

MHCC050062242022



**IN THE COURT OF SPECIAL JUDGE UNDER THE PROTECTION  
OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 AT  
BORIVALI DIVISION, DINDOSHI, MUMBAI  
ANTICIPATORY BAIL APPLICATION NO.1868 OF 2022**

**Amar Dilip Babaria**

**Age : 47 Years, Occ. : Artist.**

**R/o. : A-401, Venus Apartments,**

**4<sup>th</sup> Cross Lane, SBI Bank,**

**Lokhandwala Complex,**

**Andheri (W), Mumbai-400 053.**

**....Applicant/accused**

**V/s.**

**State of Maharashtra**

**(At the instance of Oshiwara Police Station) .....Respondents**

Advocate Rohit Sawant for Applicant/original accused.

Spl. APP Mr. A. A. Deotarse for State.

**CORAM : H.H.THE SPECIAL JUDGE,**

**MS. S. J. ANSARI, (C.R.NO.11)**

**DATE : 28<sup>th</sup> November, 2022**

**ORDER**

The present application has been filed by the applicant for seeking anticipatory bail in Crime No.1523/22 registered by the Police Station Oshiwara for the offences punishable u/s.354 of the Indian Penal Code (hereinafter referred to as "IPC") and u/s.8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act").

2. As per the applicant, the said offences had come to be lodged against him at the instance of his wife who is living away from him since long. Initially, the report having been lodged with the Vasai Police Station, the same had come to be registered under the number "0" after which FIR had been transferred to the Oshiwara police station.

3. As per the applicant, he and his wife have been involved in a series of civil and criminal litigations since before the lodging of the FIR against him which has resulted in filing of the application in question. As per the applicant, his wife had first lodged a proceeding against him bearing No.170/20 under the provisions of the Protection of Women from Domestic Violence Act on 09/12/20 before the learned J.M.F.C. at Vasai. The relevant reliefs had been claimed by her by filing various applications. Subsequently, the applicant had filed a proceeding before the District Court, Vasai for seeking the custody of his daughters. Therein, he had also filed Civil Miscellaneous Application No.10/21 seeking their interim custody. After hearing both the parties, the learned District Judge had granted access to the applicant for meeting his daughters vide the order dated 17/11/21. In spite of this, the applicant's wife, as per his contentions, used all the tricks to prevent the applicant from gaining access to his daughters. She also applied to the learned District Judge for the modification of the order granting interim access. However, the said application came to be rejected. In the intervening period, the applicant has ended up registering one FIR and more than 13 complaints with Vasai Police Station.

4. With the sole intention to prevent the applicant from gaining access to his daughters two years after leaving her matrimonial home, the

applicant's wife registered an FIR bearing No.314/22 against him on 12/10/22 for the offences punishable u/s.498-A, 323, 504, 506 and 500 of the IPC. The police then recorded the informant's statement on 12/10/22. However, as per the applicant, no whisper was made in the said report about the applicant having molested his daughters. Further, during the investigation of the said FIR, the police issued a notice to the applicant u/s.41-A of the Cr.P.C. While the applicant co-operated with the police in the investigation, the first informant therein, who is the wife of the present applicant insisted on his arrest only with the intention to defeat the order of access. The applicant's wife was, however, not able to achieve her goal. She then approached some NGO and the Commissioner of Police and subsequently lodged the present FIR against him regarding having outraged the modesty of his own daughters and of having committed the offences under the POCSO Act.

5. The case of the prosecution in the said matter, as per the applicant, is that in January 2020 when the applicant's wife had asked her younger daughter to change her clothes, she found her to be scared. Though the applicant enquired with her elder daughter about the same, she did not reply to the said inquiry. Hence, as the informant thought that something bad was happening with her daughters, she took them in confidence. It was only then that she came to know that the applicant used to tell his daughters to stay nude and used to shout at them if they refused to do so. At that moment, as per the FIR, the informant informed her daughters about "good touch" and "bad touch". Thereafter, the applicant's daughters told their mother that when she used to be busy, the applicant used to tell them to become nude and dance. It was also stated that the applicant had

asked them to play some bum game and their refusal used to result in the applicant not allowing them to play games on his mobile phone. Hearing this, the informant became vigilant and then found that the applicant was making their daughters sleep nude on the bed. When she inquired with the applicant about the same, he assaulted her and due to the said reason, the informant i.e. the applicant's wife left her home.

6. However, as per the applicant, he is completely innocent in the matter and has not committed any offences of the kind as alleged against him. On the other hand, he has categorically stated that it is his wife who has abused the sacred relationship between a father and a daughter only to defy the order of access by the Court at Vasai. It has also been stated that the entire allegations rely upon the mobile recording done by his wife. It has also been pointed out that the applicant's wife has failed to give the date and time of the alleged photographs as taken by her, because the same will hamper the allegations made by her.

7. In such circumstances, contending that the entire allegations made against him are nothing but an after thought and the same can be seen from the change in the versions of the incidents stated by his wife in the proceeding filed under the Domestic Violence Act, in the reply filed in the custody proceeding and even in the FIR filed against him u/s.498-A of the IPC, etc, the applicant pointed out that there is no substance in the same. In the result, stating that he is ready and willing to co-operate with the investigating agency, that his physical custody is not required as nothing is to be recovered at his instance, the applicant is seeking the relief of anticipatory bail.

8. The investigating officer has filed her reply (Exh.2). Therein, she has first stated the facts as mentioned in the FIR and highlighted the allegations made therein against the applicant. These pertain to the applicant always telling his daughters to be nude, shouting at them if they did not do so, telling them to dance nude and asking them not to listen to their mother when his daughters used to tell them that their mother had told them not to do so. Further, the other allegations as stated by the investigating officer viz-a-viz the applicant are about he always touching his daughters' buttocks and playing some bum game and refusing to let his daughters use his mobile phone if they would not allow him to touch their buttocks. As per the investigating officer, the informant had stated that after coming to know about these facts, she had started keeping an eye on everything. In the course of the same, she saw that the applicant used to make their daughters sleep nude and if any of their daughters would be wearing any nicker, he would insert his hand in the same. When the informant, as per the investigating officer, questioned the applicant about his behaviour, he assaulted her. Hence, as the informant became angry, she decided to leave home after which she did so.

9. As regards the investigation undertaken in the matter, it has been stated that the statements of the two victims have come to be duly recorded and the statements of the other relevant witnesses i.e. the informant, her mother, etc. have also been duly recorded. Thereafter, the application for anticipatory bail has been strongly opposed by the investigating officer by pointing out that the applicant has prima facie been shown to be involved in a very serious crime, that there is every possibility of he threatening the victims and the family members as also absconding if released. She has therefore, sought the rejection of the application.

10. The informant in the matter, who is the wife of the present applicant, has also intervened in the matter. In her written submissions, she has pointed out that the applicant had subjected her to physical and mental torture on one or the other ground since their marriage. When things became intolerable, she was constrained to lodge a complaint with the Vasai Police Station which resulted in the registration of the FIR No.314/22 against him for the offences punishable u/s.498-A, 323, 504, 506 and 500 of the IPC. However, the police, as per the applicant, did not take any action against her husband. Thereafter, stating that the applicant had not complied with the directions given to him under the Domestic Violence proceedings for paying interim maintenance at the rate of Rs.12,000/- per month to her and had only filed the application for the custody of their daughters before the Sessions Court at Vasai to harass her and that he has illicit relations with another lady, she has sought the rejection of the application.

11. As regards the allegations viz-a-viz the FIR under consideration, the intervenor i.e. the wife of the applicant has reiterated the fact of the applicant telling her daughters to remove their clothes and of she having taken the photographs of the said incident and of then having lodged the FIR in question. Hence, stating that she has a reasonable apprehension of danger to her and her daughters at the hands of the applicant, she is seeking the rejection of the application for anticipatory bail. Together with the said application, the intervenor has filed on the record the copies of the N.C. complaints, the FIR, orders in D.V. case and the photographs with her daughters to show that the applicant does not require the indulgence of the Court. A transcript of a recording of a conversation which had

allegedly taken place between the applicant's wife and their daughters had also been placed on the record.

12. Heard the learned Advocate for the applicant and the learned APP for the State.

13. At the outset, I would like to point out that in the course of his arguments, the learned APP has placed reliance upon the judgment of the Hon'ble Supreme Court in **XXX V. Arun Kumar C. K. and another 2022 LiveLaw (SC) 870** for the proposition that the fact of custodial interrogation not being required, cannot be the sole ground for grant of anticipatory bail to a person alleged to have committed the offences under the POCSO Act. Therein, it has been stated that the first and the foremost thing that the court hearing an anticipatory bail application should consider is the prima facie case put up against the accused. Thereafter, the nature of the offences should be looked into along with the severity of the punishment. Custodial interrogation can be one of the grounds to decline anticipatory bail. However, even if custodial interrogation is not required or necessary, that by itself, as per the Hon'ble Supreme Court, cannot be enough to grant the relief claimed i.e. the anticipatory bail. Another point on which much emphasis has been placed by the learned APP is the fact of section 29 of the POCSO Act being kept in mind while deciding the application for anticipatory bail for the offences committed under the POCSO Act.

14. In my opinion, there cannot at all be any quarrel with the proposition laid down by the Hon'ble Supreme Court. Indeed the offences

under the POCSO Act are serious. The provisions of section 29 of the POCSO Act cannot also be ignored. At the same time, it will still have to be seen as to whether the allegations as made against a person about having committed the offences under the POCSO Act do indeed find support from the material collected in the investigation and as to whether the other circumstances on record are such as to create a doubt regarding the same.

15. In the matter in hand, as repeatedly pointed out by the learned Advocate for the applicant, the material before me specially the proceeding lodged by the applicant's wife against him before the J.M.F.C., Vasai for seeking certain reliefs under the Domestic Violence Act will show that the same had come to be lodged in December 2020. A perusal of Para 37 of the same will show that therein, the applicant's wife had stated the fact of having come to know about the alleged inappropriate behaviour of the applicant with his own daughters. It is therefore, apparent that as per the application given in the proceeding under the Domestic Violence Act, the applicant's wife had come to know about the same in May 2020. A perusal of the FIR No.1523/22 dated 12/11/22 will, however, show that as per the applicant's wife, she had come to know about the applicant's inappropriate behaviour with his own daughters in January 2020. It is however, strange to see that inspite of coming to know about the same, the applicant's wife did not immediately choose to take any action regarding the same and only filed the proceeding under the Domestic Violence Act against him.

16. A perusal of the case diary which had been called by me will prima facie go to show that both the applicant's daughters have contended the fact of the applicant behaving with them in the manner as alleged. It is, however, significant to note that the victims have clearly stated that they



used to tell their mother whenever such incidents used to occur. The fact that the applicant did not take any action inspite of this, while not reflecting in any manner on the correctness or otherwise of the allegations as made by the daughters the same will, in my opinion, surely raise a question mark regarding the timing of the allegations made by the victim's mother in the FIR in question. This is because, as pointed out by the learned Advocate for the applicant, it cannot be ignored that initially, the applicant's wife had only filed a proceeding against him under the Domestic Violence Act. Thereafter, when the applicant filed a proceeding against her for seeking the custody of their daughters and was granted interim access vide the order dated 17/11/21, she did not allow the said access. On the other hand, she filed an application for modification of the order of the interim access, which again came to be rejected on 20/07/22. It is only thereafter that the applicant's wife filed a report dated 12/10/22 against him which alleged the fact of she having been subjected to cruelty. This resulted in the registration of the offences against the applicant u/s.498-A, 323, 504, 506 of the IPC, etc. It is quite strange to note that even at that point of time, the applicant's wife did not think it proper to file appropriate proceedings against him for the alleged molestation of her daughters. It will have to be noted that since leaving her home, the applicant's wife was approaching the courts of law for seeking various reliefs. At that point of time, she was also knowing about the applicant having behaved in the manner as alleged by his daughters. If the informant would have suspected any sexual intent in the conduct of the applicant and if the said behaviour would not have been as per the atmosphere prevailing in their home, the FIR as lodged presently would have been lodged immediately. Inexplicably, this was not done.

17. Undoubtedly, the mere fact of delay in lodging of an FIR is usually not relevant while considering the application for anticipatory bail. This is because, there may be innumerable reasons for the delay in lodging an FIR under the POCSO Act. Even if that is so, the peculiar facts of the case before me make me inclined to believe that the applicant's wife, on seeing that the applicant had not been put behind the bars inspite of an FIR having been filed against him u/s.498-A of the IPC and other offences and also to somehow prevent the execution of the order of the interim access, had then lodged the FIR in question.

18. Certain photographs have also been placed on the record to substantiate the fact of the applicant touching the buttocks of his daughters even when they were wearing clothes and of his daughters sleeping in the nude with him. In my opinion, it will have to be noted that in the photographs in which the applicant is seen inserting his hand inside the nicker of his daughter, his other daughter and an old lady can also be seen in the same. However, though the applicant's wife has made a hue and cry about the said behaviour of her husband, it is difficult to understand as to why did she remain silent and content with simply taking the photograph and did not immediately question the applicant regarding his inappropriate behaviour. No doubt that the conduct like that of the applicant does appear to be unusual. However, the continued silence of the applicant's wife does create a doubt in my mind about her intention in just clicking the photographs and keeping silent about it. It will also have to be appreciated that the social mores in a city like Mumbai are changing. The fact that the other daughter of the applicant and the old lady in the photograph were present and nobody took any objection to the applicant

behaving in the manner in which he did, shows that the said conduct, though strange, appears to be acceptable in that family. The learned Advocate for the applicant has also placed on the record innumerable photographs to show that he i.e. the applicant was loving and caring father, looking after and always caring for his children. The photographs as filed do indeed make out that the applicant was a father who took care of his daughters. At the same time, the fact of he having slept on the bed with his daughters being in the nude and inserting his hand inside his daughter's nicker are also facts which are apparent on the record. Even so, it cannot be ignored that a person will not, in the presence of all the other family members, conduct himself in a manner reflecting sexual intent vis-a-vis his own child. On the other hand, if a father has any such intention, he will take care to behave carefully in the presence of the other members of the family. Further, as regards the question of the daughters sleeping in the nude, it will have to be noted that the children and their father i.e. the applicant are sleeping. No other activity is apparent in the photograph placed on the record regarding the same. I am therefore, of the view that the photographs as placed on the record are not enough to classify the applicant as a paedophile.

19. This is especially so as it will also have to be appreciated that if indeed the accused would have been the pervert as sought to be portrayed by his wife, her daughters would have told her about the alleged fact of the applicant touching his younger daughter's vagina while washing her after she used the toilet, at least after they had left the applicant's home in May 2020. This disclosure had apparently not been made as the allegations in the D.V. proceeding and the custody petition do not make a

mention of the same. A perusal of the transcript of the conversation between the applicant's wife and their daughters as placed on the record, in my opinion, will prima facie show that the mother has prompted the younger daughter during the same. Further, it is only in the statement of the younger daughter as recorded by the police that similar allegations have been made. This is indeed strange. It will also have to be noted that the applicant and his wife are going hammer and tongs at each other with each lodging reports, alleging assaults by the other and being careful enough to take photographs of each injury. Prima facie, it is clear to me that the parents are using the children as pawns to win the battle between them without giving any thought to the trauma which they would be going through.

20. Undoubtedly, the offences alleged to have been committed by the applicant carry a maximum punishment of five years and fine. Even if that is so, the fact that the allegations are made against the children's own father makes the same quite serious in nature. Be that as it may, the manner in which and the circumstances in which the informant has decided to bring forth the alleged offences, specially in the background of the extremely vitiated relations between the applicant and his wife, does prima facie create a sneaking doubt about the FIR in question having been lodged to somehow stop the applicant from gaining access to his daughters. However, without going into the details of the said issue, as that is something which will be gone into at the time of trial and as the investigation cannot be impeded by making any observations on the merits of the matter, suffice it to say that I am of the opinion that the applicant is entitled to anticipatory bail. This is because a major part of the

investigation has been completed, as the applicant has not been shown to suffer from any other criminal antecedents unrelated to the prosecution lodged against him by his wife, and as there is nothing to indicate that he would abscond, if so released. The same will, however, be subject to certain conditions. In the result, I proceed to pass the following order :-

**ORDER**

- 1) The Anticipatory Bail Application No.1868 of 2022 stands allowed.
- 2) In event of Oshiwara police station arresting Amar Dilip Babaria in FIR No.1523/2022 registered for the offences punishable U/sec.354 of the Indian Penal Code, 1860 and U/sec.8 and 12 of the Protection of Children from Sexual Offences Act, 2012, he shall be released on bail on furnishing on P.R. Bond of Rs.15,000/- (Rupees Fifteen Thousand Only) with one solvent surety in the like amount on the following conditions :-
  - a) That he shall appear before the investigating officer from 11.00 a.m. to 2.00 p.m. on every Thursday till such time as the chargesheet is filed.
  - b) That he shall not threaten or try to intimidate, pressurize or cause any harm to his wife and his daughters in any way or tamper with the prosecution witnesses in any manner.
  - c) That he shall submit the documents regarding three of his blood relatives as also their addresses before the Investigating Officer.

Date : 28.11.2022

(S. J. Ansari)  
Special Judge,  
Sessions Court, Borivali Division,  
Dindoshi, Goregaon, Mumbai

ABA NO.1868/2022

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ORDER

Dictated on : 28.11.2022  
Transcribed on : 02.12.2022  
Checked and corrected on : 07.12.2022  
Signed on : 07.12.2022  
Sent to Dept. on :

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER.”

UPLOAD DATE  
AND TIME : 07/12/22 at 5.37 p.m.

Mrs. Vidya Pendharkar  
NAME OF STENOGRAPHER

Name of the Judge (with Court Room No.)	HHJ S. J. Ansari (Court Room No.11)
Date of Pronouncement of Judgment/Order	28/11/2022
Judgment/Order signed by P.O. on	07/12/2022
Judgment/Order uploaded on	07/12/2022