

Court No. - 77

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 12969 of 2023

Applicant :- Ankit Baliyan

Opposite Party :- State Of U.P. And 2 Others

Counsel for Applicant :- Awadhesh Kumar Pandey, Kunal Shah

Counsel for Opposite Party :- G.A.

Hon'ble Sanjay Kumar Singh, J.

(1) Heard learned counsel for the parties.

(2) On 26.02.2024, matter was heard at length and while granting interim anticipatory bail to the applicant, following order was passed by this Court :

"1-Heard learned counsel for the applicant, Shri Deepak Mishra, learned Additional Government Advocate representing the State / opposite party nos. 1 & 2 and perused the record.

2-This Criminal Misc. Anticipatory Bail Application under section 438 Cr.P.C. has been moved by the applicant after rejecting his anticipatory bail application by the order dated 06.11.2023 passed by learned Additional Sessions Judge/ Special Judge, Special Court No.2 (Prevention of Corruption Act), Meerut seeking Anticipatory Bail in Case Crime No. 467 of 2023, under Section 13(1)(a) Prevention of Corruption Act, Police Station Bitra-2 Noida, District Gautam Buddh Nagar.

3-As per prosecution case in brief, the informant- Chandra Prakash Sharma, Senior Sub-Inspector, Police Station Bitra-2 Noida, District Gautam Buddh Nagar lodged First Information Report on 08.09.2023 at 02:31 PM against the applicant-Ankit Baliyan (Constable 2031/PNO-152330811) under Section 13(1)(a) of the Prevention of Corruption Act, alleging inter alia that a whatsapp voice call recording between Wasim Khabadi and applicant-Ankit Baliyan, which is going viral since 07.09.2023 was sent by Media Cell, Gautam Buddh Nagar, on social media on 08.09.2023, in which applicant who was posted as Constable in Police Station Rabupura, District Gautam Buddh Nagar is threatening Wasim Khabadi to implicate him in a false case and demanding Rs. 1,00,000/- from Wasim Khabadi (scrap dealer). Regarding the said audio call recording, another application dated 05.09.2023 of Wasim Khabadi addressed to the Hon'ble Chief Minister is also going viral, in which Waseem Khabadi has requested to take action against the applicant-Ankit Baliyan regarding demand of illegal gratification of Rs. 25,000/- per month and bribe of Rs. one lakh through whatsapp call

from his mobile no. 8130358626. Due to which image of police department is being tarnished. In relation to which higher authorities were informed and higher authorities directed to take legal action against the applicant-Ankit Baliyan.

4-Learned counsel for the applicant argued that:

(i) Chandra Prakash Sharma, Senior Sub Inspector lodged the first information report mentioning inter alia that information about the whatsapp voice call recording in question was given to higher officers, who had directed to take legal action against the applicant. Thereafter, the first information report has been lodged whereas it is not mentioned that who gave information about the whatsapp voice call recording in question to the higher authorities and by which mode.

(ii) Even name of higher officers to whom information was given about alleged whatsapp voice call recording has not been disclosed.

(iii) Much emphasis has been given by contending that in the first information report, it is also not mentioned that on whose direction/order, the first information report has been lodged by Chandra Prakash Sharma, Senior Sub-Inspector against the applicant.

(iv) As per the version of first information report, whatsapp voice call recording went viral since 07.09.2023 and on the same day, i.e., 07.09.2023, Assistant Commissioner Police-IV, Greater Noida and Deputy Commissioner of Police, Greater Noida submitted their report against the applicant and thereafter Mr. Ram Badan Singh, Commissioner of Police, Gautam Buddha Nagar dismissed the applicant from service without any show cause notice or inquiry, etc. which is major punishment and the same is violative of principle of natural justice and Article 311 of Constitution of India. Copy of dismissal order dated 07.09.2023 of the applicant produced by the counsel for the applicant during the course of argument, is kept on record.

(v) As per the version of the first information report, whatsapp voice call recording between the applicant Ankit Baliyan and alleged victim Waseem Kabadi went viral since 07.09.2023 whereas whatsapp call cannot be recorded.

(vi) Till date, the source of alleged whatsapp voice call in question has not been traced out.

(vii) There is no certificate under Section 65B of the Evidence Act regarding genuineness of alleged whatsapp voice call recording, hence the same cannot be read in evidence and in absence of required certificate under Section 65B of the Evidence Act, no prosecution of the applicant can be done on the basis of said fake and fabricated whatsapp voice call recording.

VERDICTUM.IN

(viii) *The alleged whatsapp voice call recording is fake and fabricated material.*

(ix) *Since the applicant has been falsely implicated on the basis of fake and fabricated alleged whatsapp voice call recording, therefore, Investigating Officer deliberately did not take any pain to investigate about the source of alleged whatsapp voice call recording.*

(x) *At the time of hearing of the anticipatory bail application of the applicant before the Court of Additional Sessions Judge/Special Judge, Special Court No. 2 (Prevention of Corruption Act), Meerut, the alleged victim Waseem Kabadi moved an application dated 26.10.2023 along with his affidavit dated 26.10.2023 mentioning therein that no such incident took place with him. The entire story of the applicant is fabricated and the applicant has made accused on account of personal rivalry with the police. In the affidavit, it is also mentioned by the victim Waseem Kabadi that he does not know Ankit Baliyan and he never demanded any money from him.*

(xi) *There is no statement of Waseem Kabadi.*

(xii) *Till date, neither voice sample of the applicant nor of the alleged victim Waseem Kabadi has been taken by the Investigating Officer for the purpose of its examination by Forensic Science Laboratory.*

(xiii) *The applicant has no criminal history to his credit.*

(xiv) *The applicant has been falsely implicated and police is not conducting fair investigation.*

(xv) *The applicant has apprehension of his arrest and his false implication in other cases.*

5-On putting query with regard to aforesaid submissions on behalf of the applicant, Mr. Deepak Mishra, learned A.G.A. representing the State prays for time to seek complete instructions in the matter from the Investigating Officer and other concerned officers.

6-Having heard the submission of learned counsel for the parties and going through the record, this Court is of the view that if the facts as pointed out by learned counsel for the applicant as noted above is true, then it is a matter of serious concern because whatsapp calls are not recorded. But this Court feels that before passing any final order in the matter, it would be appropriate to give one opportunity to the State to file counter affidavit.

7-Accordingly, Commissioner of Police, Gautam Buddh Nagar is directed to file personal affidavit/counter affidavit in the matter regarding the above submissions made on behalf of the applicant as noted in paragraph no. 4, after seeking response from the

VERDICTUM.IN

informant and Investigating Officer of this case. Affidavit shall further indicate that in last three years, how many cases for the offence under the Prevention of Corruption Act, have been registered against police personnel in District Gautam Buddh Nagar and in how many cases accused-police persons have been dismissed from service on the same day without any show cause notice or proper enquiry, as done in the present matter. The affidavit shall further indicate that what was the urgency or compelling circumstances for the State to dismiss the applicant on the day the alleged video went viral, i.e. on 07.09.2023 itself without any show cause notice to the applicant or conducting proper and regular enquiry.

8-Put up this case on 12.03.2024 in the list of fresh cases.

9-On the next date, Mr. Ram Krishna Tiwari (Investigating Officer)/Assistant Commissioner of Police, Greater Noida and informant-Chandra Prakash Sharma, Senior Sub Inspector shall appear in person before this Court along-with complete record of this case to assist learned Additional Government Advocate.

10-In view of the above, this Court is of the view that the applicant is entitled for interim anticipatory bail. Accordingly, it is directed that until further orders of this Court, the applicant shall not be arrested in the aforesaid case.

11-Registrar (Compliance) of this Court shall communicate this order within three days to the Commissioner of Police, Gautam Buddh Nagar, Mr. Ram Krishna Tiwari (Investigating Officer)/Assistant Commissioner of Police, Greater Noida and informant-Chandra Prakash Sharma, Senior Sub- Inspector for compliance.

12-A copy of this order shall also be sent to the Director General of Police, U.P. Lucknow for information."

(3) Today, on the matter being taken up, Mr. Ram Krishna Tiwari (Investigating Officer)/Assistant Commissioner of Police, Greater Noida and Mr. Chandra Prakash Sharma, Senior Sub Inspector, Sector 20 Noida, who lodged F.I.R. are personally present before this Court, but in compliance of the direction given in paragraph no. 7 of the above mentioned order of this Court dated 26.02.2024, Commissioner of Police, Gautam Buddh Nagar has not filed any affidavit, which is not expected from an officer of the rank of Commissioner of Police. This apathetic attitude of the officer concerned indicates that either she has no respect to the order of the Courts or she has nothing to counter the submissions made on behalf of the applicant. Such conduct of the Commissioner of Police, Gautam Buddh Nagar is not approved by this Court. It is often seen that senior officials of the state do not

comply the orders of the Court within stipulated time, which is not a healthy practice and it amounts to creating hindrance in the administration of justice.

(4) On putting specific query with regard to contents of Paragraph No. 4(i) to (xv) and 07 of the above mentioned order dated 26.02.2024, Mr. Ram Krishna Tiwari and Mr. Chandra Prakash Sharma could not give satisfactory reply.

(5) Mr. Chandra Pal Sharma, who lodged F.I.R. stated that said whatsapp voice call recording was sent by one Shakir to Pankaj Kumar, Tricity Head, who forwarded the same to Government Media Cell, office of Commissioner of Police, Noida, which was transferred to Mr. Vinod Kumar Mishra, Station House Officer, Police Station Bitra-2, Greater Noida, who, in turn, directed him to lodge F.I.R. against the applicant without verifying the genuineness of the said whatsapp voice call recording and tracing the original source of the same.

(6) On asking about original source of alleged "whatsapp voice call recording" between Wasim Kabadi and applicant-Ankit Baliyan, learned A.G.A., upon instructions received from Mr. Ram Krishna Tiwari (Investigating Officer)/Assistant Commissioner of Police Greater Noida and Mr. Chandra Prakash Sharma, submitted that said whatsapp voice call was recorded by an unknown passer-by. Thereafter one Shakir transferred the said recording from the mobile phone of that unknown passer-by to his mobile phone and after that deleted the original voice call recording from the mobile phone of that passer-by (unknown person). As such it is admitted fact that neither original source of alleged whatsapp voice call recording nor mobile number and mobile phone, by which the said voice call was alleged to have been recorded are available with the investigating officer. They have also admitted that whereabouts of so-called passer-by is not known. The fact of moving application by the alleged victim Waseem Kabadi along with his affidavit dated 26.10.2023 before the Court of Additional Sessions Judge/Special Judge, Special Court No. 2 (Prevention of Corruption Act), Meerut, mentioning inter-alia therein that no such incident took place with him and the applicant has been made accused on account of personal rivalry with the police has also not been denied.

(7) Mr. Ram Krishna Tiwari, the present Investigating Officer, has also apprised the Court that the statements of alleged victim, Shakir who made the whatsapp voice call recording viral, group

admin Mr. Pankaj, who is Media Head, and Vinod Kumar Mishra, S.H.O., Police Station Bitra-2, Greater Noida have been recorded, but all the aforesaid exercise has been done after passing of the order dated 26.02.2024 by this Court, whereas F.I.R. of this case was lodged on 08.09.2023.

(8) The learned counsel for the applicant submitted that when this Court directed for filing of personal affidavit of the Commissioner of Police, Gautam Buddh Nagar in the matter by order dated 26.02.2024, police by mounting pressure upon Waseem Kabadi got his false statement recorded in order to save their skin whereas there was no complaint of Waseem Kabadi against the applicant prior to order dated 26.02.2024 of this Court. Much emphasis has been given by contending that on exposing the act and conduct of the police personnel after the order dated 26.02.2024 passed in this case, they started cooking fabricated story in their defence.

(9) Object of section 438 of the Code of Criminal Procedure, is that a person should not be unnecessarily harassed or humiliated in order to satisfy personal vendetta or grudge of complainant or any other person operating the things directly or from behind the curtains. It is well settled that discretionary power conferred by the legislature on this court cannot be put in a straitjacket formula, but such discretionary power either grant or refusal of anticipatory bail has to be exercised carefully in appropriate cases with circumspection on the basis of the available material after evaluating the facts of the particular case and considering other relevant factors (nature and gravity of accusation, role attributed to accused, conduct of accused, criminal antecedents, possibility of the applicant to flee from Justice, apprehension of tampering of the witnesses or threat to the complainant, impact of grant of anticipatory bail in investigation or society, etc.) with meticulous precision maintaining balance between the conflicting interest, namely, sanctity of individual liberty and interest of society.

(10) Looking to the facts of the case, reasonable apprehension of arrest, taking into consideration the gravity and nature of accusation, there being no criminal antecedents of the applicant and there being no possibility of his fleeing from justice, this Court feels that in the light of judgment of the Hon'ble Supreme Court in the case of **Sushila Agrawal Vs. State (NCT of Delhi), 2020 SCC OnLine SC 98**, the applicant is entitled to be released on anticipatory bail in this case.

VERDICTUM.IN

(11) Accordingly, in view of the above, the interim anticipatory bail granted to the applicant vide above order dated 26.02.2024 of this Court is made absolute.

(12) In the event of arrest of the applicant **Ankit Baliyan**, involved in the aforesaid case, shall be released on anticipatory bail on his furnishing a personal bond of Rs. 25,000/- with two sureties each in the like amount to the satisfaction of the Station House Officer of the police station concerned or the court concerned as the case may be, subject to following conditions:-

i) The applicant shall make himself available for interrogation by a police officer as and when required and in case of submission of police report under Section 173 (2) Cr.P.C. and taking cognizance of the offence and issuing summon by the Court concerned, he shall attend the court proceedings whenever his presence would be required.

ii) The applicant shall not, directly or indirectly make 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 any police officer or tamper with the evidence.

(13) The Criminal Misc. Anticipatory Bail Application of the applicant is allowed.

(14) Under the facts of the case, it is also relevant to note that prima facie, this Court is satisfied that something is fishy in the matter and it appears that the officers concerned do not want to bring on record the correct facts of this case, whereas it is well settled that fair and transparent investigation is the legal right of victim as well as the accused. The investigation should be free from objectionable features and legal infirmities, therefore, high responsibility lies upon the Investigating Officer not to conduct an investigation in tainted and unfair manner, which may legitimately lead to a grievance of accused that unfair investigation was carried out with an ulterior motive. It must be impartial, conscious and uninfluenced by any external influences. It is not only the responsibility of the Investigating Officer but as well as that of Courts to ensure fair investigation.

(15) Since, Despite being given reasonable time of two weeks' the Commissioner of Police, Gautam Buddh Nagar did not provide any assistance to this Court with regard to correct factual position of the case, therefore, this Court feels that matter should be referred

to Director General of Police, U.P., Lucknow for taking corrective measures.

(16) Accordingly, Director General of Police, U.P., Lucknow is directed to look into the matter in the light of contents of para nos. 4(i) to (xv) and 07 of the above mentioned order dated 26.02.2024 of this Court and pass appropriate order in the matter. He shall also ensure fair investigation in this case.

(17) Registrar (Compliance) of this Court is directed to communicate this order to the Director General of Police, U.P., Lucknow and Principal Secretary (Home), Government of U.P., Lucknow within 48 hours for information and necessary orders.

Order Date :- 12.3.2024

Kashifa