**IN THE HIGH COURT OF JUDICATURE AT PATNA**
**CRIMINAL MISCELLANEOUS No.12922 of 2022**

Arising Out of PS. Case No.-61 Year-2020 Thana- MAHILA P.S. District- Muzaffarpur

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ARJUN KUMAR Son of Suresh Sah, Resident of Village - Saraiya, P.S. - Saraiya, District - Muzaffarpur.

... ... Petitioner/s

Versus

THE STATE OF BIHAR

... ... Opposite Party/s

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**Appearance :**

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| For the Petitioner/s | : | Mr. Indu Bhushan, Advocate<br>Ms. Prinyanka Kumari, Advocate |
| For the State | : | Mr. Sanjay Kumar Tiwary, Advocate |
| For the Informant | : | Mr. Pranav Kumar, Advocate<br>Mr. Rajeev Ranjan, Advocate<br>Mrs. Anjana Gupta, Advocate |

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**CORAM: HONOURABLE MR. JUSTICE NAWNEET KUMAR PANDEY**

CAV ORDER

3 01-12-2022 The learned counsel for the petitioner is directed to remove all the defects pointed out by the office within one month.

I have already heard the learned counsel for the petitioner as well as the learned counsel for the informant and also the learned counsel for the State.

The petitioner apprehends his arrest in connection with Muzaffarpur Mahila P.S. Case No. 61 of 2020, registered for offence punishable under sections 341, 493, 376, 323, 506/34 of the Indian Penal Code.

The prosecutrix has made allegation that the present petitioner exploited her sexually for ten years after giving

promise to marry with her. She became pregnant and gave birth to a male child. At the time of lodging of the FIR, the male child was aged about five years. The prosecutrix came to know that the petitioner has solemnized his marriage stealthily with another girl. When she inquired, the petitioner assaulted and throttled her and also threatened her to face dire consequence, had she complained the occurrence to anyone. The petitioner remained absconding during investigation and charge-sheet was submitted showing him absconder.

The learned counsel for the informant has submitted that the petitioner remained absconding during entire period of investigation. The process under sections 82 and 83 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') has been issued against the petitioner, as such, the petitioner is not entitled for the privilege of anticipatory bail. In support of his submissions, the learned counsel for the informant has relied upon a decision of Hon'ble Supreme Court, reported in *AIR 2021 SC 5125, Prem Shankar Prasad vs. the State of Bihar and another*. The Hon'ble Supreme Court, in paragraph No. 7.3 of the above-noted decision, has observed as follows:

> *"7.3 ...Recently, in Lavesh v. State (NCT of Delhi) [(2012) 8 SCC 730], this Court, (of which both of us were parties) considered the scope of*

*granting relief under Section 438 vis-à-vis to a person who was declared as an absconder or proclaimed offender in terms of Section 82 of the Code. In para 12, this Court held as under: (SCC p. 733)*

> *"12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was 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 of Section 82 of the Code he is not entitled to the relief of anticipatory bail."*

*It is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail. Thus the High Court has committed an error in granting anticipatory bail to respondent No.2-accused ignoring the proceedings under Section 82-83 of Cr.P.C."*

The learned counsel for the petitioner has submitted

that the Hon'ble coordinate Bench of this Court, after considering the above-noted decision of the Hon'ble Supreme Court, has been pleased to quote that merely because the process under section 82 or 83 of 'the Code' has been issued, it cannot be said that the anticipatory bail petition is not entertainable.

The coordinate Bench, vide order dated 15.12.2021 in Cr. Misc. No. 1118 of 2021, Krishna Mohan Lal vs. State of Bihar, has held as follows:

> *"Having discussed the case laws which have been placed before this Court, this Court is of the considered opinion that this case stands on a completely different footing and that unprecedented situation of COVID -19 cannot be forgotten. The entire country was under lock down and in such circumstances if the application of the petitioners remained pending with this Court and during the pendency they have been declared absconder by the learned court below, in the considered opinion of this Court, the petitioners cannot be ousted on this ground alone."*

It appears that the coordinate Bench has considered the unprecedented situation of Covid-19 and in these circumstances, that order was passed.

The learned counsel for the petitioner has relied upon

a decision rendered in Criminal Miscellaneous No.75288 of 2018, vide order dated 16.01.2019, by a coordinate Bench of this Court. The Hon'ble Coordinate Bench was pleased to hold that the learned Magistrate did not mention any reasons/ground for his satisfaction to issue a proclamation order under Section 82 of 'the Code' and on this score, the coordinate Bench was of the view that the order under Section 82 of 'the Code' was suffering from illegality. The relevant portion of that order is being quoted hereinbelow:-

> "Coming to the order dated 26.11.2018, whereby proclamation order under Section 82 of the Cr.P.C. has been sought by the I.O. and has at the same time been issued by the Court below, this Court again takes note of the fact that the proclamation order under Section 82 of the Cr.P.C. has also been issued on the mere asking. Section 82 of the Cr.P.C. provides that if any Court has reason to believe that any person against whom a warrant has been issued by it has absconded or is concealing himself so that the warrant cannot be executed, such Court may publish a written proclamation requiring the accused to appear at a specific place and specific time, not less than thirty

days from the date of proclamation. Hence, again in considered opinion of this Court, neither any ground/reason has been the basis of seeking of proclamation under Section 82, nor has there been any ground or basis for issuance of such proclamation by the Court. Thus, the order dated 26.11.2018 is also sans any reason or satisfaction of the Court. Reason is the soul and spirit of every order, in the absence of which every such order passed in exercise of statutory power vested in the authority/court, renders such order inexistent and illegal."

In my view, before passing an order under Section 82 of 'the Code', two ingredients must be fulfilled. First ingredient is that the Court has reason to believe that the person has absconded or is concealing himself and second ingredient is that a warrant must have been issued against that person. Section 82 of 'the Code' is being quoted herinbelow:-

"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.

(2) The proclamation shall be published as follows:-

(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court- house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2),

shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

(4) Where a proclamation published under Sub-Section (1) is in respect of a person accused of an offence punishable under section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1)."

From bare perusal of this section, it transpires that the reason of satisfaction of the Magistrate is not required to be recorded in writing. What is required is that the Magistrate has reason to believe that the accused person was absconding or concealing himself and a warrant has already been issued

against him. In 'the Code' wherever a Magistrate/Court is required to record the reason of his satisfaction in writing, it has specifically been mentioned in the legislation itself. For example, the relevant portion of Section 87 of 'the Code' is being quoted hereinbelow:-

> "87. **Issue of warrant in lieu of, or in addition to, summons**.- A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, **after recording its reasons in writing**, a warrant for his arrest-"

Similarly, in Section 116 (3) of 'the Code', the same phrase has been used. Section 116 (3) of 'the Code' is being quoted hereinbelow:-

> "After the commencement, and before the completion, of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, **may, for reasons to be recorded in writing,** direct the person in respect of whom the order under section 111 has been made to execute a bond, with or without

sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded...”

Similarly, in so many places in ‘the Code’ where the legislators intended that the reason of an order must be recorded in writing, it has specifically been mentioned in the relevant sections of ‘the Code’. While issuing process under Section 82 of ‘the Code’, the Magistrate has reason to believe that the accused was absconding or concealing himself, but the reason is not required to be reduced in writing. When a Magistrate delivers an order under Section 82 of ‘the Code’, it means he is satisfied that the accused is absconding or concealing himself.

The learned counsel for the petitioner has submitted that recently the Hon’ble Coordinate Bench of this Court in Criminal Miscellaneous No. 38750 of 2021, *Santosh Yadav @ Santosh Kumar Yadav Versus The State of Bihar*, vide order dated 04.07.2022, has been pleased to hold that merely because the issuance of the process under section 82 or 83 of ‘the Code’, the valuable statutory right given to a citizen by way of section 438 of ‘the Code’, cannot be taken away and the valuable right

like personal liberty which has been enshrined in Article 21 of the Constitution of India, cannot be taken away.

The coordinate Bench has considered the decisions of the Hon'ble Supreme Court in *Gurbaksh Singh Sibbia etc. Vs. The State of Punjab*, reported in *AIR 1980 SC 1632* and *Sushila Aggarwal and Others vs State (NCT of Delhi) And Another*, reported in *(2020) 5 SCC 1* and *Bharat Petroleum Corporation Limited and Another vs N.R. Vairamani & Others*, reported in *(2004) 8 SCC 579*.

In these decisions, the entitlement of an accused to be released on anticipatory bail when the process under section 82 or 83 of 'the Code' has been issued, was not the fact in issue. In *Gurbaksh Singh Sibbia* case (*supra*), it was held that anticipatory bail application is maintainable even after filing of the charge sheet or till the person is not arrested whereas in *Sushila Aggrawal* case (*supra*) the matter in issue was as to what should be the life span of an anticipatory bail, whether an accused who has been enlarged on anticipatory bail can get this benefit only till submission of the charge sheet or till the conclusion of the trial. The matter was referred to the Hon'ble Constitutional Bench, as there were two divergent opinion in *Salauddin Abdulsamad Shaikh vs The State of Maharashtra,*

*reported in (1996) 1 SCC 667* and *Adri Dharan Das vs State of West Bengal reported in (2005) 4 SCC 303.* The Hon'ble Constitutional Bench of Supreme Court in *Sushila Aggarwal* case (*supra*) has been pleased to hold that the right of anticipatory bail of an accused does not extinguish on submission of charge sheet and the privilege or protection granted under section 438 of 'the Code' shall extend till conclusion of the trial.

Now it has to be seen whether a person who is declared absconder is entitled for anticipatory bail or not? If a person is declared absconder under section 82 of 'the Code', it means that the court which declared him as absconder has reason to believe that he has absconded or is concealing himself. There are two ingredients or pre-requisites of declaring an accused as an absconder. First ingredient is that a warrant should have been issued against that person and second, the Court must be of the opinion that the accused has absconded or is concealing himself.

The order under section 82 of 'the Code' is a judicial order pronounced by a court of competent jurisdiction. When the order is passed under section 82 of 'the Code' by a court of competent jurisdiction, it means that the court was of the

opinion that the accused was concealing himself or absconding. Until or unless this order is set aside by the superior court, there is presumption that the person against whom the process under section 82 of 'the Code' has been issued, is concealing himself or absconding. Though the order is transitory in nature and subservient to provisions under sections 83, 84, 85 and 86 of 'the Code' even then its judicial sanctity is indefeasible unless it is judicially reviewed by the superior authorities in hierarchy.

Section 438 of 'the Code' provides a statutory right to a person who has reason to believe that he may be arrested on accusation of having committed a non-bailable offence to file petition for his pre- arrest bail, before the High Court or the Court of Session. A person, who is fleeing away from justice and has been declared as absconder by a judicial order promulgated by a competent court, how can he say that there is apprehension of his arrest, without making himself available to the process of justice. In my view, he is certainly not entitled for anticipatory bail. He is under obligation to make himself available to the authority where his appearance is required and bypassing that authority if he comes before the superior court with a prayer of anticipatory bail, he is not entitled for that. In my view, he should submit himself to the court/authority where

his presence is required. The petitioner instead of making himself available before the learned court below or before the investigating authorities, wants a protective blanket of anticipatory bail over his head, which cannot and should not be given.

Now it is pertinent to mention here some repercussions which arise due to absconding of an accused which affects the administration of criminal justice system. Normally it is seen that if more than one persons are accused in a case and during investigation one or more than one accused persons are absconding, the investigating officer generally submits report under Section 173 of 'the Code' against the appearing accused persons, splitting the case of absconding accused persons. The appearing accused persons are put on trial and the trial comes to the logical conclusion. Thereafter when the absconding accused is apprehended again police report is submitted and again he faces trial. As such, the consequence of absconding of the accused results into multiplicity of cases, which burdens the docket of the court which is already under pressure of docket explosion. The situation becomes more severe, predicamentary and paradoxical when the dichotomy arises before a court when in the first trial the witnesses support

the prosecution case and in subsequent trial arisen out of the same case the same witnesses would turn hostile. Similar situation arose before the Hon'ble Jharkhand High Court in case of *Gagan Thakur vs. State of Jharkhand and others*, reported in *2004 (2) Cr.L.J. page 1910*, the relevant portion of paragraph 7 of that case is being extracted hereinbelow:-

> "The splitting up of cases leave scope for many splittings, depending upon the number and will of absconders. This is, thus, a misuse of process of Court manipulated by absconders and can tend to failure of justice or its miscarriage. To illustrate, I found that in Cr Appeal No. 1431/03, the main case was split up. The informant appeared at trial and said that he identified two dacoits and took their names (one of the two was absconder and the one was facing trial) and when the case of absconding accused was committed and he was put on trial, the same witness said he had identified none. Such are likely to be the ill-effect of splitting up."

In Special Leave Petition (Criminal) No. 7358 of 2021, *Sanatan Pandey Versus State of Uttar Pradesh and another,* in a recent decision where an accused against whom the

process under section 82 of 'the Code' was issued, approached for anticipatory bail, the Hon'ble Supreme Court observed as follows:-

> "The Court shall not come to the rescue or help the accused who is not cooperating the investigating agency and absconding and against whom not only non-bailable warrant has been issued but also the proclamation under Section 82 Cr. P.C. has been issued."

It has been argued on behalf of the petitioner that anticipatory bail petition was filed before issuance of process under section 82 of 'the Code'. In this respect, my humble view is that the above-mentioned decisions of Hon'ble Supreme Court in the case of *Lavesh v. State (NCT of Delhi)* (*supra*) and in the case of *Prem Shankar Prasad vs. the State of Bihar and another* (*supra*) does not make any distinction whether anticipatory bail petition is filed before or after passing of order under section 82 of 'the Code'. Merely because the petitioner has preferred anticipatory bail petition prior to order passed under section 82 of 'the Code', it does not *ipso facto* make him entitled to the privileges for anticipatory bail.

On the above-mentioned observations, the petitioner is

not entitled for privileges of anticipatory bail. Accordingly, it is rejected.

Office shall ensure that all defects are removed by the petitioner within the stipulated time mentioned hereinabove, failing which, the matter shall be brought to the notice of this Court.

**(Nawneet Kumar Pandey, J)**

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