

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 38721 of 2023

Applicant :- Rishi Rajbhar

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

Counsel for Applicant :- Ashok Kumar Singh

Counsel for Opposite Party :- G.A.

Hon'ble Rajeev Misra,J.

1. Heard Mr. Ashok Kumar Singh, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. This application for bail has been filed by applicant Rishi Rajbhar, seeking his enlargement on bail in Case Crime No.102 of 2023, under Sections 363, 366, 376, 504, 323, 342 & Section 3/4 POCSO Act, Police Station- Mardah, District- Ghazipur during the pendency of trial.

4. Present application for bail came up for orders on 03.10.2023 and this Court passed the following orders:-

"1. Heard Mr. Ashok Kumar Singh, the learned counsel for applicant and the learned A.G.A. for State.

2. Perused the record.

3. This application for bail has been filed by applicant-Rishi Rajbhar seeking his enlargement on bail in Case Crime No. 102 of 2023, under Sections 363, 366, 376, 504, 323, 342 IPC and Sections 3/4 POCSO Act, Police Station-Mardah, District-Ghazipur during the pendency of trial.

4. 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 26.08.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant-opposite party 2 to oppose this application for bail.

5. After some arguments, it transpires that the age of the prosecutrix has been determined as per her date of birth mentioned in her Class-9 mark sheet. By virtue of the provisions contained in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, the age of the prosecutrix can be determined only on the basis of her date of birth mentioned in the documents recognized under Sections 94(1)(a) and 94(1)(b) of the Juvenile Justice (Care and Protection of Children) Act, 2015. Since the document on the basis of which, the age of the prosecutrix has been determined with regard to the date of birth recorded therein is not in consonance with the provisions of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, therefore, the inference so drawn by the prosecution is manifestly illegal.

6. Learned A.G.A. submits that investigating is still going on. Be that as it may, Investigating Officer is directed to conduct further investigation with regard to the date of birth of the prosecutrix recorded in the institution first attended by her. The Investigating Officer shall be further be at liberty to collect any other document regarding the date of birth of the prosecutrix which may be in consonance with the provisions of Section 94(a) and 94(b) of the aforementioned Act. Let necessary exercise be completed by the Investigating Officer within a period of three weeks from today. The copy of supplementary case diary shall be transmitted to this Court through the learned A.G.A. before the next date fixed.

7 Matter shall, accordingly, re-appear as fresh on 31.10.2023.

8. It is, however, provided that if in the interregnum, the police report in terms of Section 173(2) Cr.P.C. has already been submitted, then the Investigating Officer shall file an application before court below in terms of Section 173(8) Cr.P.C. and seek the permission of the Court to conduct further investigation."

5. Learned A.G.A. has filed an affidavit of compliance in Court today, which is taken on record.

6. Record shows that in respect of an incident, which is alleged to have occurred in between 25.06.2023 to 28.06.2023, an F.I.R. dated 28.06.2023 was lodged by first informant Somari Devi (mother of the prosecutrix) and was registered as Case Crime No.0102 of 2023, under Sections 363, 366, 504, 323, 342 IPC, Police Station-Mardah, District-Ghazipur. In the aforesaid F.I.R., four persons namely; Rishi Rajbhar (applicant herein), Munna Rajbhar, Ashok Rajbhar and Govinda have been nominated as named accused.

7. The gravamen of the allegations made in the F.I.R. is to the effect that named accused Rishi Rajbhar (applicant herein) is alleged to have enticed away the daughter of the first informant i.e. prosecutrix namely X aged about 15 years.

8. After aforementioned 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 29.06.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 Cr.P.C. Same is on record at page 25 of the paper book. The 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 ultimately solemnized marriage with the applicant on 25.06.2023. It is apposite to mention here that the prosecutrix was recovered from her marital home by the police. Thereafter, the prosecutrix was requested for her internal medical examination, which was refused by her. Ultimately the statement of the prosecutrix was recorded under Section 164 Cr.P.C. wherein she has rejoined her previous

statement under Section 161 Cr.P.C. During course of investigation, Investigating Officer recovered the class 9th mark-sheet of the prosecutrix wherein her date of birth has been recorded as 01.01.2008. Subsequent to order dated 03.10.2023 passed by this Court, Investigating Officer conducted further investigation. The date of birth of the prosecutrix recorded in the institution first attended by her is 15.07.2008. The occurrence giving rise to present criminal proceedings is alleged to have occurred on 25.06.2023. As such, the prosecutrix was aged about fifteen years, five months and twenty four days from the date of birth i.e. 01.01.2008..

9. Learned counsel for applicant submits that though applicant is a named accused, yet he is liable to be enlarged on bail. The prosecutrix in her statements recorded under Section 161/164 Cr.P.C. has not supported the F.I.R. The prosecutrix has categorically and consistently stated that she has solemnized marriage with the applicant. As per the date of birth of the prosecutrix recorded in the institution first attended by her i.e. 15.07.2008, the prosecutrix was aged about fourteen years eleven months on the date of marriage. However, even though the prosecutrix was below 18 years of age on the date of her marriage with the applicant yet 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. However, there is nothing on record to show that the prosecutrix has initiated proceedings for cancellation of her marriage with the applicant. He, therefore, submits that since applicant has solemnized marriage with the prosecutrix, therefore the criminality, if any, alleged against him stands washed off.

10. 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 29.06.2023. As such, he has undergone more than four months of incarceration. Moreover, no such circumstance as emerged necessitating the custodial arrest of applicant during the course of trial. In case the applicant is enlarged on bail, he shall not misuse the liberty of bail and shall co-operate with trial.

11. Per contra, the learned A.G.A. has opposed the present application for bail. He submits that since the prosecutrix is a young girl aged about approximately 15 years, therefore, her consent is immaterial. Learned A.G.A. thus submits that no sympathy be shown by this Court in favour of applicant. However, he could not dislodge the factual/legal submissions urged by the learned counsel for applicant with reference to the record at this stage.

12. 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 the complicity of applicant and accusation made coupled with the fact that though the applicant is a named accused, yet this Court finds that the prosecutrix has ultimately solemnized marriage with the applicant, even though the prosecutrix was below 18 years of age on the date of her marriage with the applicant, yet 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, therefore,

the criminality alleged against applicant stands washed off, 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 clean antecedents of the applicant, the period of incarceration undergone, therefore, irrespective of the objections raised by the learned A.G.A. 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.

13. Accordingly the bail application is **allowed**.

14. Let the applicant **Rishi Rajbhar**, 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.

15. 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 :- 16.11.2023

Zafar