

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 41390 of 2023

Applicant :- Suraj

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

Counsel for Applicant :- Mahadeo Singh Chandel,Rakesh Kumar Gupta

Counsel for Opposite Party :- G.A.,Nilay Kumar Pandey

Hon'ble Rajeev Misra,J.

Heard Mr. Mahadeo Singh Chandel, the learned counsel for applicant, the learned A.G.A. for State and Mr. Nilay Kumar Pandey, the learned counsel representing first informant-opposite party-4.

This application for bail has been filed by applicant Suraj seeking his enlargement on bail in Case Crime No.542 of 2021, under Sections 363, 366, 376, 504, 506 IPC and Section 3/4 Pocso Act, police station Shivali, district Kanpur Dehat, during the pendency of trial.

Perused the record.

Record shows that in respect of an incident which is alleged to have occurred on 21.11.2021, a delayed F.I.R. dated 23.11.2021 was lodged by first informant, namely, Sri Ramu (brother of the prosecutrix) and was registered as Case Crime No.0542 of 2021, under Sections 366, 504, 506 IPC, police station Shivali, district Kanpur Dehat. In the aforesaid F.I.R., the applicant Suraj has been nominated as solitary named accused.

Learned counsel for the applicant contends that though applicant is a named as well as charge-sheeted accused inasmuch as the charge-sheet has been submitted against applicant on 14.06.2022 yet he is liable to be enlarged on bail. Referring to the statements of the prosecutrix recorded under Section 161/164 CrPC (copies of which are on record as Annexure-'4' and '5' to the affidavit filed in support of the bail application), he contends that the prosecutrix in her aforesaid statements has clearly and categorically stated that she has solemnized marriage with the applicant. Subsequently, from the aforesaid wedlock of the prosecutrix and the applicant, a male child was born who is now said to be aged about one year. During the course of investigation, Investigating Officer recovered the School Leaving Certificate of the prosecutrix from the institution where the prosecutrix had studied up to class-IV. As per the said certificate, the date of birth of the prosecutrix recorded in the institution is 06.01.2004.

Subsequently, Investigating Officer recovered another School Leaving Certificate of the prosecutrix from the subsequent institution where the prosecutrix had studied up to class-VIII. As per the said certificate, the date of birth of the prosecutrix is 28.07.2004. Taking the date of birth of the prosecutrix as 06.01.2004 and the occurrence giving rise to the present criminal proceeding having occurred on 19.11.2021, the prosecutrix was aged about 17 years 10 months and 13 days on the date of occurrence. On the above premise, the learned counsel for applicant contends that though the prosecutrix was below 18 years of age on the date of occurrence/marriage 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, 1955. However, up to this stage, nothing has emerged on record to show that the prosecutrix has initiated any proceeding for declaration of her marriage with the applicant as void. Consequently, the criminality, if any, alleged against the applicant stands washed off on account of aforesaid fact. As such, the prosecution of the applicant itself cannot be maintained.

Even otherwise, the applicant is a man of clean antecedents having no criminal history to his credit except the present one. He is in jail since 01.08.2023. As such, he has undergone more than one year and three months of incarceration. The police report under Section 173 (2) CrPC i.e. charge-sheet has already been submitted against the applicant therefore, the entire evidence sought to be relied upon by prosecution against applicant stands crystalized. However, up to this stage, no such circumstance has emerged on the basis of which it can be said that custodial arrest of applicant is absolutely necessary during the pendency of trial. It is thus urged that the 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 first informant have vehemently opposed the prayer for bail. They submit that since the applicant is a named/charge-sheeted accused therefore, he does not deserve any indulgence by this court. 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, the learned counsel representing first informant, upon perusal of material brought on record, evidence, complicity of the accused, accusation made, nature and gravity of offence and coupled with the fact that the prosecutrix in her statements recorded under Sections

161/164 CrPC has not supported the F.I.R., the prosecutrix is a willing and consenting party, as per the admitted case of the prosecutrix she herself accompanied the applicant, the prosecutrix has clearly and categorically stated that she has solemnized marriage with the applicant, from the aforesaid wedlock of the prosecutrix and the applicant a male child was born who is now said to be aged about one year, in view of above the criminality if any committed by the applicant stands washed of, though the prosecutrix was below 18 years of age on the date of marriage but simply on that account 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, 1955, no proceedings have been initiated by the prosecutrix for declaration of her marriage with the applicant as void, in spite of the fact that the charge-sheet has been submitted against applicant and therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized, yet the learned A.G.A. nor the learned counsel for first informant could point out any such incriminating circumstance from the record necessitating the custodial arrest of the applicant during the pendency of trial, the judgement of Supreme Court in **Sumit Subhashchandra Gangwal and Another Vs. State of Maharashtra and Another 2023 LiveLaw (SC) 373 (paragraph 5)**, 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 comments on the merit of the case, the applicant has made out a case for bail.

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

Let the applicant **Suraj**, involved in aforesaid case crime number, be released on bail on his furnishing a personal bond with 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 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 counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under section 229-A I.P.C.

(iii) In case, the applicant misuses the liberty of bail during

trial and in order to secure his 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, in accordance with law, under section 174-A I.P.C.

(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 him 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 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 :- 28.11.2023.

Rks.