

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 35044 of 2023

Applicant :- Premprakash

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Brijesh Kumar Srivastava, Rajesh Tripathi, Ramkailash Rajbhar

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra, J.

1. Heard Mr. Rajesh Tripathi, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. Instant application for bail has been filed by applicant- Premprakash seeking his enlargement on bail in Case Crime No. 170 of 2023 under Sections 363, 366, 370, 376 I.P.C. and Sections 5/6 POCSO Act, Police Station-Kothibhar, District-Maharajganj, during the pendency of trial.

4. Present application came up for orders on 10.10.2023 and this Court passed the following order:

"Heard Mr. Rajesh Kumar Tripathi, Advocate, holding brief of Mr. Brijesh Kumar Srivastava, the learned counsel for applicant and the learned A.G.A. for State.

This application for bail has been filed by applicant Premprakash seeking his enlargement on bail in Case Crime No. 170 of 2023, under Sections 363, 366, 376 IPC and Sections 5/6 POCSO Act, 2012, P.S. Kothibhar, District Maharajganj, during the pendency of trial.

Perused the record.

At the very outset, the learned A.G.A. submits that notice of present application for bail has been served upon first informant opposite party 4 on 2.8.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant opposite party 4 to oppose this application for bail.

After some arguments, it transpires that the age of the prosecutrix has been determined as per her date of birth mentioned in the certificate issued by the Principal of the institution, where the prosecutrix had studied. The said document is on record at page 42 of the paper book. Prima facie, the determination of age of the prosecutrix made on the basis of said document is illegal, by virtue of provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The age of the child can be determined only as per the date of birth of the child recorded in a document recognized under Section 94 (1) (a) and 94 (1) (b) of Section 94 of the Juvenile Justice (Care and Protection of Children) Act 2015. Since the certificate issued by the Principal of the institution, where the prosecutrix had studied is not recognized under the aforesaid provisions, therefore, no reliance could have been placed upon the same.

Learned A.G.A. submits that the charge sheet has already been submitted against applicant on 2.9.2023. In view of above, Investigating Officer is directed to submit an application before the Court below in terms of Section 173 (8) Cr. P. C. seeking permission of the Court to conduct further investigation. After seeking the permission of the Court below, Investigating Officer shall proceed to discover the age of the prosecutrix recorded in the institution first attended by her. Necessary exercise shall be conducted within a period of three weeks from today. The copy of the supplementary case diary shall be transmitted by the Investigating Officer to this Court through the learned A.G.A. before the next date fixed.

Matter shall, accordingly, re-appear for orders as fresh on 3.11.2023. "

5. Subsequent to above order dated 10.10.2023, the learned A.G.A. has filed an affidavit of the Investigation Officer which is already on record. .

6. Record shows that in respect of an incident, which is alleged to

have occurred on 30.04.2023 a delayed F.I.R. dated 04.05.2023 was lodged by first informant Smt. Saroj Devi(mother of the prosecutrix) and was registered as Case Crime No. 170 of 2023 under Sections 363 I.P.C., Police Station-Kothibhar, District-Maharajganj. In the aforesaid F.I.R. an unknown person has been arraigned as solitary accused.

7. The gravamen of the allegations made in the F.I.R is to the effect that the daughter of first informant i.e. prosecutrix namely X, who is aged about 15 years went missing on 30.04.2023 from 6.30 P.M.

8. After aforementioned F.I.R. was registered, Investigating Officer proceeded with statutory investigation of aforesaid case crime number in terms of Chapter XII Cr.P.C. The prosecutrix was recovered on 05.06.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr.P.C., which is on record at page 28 of the paper book. The prosecutrix in her aforesaid statement has stated that one lady by the name of Sati took the prosecutrix to her home and thereafter solemnized her marriage forcibly with Premprakash. Subsequent to above, the prosecutrix was residing with Premprakash as his wife. Physical relations were established between herself and applicant numerously. Subsequently, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the doctor, who medically examined her, has rejoined her previous statement recorded under Section 161 Cr.P.C. However, the Doctor, who medically examined the prosecutrix did not find any injury on her body so as to denote commission of deliberate and forceful penetrative sexual assault upon the prosecutrix.

9. Certain samples were taken from the body of the prosecutrix for

pathological examination. However, the result of the same is in negative. As per medical opinion, the prosecutrix is said to be aged about 16 years. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C., which is on record at page 28 of the paper book. The prosecutrix in her aforesaid statement has reiterated her earlier statement recorded under Section 161 Cr.P.C. The prosecutrix has further alleged that lady Sati took Rs. 1.60 Lakhs from Prem Prakash in lieu of the marriage.

10. During course of investigation, the complicity of another accused Vikash came to be surfaced as he was alleged to be the mediator in the marriage of the prosecutrix with applicant. On the basis of above and other material collected by Investigating Officer during course of investigation, he came to the conclusion that complicity of two accused namely Premprakash and Sati is fully established in the crime in question. Accordingly, Investigating Officer, submitted the charge sheet dated 29.06.2023 whereby both the accused have been charge sheeted under Sections 363, 366, 370, 376 I.P.C. and Sections 5/6 POCSO Act.

11. Learned counsel for applicant contends that though the applicant is not named in the F.I.R. but a charge-sheeted accused yet he is liable to be enlarged on bail. With reference to the material on record he submits that prosecutrix is a willing and consenting party, therefore offence committed by applicant stands washed off. It is then contended that though the prosecutrix was below 18 years of age on the date of her marriage with the applicant, but simply on that ground the marriage of the prosecutrix with the applicant shall not be void but voidable at the instance of the prosecutrix alone by virtue of the provisions contained in Section 11 (2) of the Hindu Marriage Act. Upto this stage, no proceedings have been initiated by the prosecutrix for

declaration of her marriage with the applicant as void.

12. Even otherwise applicant is a man of clean antecedents inasmuch as he has no criminal history to his credit except the present one. Applicant is in custody since 08.06.2023. As such he has undergone more than five months of incarceration. Police report (charge-sheet) in terms of Section 173 (2) Cr.P.C. has already been submitted, therefore the entire evidence sought to relied upon by the prosecution against applicant stands crystallised. Upto this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. The medical evidence does not support the charge-sheet. On the above premise, the learned counsel for applicant submits that applicant is liable to be enlarged on bail. In case the applicant is enlarged on bail, he shall not misuse the liberty of bail and shall co-operate with the trial.

13. Per contra, the learned A.G.A. has opposed the prayer for bail. He submits that since the applicant is a charge-sheet accused, therefore he does not deserve any indulgence by this Court. The learned A.G.A. further contends that the date of birth of the prosecutrix recorded in the institution first attended by her is 08.08.2008. The occurrence giving rise to present criminal proceedings occurred on 30.04.2023. As such, the prosecutrix was aged about 14 years 8 months and 22 days on the date of occurrence. With reference to the material occurring at page 33 of the paper book, he submits that marriage of the prosecutrix solemnized with applicant was without consent of the parents of the prosecutrix, therefore, criminality committed by applicant cannot be said to be washed off on account of alleged marriage of applicant with the prosecutrix. Learned A.G.A. further contends that marriage of the prosecutrix with the applicant was got

performed forcibly without the consent of the parents of the prosecutrix and therefore the case of the applicant is clearly distinguishable. On the above premise, he submits that no sympathy be shown by this court in favour of applicant. Further, since the prosecutrix is below 16 years of age therefor in view of law laid down by Apex Court in *X (Minor) Vs. The State of Jharkhand and Another* (2022 Live Law (SC) 194, applicant cannot be enlarged on bail.

14. When confronted with above, the learned counsel for applicant could not overcome the same.

15. Having heard the learned counsel for applicant, the learned A.G.A. for State, upon consideration of material on record, evidence, gravity and nature of offence, accusations made as well as complicity of applicant coupled with the fact that objections raised by the learned A.G.A. in opposition to present application for bail could not be dislodged by the learned counsel for applicant, therefore, irrespective of the varied submissions urged by the learned counsel for applicant in support of present application for bail, this court does not find any good or sufficient ground to enlarge the applicant on bail.

16. As a result, present application for bail fails and is liable to be rejected.

17. It is accordingly **rejected**.

Order Date :- 20.11.2023

YK