

Court No. - 65

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 49682 of 2023

Applicant :- Nitesh Kumar Patel

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

Counsel for Applicant :- Amarnath Tripathi

Counsel for Opposite Party :- G.A.,Renu Swarnkar

Hon'ble Rajeev Misra,J.

1. Heard Mr. Amarnath Tripathi, 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 **Nitesh Kumar Patel** seeking his enlargement on bail in Case Crime No. 212 of 2023, under Section 363, 366 376 I.P.C. and 3/4 POCSO Act, Police Station Mirzamurad, District Varanasi during the pendency of trial.

3. 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 29.10.2023. However, inspite of service of notice no one has put in appearance on behalf of opposite party-2 to oppose this application for bail.

4. Record shows that in respect of an incident which is alleged to have occurred on 27.08.2023, a prompt F.I.R. dated 27.08.2023 was lodged by first informant Jeet Narayan (father of the prosecutrix) and was registered as Case Crime No. 212 of 2023, under Section 363, 366 376 I.P.C. and 3/4 POCSO Act, Police Station Mirzamurad, District Varanasi (Commissionate). In the aforesaid F.I.R. applicant Nitesh Kumar Patel has been nominated as solitary named accused.

5. The gravamen of the allegations made in the F.I.R. is to the effect that named accused Nitesh Kumar Patel enticed away the daughter of the first informant i.e. prosecutrix namely-X on 26.08.2023 at around 4:00 P.M.

6. After above-mentioned FIR 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 28.08.2023. Subsequent to above, the statement of the prosecutrix was recorded under Section 161 Cr.P.C., which is on record at page 15 of the supplementary affidavit. The prosecutrix in her aforesaid statement has not supported the FIR. To the contrary, the prosecutrix has stated that she was in love with the applicant for the last four years. She further stated that she has solemnized marriage with the applicant. Thereafter, the prosecutrix was requested for her internal medical examination but the same was refused by her. Ultimately, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. which is on record at page 23 of the supplementary affidavit. The prosecutrix in her said statement has rejoined her previous statement under Section 161 Cr.P.C.

7. During course of investigation, Investigating Officer recovered the High School Certificate of the prosecutrix, wherein, her date of birth is recorded as 11.03.2006. The occurrence giving rise to the present criminal proceedings is alleged to have occurred on 27.08.2023. As such, the prosecutrix was aged about 17 years, 5 months and 16 days on the date of occurrence i.e. 27.08.2023. Investigating Officer further examined the first informant and other witnesses under Section 161 Cr.P.C. Witnesses so examined have substantially 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. Accordingly, Investigating Officer submitted the charge-sheet dated 12.09.2023 whereby applicant has been charge sheeted under Section 363, 366 376 I.P.C. and 3/4 POCSO Act.

8. Learned counsel for applicant submits that though applicant is a named and charge sheeted accused, yet he is liable to be enlarged on bail. Referring to the statements of the prosecutrix recorded under Sections 161/164 Cr.P.C., he submits that as per the aforesaid statement, it is apparent that the prosecutrix was not abducted, kidnapped and enticed away by the applicant. To the contrary, the prosecutrix appears to be a consenting party and herself joined the present applicant. As such, no offence under Sections 363/366 can be said to have been committed by the applicant. It is then contended that prosecutrix in her aforesaid statements has also stated that she has solemnized marriage with the applicant. On account of above, the parties came with co-habitation as husband and wife. As a result, no offence under

Section 376 and 3/4 POCSO Act can be said to have been committed by the applicant either.

9. According to the learned counsel for applicant though prosecutrix was below 18 years of age on the date of her marriage with the applicant, inasmuch as, the date of birth of the prosecutrix recorded in the High School Certificate is 11.03.2006 and the occurrence giving rise to the present criminal proceedings is alleged to have occurred on 27.08.2023 yet inspite of above, 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. On the conspectus of above, he therefore contends that applicant is liable to be enlarged on bail.

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 31.08.2023. As such, he has undergone more than 3 months of incarceration. The police report in terms of Section 173(2) Cr.P.C. has already been submitted. As such, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized. However, upto this stage, no such incriminating circumstance has emerged on record necessitating the custodial arrest of applicant during the pendency of trial. On the above premise, he 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.

11. Per contra, the learned A.G.A. has opposed the prayer for bail. He submits that since applicant is a named as well as charge-sheeted accused therefore, he does not deserve any indulgence by this Court. As the prosecutrix was below 18 years of age on the date of her marriage with the applicant, therefore her consent if any is wholly immaterial. However, the learned A.G.A. could not dislodge the factual and 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 record, evidence, complicity of accused, gravity and nature of offence, accusation made coupled with the fact that the prosecutrix in her statements under Sections 161/164 Cr.P.C has not supported the F.I.R, as per the material on record it cannot be said that prosecutrix was abducted, kidnapped

or enticed away by the applicant, prima facie the prosecutrix appears to be a willing and consenting party is joining the applicant, the prosecutrix has solemnized marriage with the applicant, therefore, the criminality if any committed by the applicant against prosecutrix stands washed of, though prosecutrix was below 18 years of age on the date of her marriage with the applicant, as the date of birth of the prosecutrix recorded in the High School Certificate is 11.03.2006 and the occurrence giving rise to the present criminal proceedings is alleged to have occurred on 27.08.2023, however, irrespective of above, the marriage of 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, the clean antecedents of applicant, the period of incarceration undergone, the police report under Section 173 (2) CrPC i.e. charge-sheet has already been submitted, therefore, the entire evidence sought to be relied upon by the prosecution against applicant stands crystallized, yet in spite 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, 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 merits of the case, the applicant has made out a case for bail.

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

14. Let the applicant-**Nitesh Kumar Patel** be released on bail in the aforesaid case crime number on his 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 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 :- 6.12.2023

Imtiyaz