

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 41578 of 2023

Applicant :- Rahul Tiwari

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

Counsel for Applicant :- Kameshwar Singh, Sudhanshu Kumar Singh

Counsel for Opposite Party :- G.A., Babita Upadhyay

Hon'ble Rajeev Misra, J.

Heard Mr. Kameshwar Singh, the learned counsel for applicant, the learned A.G.A. for State and Mrs. Babita Upadhyay,, the learned counsel for opposite party-3.

Perused the record.

This application for bail has been filed by applicant Rahul Tiwari, seeking his enlargement on bail in Case Crime No. 276 of 2023, under Section 363, 376 IPC and Section 5/6 POCSO Act, 3(2)5 S.C./S.T. (P.A) Act, Police Station- Kotwali Nagar, District Banda during the pendency of trial.

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-2 on 22.8.2023. However, inspite of service of notice, no one has put in appearance on behalf of first informant-opposite party-2 to oppose this application for bail.

Record shows that in respect of an incident which is alleged to have occurred on 23.3.2023, a belated F.I.R. dated 24.3.2023 was lodged by first informant Sunil Kumar, brother of the prosecutrix, and was registered as Case Crime No. 276 of 2023, under Section 363 IPC, Police Station- Kotwali Nagar, District Banda. In the aforesaid F.I.R., one unknown person has been nominated as solitary accused.

Gravamen of the allegations made in the F.I.R. is to the effect that sister of the first informant namely- X aged about 16 to 17 years has gone missing from 3:00 pm on 23.3.2023.

After aforesaid F.I.R. was lodged Investigating Officer proceeded

with statutory investigation of concerned case crime number in terms of Chapter XII Cr.P.C. The prosecutrix was recovered on 19.4.2023. Thereafter the statement of prosecutrix was recorded under section 161 Cr.P.C, which is on record at page 6 of the supplementary affidavit. Prosecutrix in her aforesaid statement has not supported the F.I.R. To the contrary, she has stated that she herself joined the applicant and thereafter accompanied him to Surat. Subsequently, prosecutrix is alleged to have solemnized marriage with applicant on 26.3.2023. Thereafter the prosecutrix was requested for her internal medical examination, which was refused by her. As per USG report, prosecutrix was found to be in family way. Ultimately, statement of the prosecutrix was recorded under section 161 Cr.P.C. which is on record at page 34 of the paper book. The prosecutrix in her aforesaid statement has not implicated applicant in the crime in question. The prosecutrix has further departed from her previous statement under section 161 Cr.P.C.

During course of investigation, Investigating Officer recovered the mark-sheet of Class-IX of the prosecutrix, wherein her date of birth is recorded as 4.5.2006. The occurrence giving rise to present criminal proceedings is alleged to have occurred on 23.3.2023. As such, the prosecutrix was aged about 16 years and ten months on the date of occurrence. During course of investigation, Investigating Officer examined first informant and other witnesses under section 161 Cr.P.C. The witnesses so examined have supported the F.I.R. On the basis of above and other material collected by Investigating Officer, during course of investigation he came to the conclusion that complicity of applicant is established in the crime in question. He, accordingly submitted the charge sheet dated 1.6.2023, whereby applicant has been charge sheeted under sections 363, 376 IPC and Section 5/6 POCSO Act, 3(2)5 S.C./S.T. (P.A) Act.

Learned counsel for applicant submits that though the applicant is a named as well as charge sheeted accused, yet he is liable to be enlarged on bail. Referring to the statement of the prosecutrix recorded under section 161 Cr.P.C. he contends that prosecutrix is a willing and consenting party. Prosecutrix herself came to applicant and thereafter accompanied him to Surat. He, therefore contends that in view of above, it cannot be said that applicant has kidnapped, abducted or enticed away the prosecutrix. As such, no offence under sections 363 IPC can be said to have been committed by applicant. It is then contended that prosecutrix in her aforesaid statement has further stated that she has solemnized

marriage applicant, in view of above, parties came in cohabitation and started living as husband and wife. As such, no offence under sections 376 IPC and 5/6 POCSO Act can be said to have been committed by applicant. According to learned counsel for applicant, though the prosecutrix was below 18 years of age on the date of her marriage with the applicant but the marriage of the prosecutrix with the applicant on that ground shall not be void but voidable at the instance of the prosecutrix alone by virtue of section 11 (2) of the Hindu Marriage Act. However, no proceedings have been initiated by the prosecutrix for declaration of her marriage with the applicant as void. The prosecutrix in her statements under sections 161/164 Cr.P.C. has not remained consistent. As such, when the statements of the prosecutrix referred to above are examined as a whole and in the light of above, then it cannot be said that the same are of impeccable character.

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 jail since 28.4.2023. As such, he has undergone more than seven months of incarceration. The Police report in terms of Section 173(2) has already been submitted against applicant therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized. However, upto this stage, no such circumstance has emerged necessitating the custodial arrest of applicant during the pendency of trial. It is thus urged 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.

Per contra, the learned A.G.A. and the learned counsel representing opposite party-3 has opposed the prayer for bail. They submit that since applicant is a named and charge-sheeted accused, therefore he does not deserve any indulgence by this Court. The prosecutrix is a young and minor girl whose modesty has been dislodged. Since the prosecutrix is below 18 years of age, therefore, her consent if any is immaterial. As such, no indulgence be shown by this Court in favour of applicant. However, they could not dislodge the factual and legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

Having heard the learned counsel for applicant, the learned A.G.A. for State, upon perusal of material brought on record, evidence, nature and gravity of offence as well as complicity of applicant, accusation made coupled with the fact that the prosecutrix was requested for her internal medical examination, which was refused

by her, police report in terms of Section 173 (2) Cr.P.C. has already been submitted against applicant, as such, the entire evidence sought to be relied upon by the prosecution against applicants stands crystalized, yet inspite of above, the learned A.G.A. could not point out any such circumstance from the record necessitating the custodial arrest of applicant during the pendency of trial, the period of incarceration undergone, the clean antecedents of applicant, therefore irrespective of the objections urged by the learned A.G.A. and the learned counsel for first informant in opposition to the present application for bail but without making any comment on the merits of the case, applicant has made out a case for bail.

Accordingly, the bail application is **Allowed**.

Let the applicant- **Rahul Tiwari**, be released on bail in the aforesaid case crime number on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

(i) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT HE/SHE SHALL NOT SEEK ANY ADJOURNMENT ON THE DATE FIXED FOR EVIDENCE WHEN THE WITNESSES ARE PRESENT IN COURT. IN CASE OF DEFAULT OF THIS CONDITION, IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT IT AS ABUSE OF LIBERTY OF BAIL AND PASS ORDERS IN ACCORDANCE WITH LAW.

(ii) THE APPLICANT SHALL REMAIN PRESENT BEFORE THE TRIAL COURT ON EACH DATE FIXED, EITHER PERSONALLY OR THROUGH HIS/HER COUNSEL. IN CASE OF HIS/HER ABSENCE, WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST HIM/HER UNDER SECTION 229-A IPC.

(iii) IN CASE, THE APPLICANT MISUSES THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HIS/HER PRESENCE PROCLAMATION UNDER SECTION 82 CR.P.C., MAY BE ISSUED AND IF APPLICANT FAILS TO APPEAR BEFORE THE COURT ON THE DATE FIXED IN SUCH PROCLAMATION, THEN, THE TRIAL COURT SHALL INITIATE PROCEEDINGS AGAINST HIM/HER, IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(iv) THE APPLICANT SHALL REMAIN PRESENT, IN PERSON, BEFORE THE TRIAL COURT ON DATES FIXED FOR (1) OPENING OF THE CASE, (2) FRAMING OF CHARGE AND (3) RECORDING OF STATEMENT UNDER SECTION 313 CR.P.C. IF IN THE OPINION OF THE TRIAL COURT ABSENCE OF THE APPLICANT IS DELIBERATE OR WITHOUT SUFFICIENT CAUSE, THEN IT SHALL BE OPEN FOR THE TRIAL COURT TO TREAT SUCH DEFAULT AS ABUSE OF LIBERTY OF BAIL AND PROCEED AGAINST THE HIM/HER IN

ACCORDANCE WITH LAW.

(v) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT.

However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his/her bail so granted by this court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above.

Order Date :- 4.12.2023
Arshad