

Court No. - 27

Case :- CRIMINAL MISC. BAIL APPLICATION No. - 12045 of 2023

Applicant :- Mohammad Zishan

Opposite Party :- The State Of U.P. Thru. Prin. Secy. Lko. And Others

Counsel for Applicant :- Anil Kumar Tiwari

Counsel for Opposite Party :- G.A.,Mohak Srivastava

Hon'ble Brij Raj Singh,J.

1. Heard learned counsel for the applicant, Sri Vishvas Saraswat, learned A.G.A. for the State and perused record.
2. Notice has been served upon the O.P. No.2 but no one is present.
3. Supplementary affidavit filed today on behalf of the applicant is taken on record.
4. The present bail application has been filed by the applicant with a prayer to enlarge him on bail in Case Crime No.378 of 2023 under Section 323/328/376/504/506 IPC and Section 3/4 of Protection of Children from Sexual Offences Act, 2012, PS Kotwali Nagar, district Ayodhya/Faizabad.
5. This Court had passed following order while granting interim bail to the applicant on 8.11.2023:-

"1. Heard learned counsel for the applicant, Sri Mohak Srivastava as well as Sri Arpan Prakash Srivastava both learned counsel for O.P. No.2, Sri Mohd. Asif Khan, learned AGA for State and perused record.

2. Supplementary affidavit filed today on behalf of applicant is taken on record.

3. Present first bail application is filed by the applicant for bail in case crime No.378 of 2023 under Section 323/328/376/504/506 IPC and Section 3/4 of Protection of Children from Sexual Offences Act, 2012, PS Kotwali Nagar, district Ayodhya/Faizabad.

4. Learned counsel for the applicant has invited attention of this Court towards the statement of prosecutrix under Section 161 CrPC in which she has mentioned that on the pretext of marriage, the applicant had established physical relation. Learned counsel for the applicant has further relied on the statement of prosecution under Section 164 CrPC in which she has stated that she used to talk with the applicant and thereafter, she was taken to a hotel where, some

drug was adulterated in the drink and after consuming the same, she became unconscious and the applicant committed rape against her. She has further stated that the applicant blackmailed her and thereafter, many times, had established physical relation.

5. Learned counsel for the applicant has further submitted that the statements of the prosecutrix under Section 161 CrPC as well as version of FIR clearly indicate that it is a case of consent and the prosecutrix did not raise any alarm nor any protest was raised by her. He has further submitted that no obscene material, photographs or video has been made viral by the applicant and that as per School Certificate, the prosecutrix is 17 years 9 months and 16 days old and, only 14 days are short in getting majority. He has further submitted that now, the prosecutrix has become major.

6. Learned counsel for the applicant has submitted that in para-4 of the supplementary affidavit, the applicant is ready to marry the prosecutrix. He has further submitted that the applicant has no criminal history and he is in Jail since 29.6.2023.

7. On the other hand, learned counsel for the complainant O.P. No.2 Sri Mohak Srivastava has no objection at the moment and has stated at Bar that the prosecutrix is also ready to marry the applicant.

8. Looking into the peculiar facts and circumstances of the case, I grant interim bail to the applicant for one month from the date of his release.

9. The applicant Mohammad Zishan will be released on interim bail for a period of one months from the date of his release on his furnishing a personal bond and two sureties in the like amount to the satisfaction of the Court concerned on the following conditions:-

(i) The applicant will marry the prosecutrix after his release on interim bail within one month from his release.

(ii) On the next date, the applicant will file the proof of marriage along the affidavit before this Court.

AND

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates 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 of the Indian Penal Code.

(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. is issued and the 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 of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) 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.

10. It is made clear that the observations made in this order are limited to the purpose of determination of this bail application and will in no way be construed as an expression on the merits of the case. The Trial Court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything in this order.

11. List this case on 11.12.2023 within top 20 cases. When the case is listed next, the name of Sri Arpan Prakash Srivastava learned counsel for the complainant O.P. No.2 will also be shown in the cause list."

6. Learned counsel for the applicant has submitted that marriage of the applicant has been performed with the prosecutrix who is also major. It has been submitted that both are living as wife and husband. He has also filed NikahnNama along with the supplementary affidavit dated 11.10.2023, filed today.

7. Learned A.G.A. though opposed the bail but could not dispute the fact that the applicant and prosecutrix have performed marriage and are living together as husband and wife and the fact that it is a case of consent and FIR indicates that prosecutrix had established physical relation out of her free will.

8. Considering over all facts and circumstances of the case, the argument that the applicant and prosecutrix have performed marriage and are living together as husband and wife and the argument that it is a case of consent and FIR indicates that prosecutrix had established physical relation out of her free will, it is a fit case for bail.

9. Let the applicant, Mohammad Zishan be released on bail in the above case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of Court concerned with the following conditions :-

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates 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 of the Indian Penal Code.

(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. is issued and the 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 of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) 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.

10. It is made clear that the observations made in this order are limited to the purpose of determination of this bail application and will in no way be construed as an expression on the merits of the case. The Trial Court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything in this order.

Order Date :- 11.12.2023

Rajneesh JR-PS)