

**Court No. - 65**

**Case :-** CRIMINAL MISC. BAIL APPLICATION No. - 40251 of 2023

**Applicant :-** Mahendra Alias Prem Kushwah

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

**Counsel for Applicant :-** Vipin Kumar, Jai Kishan

**Counsel for Opposite Party :-** G.A.

**Hon'ble Rajeev Misra, J.**

Heard Mr. Vipin Kumar, the learned counsel for applicant and the learned A.G.A. for State.

Perused the record.

This application for bail has been filed by applicant- Mahendra @ Prem Kushwaha seeking his enlargement on bail in Case Crime No. 252 of 2023, under Sections 363, 376 IPC and Section 3/4 POCSO Act, POCSO Act, Police Station- Kotwali Dehat, District Etah, during the pendency of trial.

At the very outset, the learned A.G.A. submits that notice of present application for bail has already been served upon first informant/opposite party-2 on 11.9.2023. However, inspite of service of notice, no one has put in appearance on behalf of first informant/opposite party-2 to oppose this application.

Record shows that, in respect of an incident which is alleged to have occurred on 4.6.2023, a belated F.I.R. dated 6.6.2023 was lodged by first informant- Virma Devi, mother of the prosecutrix and was registered as Case Crime No. 252 of 2023, under Sections 363, 376 IPC and Section 3/4 POCSO Act, POCSO Act, Police Station- Kotwali Dehat, District Etah. In the aforesaid F.I.R. an unknown person has been arraigned as solitary accused.

The gravamen of the allegations made in the F.I.R. is to the effect that the daughter of the first informant namely X aged about 14 years went missing from 14.6.2023.

After above mentioned 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 19.6.2023. 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 she was in acquaintance with applicant. She further states that in the interregnum physical relations were maintained. Investigating Officer further recovered Identity Card of Class-IV of the prosecutrix. As per said material of the prosecutrix, the date of birth of the prosecutrix recorded is 20.4.2010. Thereafter, the prosecutrix was requested for her internal medical examination. The prosecutrix in her statement before the Doctor who medically examined her has not supported the F.I.R. The genesis of her statement is that she was in consensual physical relationship with the application. The Doctor who medically examined the prosecutrix however did not find any signs on her body so as to denote commission of deliberate sexual assault. However with regard to the private part of the prosecutrix the Doctor has opined as follows:

"Hymen Not Intact"

Ultimately, the statement of the prosecutrix was recorded under section 164 Cr.P.C., same is on record at page 48 of the paper book. The prosecutrix in her aforesaid statement has re-affirmed her previous statement under section 161 Cr.P.C. 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 5.7.2021, whereby applicant has been charge sheeted under sections 363, 376 IPC and Section 3/4 POCSO Act.

Learned counsel for applicant contends that though the applicant is a named and charge sheeted accused yet he is liable to be enlarged on bail. Applicant is innocent. He has been falsely implicated in the crime in question. It is then contended that prosecutrix in her statements under sections 161 and 164 Cr.P.C. has not supported the F.I.R. The prosecutrix is a willing and consenting party. On the above premise, no offence as complained of is made out against applicant. As such, applicant is liable to be enlarged on bail.

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 19.6.2023. As such, he has undergone more than four months of incarceration. 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

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 trial.

Per contra, the learned A.G.A. has opposed the prayer for bail. He submits that the prosecutrix is a young girl aged about 13 years of age whose modesty has been dislodged. Since prosecutrix is below 16 years of age, therefore, her consent if any is immaterial. There is nothing on record to show the consent of the parents of the prosecutrix. In view of the judgement of Supreme Court in **X(Minor) Vs/State of Jharkhand and Anr., 2022 Live Law (SC) 194**, he submits that since prosecutrix is below 16 years of age, therefore, her consent is immaterial, and therefore no sympathy be shown by this Court in favour of applicant. The medical opinion regarding the private part of the prosecutrix clearly suggest that her modesty was dislodged. As such the bail application is liable to be rejected.

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

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 objections raised by the learned A.G.A. in opposition to the present application bail could not be dislodged by learned counsel for applicant, therefore irrespective of the varied submissions urged by the learned counsel for applicant in support of the present application for bail, but without making any comment on the merits of the case, this Court does not find any good or sufficient ground to enlarge the applicant on bail.

In view of above, the application fails and is liable to be rejected.

It is accordingly **rejected**.

**Order Date :- 29.11.2023**

Arshad