment of bail application; Interim order; Trial Court orders; Issue of non-bailable warrant; Disobedience by conduct; Steps for proclamation.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1552 of 2024

From the Judgment and Order dated 04.04.2023 of the High Court of Judicature at Patna in CRLM No.67668 of 2022

Appearances for Parties

Basant R Sr. Adv., Anand Shankar, Debashis Mukherjee, Param Nand, Kavinesh Rm, Onkar Nath, Advs. for the Appellants.

Anshul Narayan, Prem Prakash, Bhanwar Pal Singh Jadon, Susheel Tomar, Satya Prakash, Chetan Jadon, Ms. Abha R. Sharma, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

C.T. Ravikumar, J.

Leave granted.

1. This appeal is directed against the order dated 04.04.2023 in CRLM No.67668 of 2022 passed by the High Court of Judicature at Patna whereby and whereunder the application for anticipatory bail filed by the appellant was dismissed. The pre-arrest bail application was moved in connection with FIR No.79 of 2020, registered against him and co-accused at Govidganj, Police Station, District East Champaran, Bihar, under Sections 341, 323, 354, 354 (B), 379, 504, 506 and 149 of the Indian Penal Code, 1860 (for short, 'IPC') and Section 3/4 of Prevention of Witch (Daain) Practices Act, 1999 (for short, 'the Daain Act').

2. Heard, Mr. Basant R., learned Senior Counsel for the appellants and Mr. Anshul Narayan, learned counsel for the respondent-State.

3. The question of seminal importance that arises for consideration can better be explained and understood by referring to a decision of this Court in ***Prem Shankar Prasad v. State of Bihar and Anr.***[1], which was rendered after referring to the earlier decisions of this Court in ***State of Madhya Pradesh v. Pradeep Sharma***[2] and ***Lavesh v. State (NCT of Delhi)***[3]. In ***Lavesh's*** case (supra), this Court held in paragraph 12 thus: -

> *"12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and declared as "absconder". 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*

1 [2021] 6 SCR 1176 : (2022) 14 SCC 516

2 [2013] 12 SCR 772 : (2014) 2 SCC 171

3 [2012] 7 SCR 469 : (2012) 8 SCC 730

of Section 82 of the Code he is not entitled to the relief of anticipatory bail."

(Underline supplied)

4. In the decision in ***Pradeep Sharma's*** case (supra) this Court held that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 Cr.PC., he is not entitled to relief of anticipatory bail. After extracting Section 438, Cr.PC., it was further held therein thus:-

> *"The above provision makes it clear that the power exercisable under Section 438 of the Code is somewhat extraordinary in character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty."*

5. In ***Prem Shankar Prasad's*** case (supra), this Court took note of the fact that the respondent-accused was absconding and concealing himself to avoid service of warrant of arrest and the proceedings under Sections 82/83, Cr.PC have been initiated against him, set aside the order of the High Court granting anticipatory bail ignoring the proceedings under Sections 82/83, Cr.PC. Thus, it is obvious that the position of law, which was being followed with alacrity, is that in cases where an accused against whom non-bailable warrant is pending and the process of proclamation under Sections 82/83, Cr.PC is issued, is not entitled to the relief of anticipatory bail.

6. The learned Senior Counsel appearing for the appellants-accused would contend that the *well-nigh* settled position of law in respect of pre-arrest bail as above, is inapplicable in a case where a person apprehending arrest has already filed an application seeking anticipatory bail and it is pending sans any interim orders and during its pendency if the Trial Court issues proclamation under Section 82, Cr.PC. In short, the proposition of law raised is – when an application seeking anticipatory bail filed by a person apprehending arrest is pending without any interim protection, whether initiation of proceeding for issuance of proclamation under Section 82, Cr. PC would make that application worthy for further consideration on its own merits? According to the learned Senior Counsel appearing for the appellants even in such envisaged circumstances and despite

the pendency of non-bailable warrant, the pending application for anticipatory bail is liable to be considered on its own merits and at any rate, on the aforesaid grounds the pending application of pre-arrest bail could not be dismissed.

7. *Per contra*, the learned counsel appearing for the State vehemently opposed the proposition(s) mooted on behalf of the appellants. It is submitted that the issuance of non-bailable warrant and initiation of the proceedings under Section 82, Cr.PC are justiciable. Certainly, in the absence of an interim protection, there can be no legal trammel for issuing non-bailable warrant or for initiating proceedings under Section 82, Cr. PC. merely because of the pendency of an application for anticipatory bail though more often than not, under such circumstances subordinate Courts would wait for orders of the High Court. It be so, existence of any such circumstance would disentitle a person to press for pre-arrest bail. Even a pending application is not maintainable, it is contended.

8. It is thus obvious from the catena of decisions dealing with bail that even while clarifying that arrest should be the last option and it should be restricted to cases where arrest is imperative in the facts and circumstances of a case, the consistent view is that the grant of anticipatory bail shall be restricted to exceptional circumstances. In other words, the position is that the power to grant anticipatory bail under Section 438, Cr. PC is an exceptional power and should be exercised only in exceptional cases and not as a matter of course. Its object is to ensure that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant. (See the decision of this Court in ***HDFC Bank Ltd. v. J.J.Mannan & Anr.***[4]).

9. When a Court grants anticipatory bail what it actually does is only to make an order that in the event of arrest, the arrestee shall be released on bail, subject to the terms and conditions. Taking note of the fact the said power is to be exercised in exceptional circumstances and that it may cause some hinderance to the normal flow of investigation method when called upon to exercise the power under Section 438, Cr.PC, courts must keep reminded of the position that law aides only

4 [2009] 16 SCR 590 : 2010 (1) SCC 679

the abiding and certainly not its resistant. By saying so, we mean that a person, having subjected to investigation on a serious offence and upon making out a case, is included in a charge sheet or even after filing of a refer report, later, in accordance with law, the Court issues a summons to a person, he is bound to submit himself to the authority of law. It only means that though he will still be at liberty, rather, in his right, to take recourse to the legal remedies available only in accordance with law, but not in its defiance. We will dilate this discussion with reference to the factual matrix of this case. However, we think that before dealing with the same, a small deviation to have a glance at the scope and application of the provisions under Section 82, Cr.PC will not be inappropriate.

10. There can be little doubt with respect to the position that the *sine qua non* for initiation of an action under Section 82, Cr. PC is prior issuance of warrant of arrest by the Court concerned. In that regard it is relevant to refer to Section 82 (1), Cr. PC, which reads thus: -

> ***"82. Proclamation for person absconding**. — (1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation."*

11. The use of expression '*reason to believe*' employed in Section 82 (1) Cr. PC would suggest that the Magistrate concerned must be subjectively satisfied that the person concerned has absconded or has concealed himself. In the context of Section 82, Cr. PC, we will have to understand the importance of the term '*absconded'*. Its etymological and ordinary sense is that one who is hiding himself or concealing himself and avoiding arrest. Since the legality of the proceedings under Section 82, Cr. PC is not under challenge, we need not go into that question. As noticed above, the nub of the contentions is that pending the application for pre-arrest bail, proclamation under Section 82, Cr.P.C., should not have been issued and at any rate, its issuance shall not be a reason for declining to consider such application on merits. Bearing in mind the position of law revealed

from the decisions referred to hereinbefore and the positions of law, we will briefly refer to the factual background of the case.

12. For considering the aforesaid proposition of law, we think it absolutely unnecessary to deal with FIR No. 37 of 2018 dated 28.03.2018 filed against Respondent No.2, Mr. Rajiv Kumar Upadhyay and four others, and also FIR No.66 of 2018 registered against appellant No.4 (first accused) and four other family members of the appellants. Civil Suit No.140 of 2019 filed against the family members of the appellants for illegal encroachment is also not to be considered as nothing would turn out of it in relation to the question posed for consideration. We may hasten to add that if the question whether the appellants are entitled to anticipatory bail survives, even after answering the aforementioned question(s) posed for consideration, we may refer to the relevant aspects in relation to the said cases.

13. As noticed hereinbefore, the appellants herein moved the application for anticipatory bail in connection with FIR No.79 of 2020 registered at Govindgunj Police Station. It is a fact that the subject FIR was registered pursuant to the directions of the learned Chief Judicial Magistrate, East Champaran, Motihari on complaint No.395 of 2020 filed by Respondent No.4 under Section 156 (3), Cr. PC. The allegations in the complaint are as follows: -

On 22.02.2020, at about 8.00 am, when Jagmati Kunwar, the grandmother of respondent No.4 reached in front of the house of appellant No.2, Shashikant Upadhyay, he said that she is the witch who made his child sick and shall not be spared. Then, the appellants and eight other family members gathered around her and the 4th appellant caught hold of her hair and asked the others to bring dung. Thereupon, accused Paritosh Kumar brought dung and accused Rishu put dung into the mouth of Jagmati Kunwar. Consequently, she vomited and fell down. When respondent No.2/ complainant and other witnesses went for her help, the second appellant Shashikant Upadhayay assaulted and abused respondent No.2. Co-accused Paritosh Kumar and Jishu Kumar tore the blouse of Kiran Devi and she was disrobed. Another co-accused Soni Devi snatched a gold chain from the complainant. The co-accused Ravikant and appellant No.5 tore the clothes of Jagmati Kunwar and made her half-naked.

14. Later, after completing the investigation, charge sheet was filed on 08.08.2022 only for offences under Sections 341, 323 and 504 IPC, that too only against accused Lakhpati Kunwar (accused No.7). However, the learned Trial Court, on perusal of the FIR, charge sheet and case diary found that sufficient materials are available in the case diary to proceed against the other 12 accused, including the appellants herein and accordingly vide order dated 20.02.2021 took cognizance of the offences under Sections 341, 323, 354B, IPC and Section 3/4 of the Daain Act and issued summons to all accused including the appellants and fixed 12.04.2022 as the date for their appearance. The accused were absent on that day and hence on 12.04.2022, the Trial Court issued bailable warrants. On 25.05.2022, the accused, other than the appellants herein, appeared and applied for regular bail before the Trial Court and the Trial Court granted them regular bail. Subsequently, the complainant/the second respondent herein, applied for cancellation of bail granted to them and as per the order dated 09.06.2022 the grantees of bail were issued with show cause notices. Upon receiving the notice for cancellation of bail, they unsuccessfully approached the Sessions Court challenging the order taking cognizance, in Criminal Revision Petition No.94 of 2022. Pursuant to the dismissal of the Revision Petition, the Trial Court posted the application for cancellation of bail on different dates. The fact is that despite such developments, the appellants herein neither appeared before the Trial Court nor sought for regular bail. In the meanwhile, the appellants herein moved a bail-cum-surrender application (described as such by them), before the Trial Court. However, it was withdrawn on 23.08.2022 on the fear of arrest. Thereupon, the Trial Court fixed the date for appearance of the appellants on 30.08.2022. Before the date fixed for their appearance, the appellants filed application for anticipatory bail before the Sessions Court and, thereafter on 06.09.2022, informed the Trial Court about its listing before the Sessions Court on 27.09.2022 for final hearing. The Trial Court thereupon posted the matter for appearance of the appellants to 11.10.2022. The anticipatory bail moved by the appellants was dismissed on 27.09.2022 and thereupon, the Trial Court took up the matter on 03.11.2022. Since the appellants remained absent, the Trial Court issued non-bailable warrants and listed the matter to 04.11.2022 for their production. Meanwhile, the appellants herein approached the High Court by filing CRLM No.67668 of 2022 seeking anticipatory bail. It is to be noted that non-bailable warrants were pending against

them when they moved the said application for anticipatory bail. On 04.12.2022, on behalf of the appellants, the Trial Court was informed about the filing of anticipatory bail application before the High Court. Consequently, the matter was listed on 04.01.2023. On 04.01.2023, pursuant to the non-appearance of the appellants despite the earlier order for their appearance and the issuance of non-bailable warrants, the Trial Court issued proclamation under Section 82(1), Cr. PC. Later, proceedings under Section 83, Cr.PC were also initiated. On 15.03.2023, on behalf of the appellants it was prayed to postpone the process under Section 82/83, Cr. PC. However, the Trial Court proceeded to issue the process under Section 83, Cr. PC, based on the proclamation under Section 82(1) Cr.PC. On 04.04.2023, the application for anticipatory bail filed by the appellants was dismissed, obviously taking note of the proceedings under Sections 82/83, Cr. PC and observing that owing to such developments the application for pre-arrest bail could not be maintained.

15. The core contention of the appellants is that the rejection of the application for anticipatory bail without considering the application on merits for the reason of issuance of proclamation under Section 82, Cr. PC, is unsustainable. It is the further contended that at no stage, the appellants were "*evading the arrest*" or "*absconding*" but were only exercising their legal right to seek anticipatory bail. It is in the aforesaid circumstances that the learned Senior Counsel appearing for the appellants raised the contention that when an application for anticipatory bail is pending, the issuance of proclamation, following issuance of non-bailable warrant could not be a reason for non-considering the application for anticipatory bail on merits.

16. For a proper consideration of the aforesaid contentions and allied questions, it is only appropriate to refer to certain provisions of law as also certain relevant decisions. From the chronology of events narrated hereinbefore, it is evident that for reasons best known to the appellants, subsequent to the filing of the final report in terms of the provisions under Section 173 (2), Cr.P.C in FIR No.79/2020 and issuance of summons, issuance of bailable warrants and issuance of non-bailable warrants; pursuant to the failure of the appellants to appear before the Court on the date fixed for their appearance based on bailable warrants, they did not care to take any action in accordance with law except moving applications for bail. Same was the position even after the issuance of the proclamation under

Section 82, Cr.PC. As noted earlier, in the case of similarly situated co-accused of the appellants, they appeared and obtained regular bail pursuant to the issuance of bailable warrants. Thus, a scanning of the acts and omissions of the appellants, it can only be seen that virtually, the appellants were defying the authority of law and moving applications for bail when they apprehended arrest owing to their non-attendance and dis-obedience. It is in the context of the aforesaid facts revealed from the materials on record that the contention of the appellants that they were only pursuing their right to file application for anticipatory bail and, therefore, they were not either evading the arrest or absconding, has to be appreciated.

17. Section 70 (2), Cr. PC mandates that every warrant issued under Section 70 (1), Cr. PC shall remain in force until it is cancelled by the Court which issued it, or until it is executed. In this case, as noticed hereinbefore, the bailable warrants and thereafter the non-bailable warrants, were issued against the appellants. They were neither cancelled by the Trial Court nor they were executed. It is not their case that they have successfully challenged them. Sections 19, 20, 21, 174 and 174 A, IPC assume relevance in this context. They, insofar as relevant read thus:

> ***19. "Judge"****. —The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person*
>
> *who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body or persons, which body of persons is empowered by law to give such a judgment.*
>
> ***20. "Court of Justice"****.—The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.*
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> ***21. "Public servant"****.—The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:—*
>
> *…*

[Third.—Every Judge including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory functions;]

***174. Non-attendance in obedience to an order from public servant**.—Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order, or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same,*

intentionally omits to attend at that place or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart,

shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both,

or, if the summons, notice, order or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

***174A .Non-appearance in response to a proclamation under section 82 of Act 2 of 1974**.— Whoever fails to appear at the specified place and the specified time as required by a proclamation published under sub-section (1) of section 82 of the Code of Criminal Procedure, 1973 shall be punished with imprisonment for a term which may extend to three years or with fine or with both, and where a declaration has been made under sub-section (4) of that section pronouncing him as a proclaimed offender, he shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.*

18. Taking note of the aforesaid facts with respect to the issuance of summons, warrants and subsequently the proclamation, a conjoint reading of Sections 19, 20 and 21, IPC containing the terms "*Judge*", "*Court of Justice*" and "*Public Servant*" and Sections 174 and 174A, IPC can make them liable even to face further proceedings. Same is

the position in case of non-attendance in obedience to proclamation under Section 82, Cr. PC.

19. Bearing in mind the aforesaid provisions and position, we will refer to certain relevant decisions. In ***Savitaben Govindbhai Patel & Ors. v. State of Gujarat***[5], the High Court of Gujarat observed thus: -

> *"9. Filing of an Anticipatory Bail Application by the petitioners-accused through their advocate cannot be said to be an appearance of the petitioners-accused in a competent Court, so far as proceeding initiated under Section 82/83 of the Code is concerned; otherwise each absconding accused would try to create shelter by filing an Anticipatory Bail Application to avoid obligation to appear before the court and raises the proceeding under Section 83 of the Code claiming that he cannot be termed as an absconder in the eye of law. Physical appearance before the Court is most important, if relevant scheme of Sections 82 and 83, is read closely."*
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> *(underline supplied)*

20. We are in full agreement with the view taken by the Gujarat High Court that filing of an anticipatory bail through an advocate would not and could not be treated as appearance before a court by a person against whom such proceedings, as mentioned above are instituted. The meaning of the term "absconded" has been dealt by us hereinbefore. We found that its etymological and original sense is that the accused is hiding himself. What is required as proof for absconding is the evidence to the effect that the person concerned was knowing that he was wanted and also about pendency of warrant of arrest. A detailed discussion is not warranted in this case to understand that the appellants were actually absconding. It is not in dispute that they were served with the "summons". The fact that bailable warrants were issued against them on 12.04.2022 is also not disputed, as the appellants themselves have produced the order whereunder bailable warrants were issued against them. We have already referred to Section 70 (2), Cr. PC which would reveal the position that once a warrant is issued it would remain in force until it

5 2004 SCC OnLine Guj 345

is cancelled by the Court which issued it or until its execution. There is no case for the appellants that either of such events had occurred in this case to make the warrants unenforceable. They also got no case that their application was interfered with by a higher Court. That apart, it is a fact that the appellants themselves on 23.08.2022, moved a bail-cum-surrender application before the Trial Court but withdrew the same fearing arrest. It is also relevant to note that in the case on hand even while contending that they were before a Court, the appellants got no case that in terms of the provisions under Section 438 (1-B), Cr. PC an order for their presence before the Court was ordered either suo motu by the Court or on an application by the public prosecutor. When that be the circumstance, the appellants cannot be allowed to contend that they were not hiding or concealing themselves from arrest or that they were not knowing that they were wanted in a Court of law.

21. To understand and consider another contention of the appellants it is worthy to extract ground No.3 raised by the appellants in SLP which reads thus:

> *"III. Because the Hon'ble High Court has failed to appreciate that proclamation under section 82 Cr.P.C. was issued on 04.01.2023 by the Ld. Trial Court and thereafter process under section 83 Cr.P.C. have been initiated on 15.03.2023 whereas the application for anticipatory bail by the petitioner before the Hon'ble High Court was filed in November, 2022, however, the same was came for hearing on 04.04.2023. It is, therefore, evident that when the petitioners preferred filing of anticipatory bail before the Hon'ble High Court then none of the petitioner was declared absconder and process under section 82/83 Cr.P.C. were not initiated against them."*

22. The above extracted ground taken by the appellant constrains us to consider the question whether there could be any bar on the Trial Court for proceeding under Section 82 Cr.PC, merely because an anticipatory application for bail has been filed or because such an application was adjourned without passing any interim order. We may hasten to add here that it is always preferable to pass orders, either way, at the earliest. In the case on hand, application for anticipatory bail was filed by the appellants before the High Court in November, 2022 and brought up for hearing on 04.04.2023, on which day it was

dismissed as per the impugned order. The very ground, extracted above, would reveal that in the meanwhile, proclamation under Section 82 Cr.PC, was issued on 04.01.2023 and thereafter process under Section 83 Cr.PC was initiated on 15.03.2023.

23. There can be no room for raising a contention that when an application is filed for anticipatory bail, it cannot be adjourned without passing an order of interim protection. A bare perusal of Section 438 (1), Cr.PC, would reveal that taking into consideration the factors enumerated thereunder the Court may either reject the application forthwith or issue an interim order for the grant of anticipatory bail. The proviso thereunder would reveal that if the High Court or, the Court of Sessions, as the case may be, did not pass an interim order under this Section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest the person concerned without warrant, on the basis of the accusation apprehended in such application. In view of the proviso under Section 438(1), Cr.PC, it cannot be contended that if, at the stage of taking up the matter for consideration, the Court is not rejecting the application, it is bound to pass an interim order for the grant of anticipatory bail. In short, nothing prevents the court from adjourning such an application without passing an interim order. This question was considered in detail by a Single Bench of the High Court of Bombay, in the decision in ***Shrenik Jayantilal Jain and Anr. v. State of Maharashtra Through EOW Unit II, Mumbai***[6] and answered as above and we are in agreement with the view that in such cases, there will be no statutory inhibition for arrest. Hence, the appellants cannot be heard to contend that the application for anticipatory bail filed in November, 2022 could not have been adjourned without passing interim order. At any rate, the said application was rejected on 04.04.2023. Pending the application for anticipatory bail, in the absence of an interim protection, if a police officer can arrest the accused concerned how can it be contented that the court which issued summons on account of non-obedience to comply with its order for appearance and then issuing warrant of arrest cannot proceed further in terms of the provisions under Section 82, Cr.PC, merely because of the pendency of an application for anticipatory bail. If the said position is accepted the same would be adopted as

6 [2014 SCC Online Bom 549]

a ruse to escape from the impact and consequences of issuance of warrant for arrest and also from the issuance of proclamation under Section 82, Cr.PC, by filing successive applications for anticipatory bail. In such circumstances, and in the absence of any statutory prohibition and further, taking note of the position of law which enables a police officer to arrest the applicant for anticipatory bail if pending an application for anticipatory bail the matter is adjourned but no interim order was passed. We have no hesitation to answer the question posed for consideration in the negative. In other words, it is made clear that in the absence of any interim order, pendency of an application for anticipatory bail shall not bar the Trial Court in issuing/proceeding with steps for proclamation and in taking steps under Section 83, Cr.PC, in accordance with law.

24. We have already held that the power to grant anticipatory bail is an extraordinary power. Though in many cases it was held that bail is said to be a rule, it cannot, by any stretch of imagination, be said that anticipatory bail is the rule. It cannot be the rule and the question of its grant should be left to the cautious and judicious discretion by the Court depending on the facts and circumstances of each case. While called upon to exercise the said power, the Court concerned has to be very cautious as the grant of interim protection or protection to the accused in serious cases may lead to miscarriage of justice and may hamper the investigation to a great extent as it may sometimes lead to tampering or distraction of the evidence. We shall not be understood to have held that the Court shall not pass an interim protection pending consideration of such application as the Section is destined to safeguard the freedom of an individual against unwarranted arrest and we say that such orders shall be passed in eminently fit cases. At any rate, when warrant of arrest or proclamation is issued, the applicant is not entitled to invoke the extraordinary power. Certainly, this will not deprive the power of the Court to grant pre-arrest bail in extreme, exceptional cases in the interest of justice. But then, person(s) continuously, defying orders and keep absconding is not entitled to such grant.

25. The factual narration made hereinbefore would reveal the consistent disobedience of the appellants to comply with the orders of the trial Court. They failed to appear before the Trial Court after the receipt of the summons, and then after the issuance of bailable warrants even when their co-accused, after the issuance of bailable warrants, applied

and obtained regular bail. Though the appellants filed an application, which they themselves described as "bail-cum-surrender application" on 23.08.2022, they got it withdrawn on the fear of being arrested. Even after the issuance of non-bailable warrants on 03.11.2022 they did not care to appear before the Trial Court and did not apply for regular bail after its recalling. It is a fact that even after coming to know about the proclamation under Section 82 Cr.PC., they did not take any steps to challenge the same or to enter appearance before the Trial Court to avert the consequences. Such conduct of the appellants in the light of the aforesaid circumstances, leaves us with no hesitation to hold that they are not entitled to seek the benefit of pre-arrest bail.

26. The upshot of the discussion is that there is no ground for interfering with the order of the High Court rejecting the application for anticipatory bail rather not considering application on merits. Since their action is nothing short of defying the lawful orders of the Court and attempting to delay the proceedings, this appeal must fail. Consequently, it is dismissed.

Headnotes prepared by: Ankit Gyan

Result of the case: Appeal dismissed.