

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.42985 of 2017

Arising Out of PS. Case No.-122 Year-2017 Thana- Sono District- Jamui

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Barun Kumar, Son of Sri Dinesh Singh, resident of Village - Madhurapur,
Purbari Tola, P.S. - Teghra, District - Begusarai.

... .. Petitioner/s

Versus

The State of Bihar.

... .. Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Ajay Kumar Thakur, Adv.

Mr. Krishna Chandra, Adv.

For the State : Mr. Sadanand Paswan, Spl. P.P.

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT & ORDER

Date : 03-10-2017

There are two divergent views, which have been taken by two Co-ordinate Benches of this Court, on the question of maintainability of an anticipatory bail application under Section 438 of the Code of Criminal Procedure, 1973 (*hereinafter referred to as 'the Code'*), in a case arising out of Bihar Prohibition and Excise Act, 2016 (*hereinafter referred to as 'the Act'*), in view of clear bar provided under sub-Section (2) of Section 76 of the Act,



which of the two decisions should the Court follow, is the foremost question.

2. Since interpretation, effect and consequence of the said provision, under sub-Section (2) of Section 76 of the Act, is at the core of controversy, it is being reproduced hereinbelow:-

“76. Offences to be Cognizable and Non-Bailable.-(2)
Notwithstanding anything mentioned in sub-section (1) above, nothing in Section 360 of Code of Criminal Procedure, 1973 (Act 2 of 1974), Section 438 of Code of Criminal Procedure, 1973 (Act 2 of 1974) and Probation of Offenders Act 1958 (20 of 1958) shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under the Act.”

3. A single Bench of this Court in case of *Ashok Sahani Vs. The State of Bihar*, reported in **2017 (3) PLJR 632**, after having interpreted sub-Section (2) of the Section 76 of the Act, has held in paragraphs 14 and 15 as follows:-

“14. It would be manifest from a reading of sub-section (2) of Section 76 of “the Act” that it



disentitles an accused committing an offence under “the Act” the privilege of pre-arrest bail. In view of specific embargo of sub-section (2) of Section 76 of “the Act”, I am of the considered opinion that privilege of pre-arrest bail under Section 438 of the Cr.P.C. is not available to the persons on accusation of having committed offence under “the Act”.

15. Thus, as there is statutory bar under sub-section (2) of Section 76 of “the Act”, an application under Section 438 of the Cr.P.C. would not be maintainable, either before this Court or before the court below.”

4. Another single Bench, in case of **Manish Kumar @ Lokesh Kumar Vs. The State of Bihar (Cr. Misc. No. 21578 of 2017)**, by an order, **dated 10.08.2017**, has held the earlier decision, in case of **Ashok Sahani (supra)**, to be *per incuriam*, on the reasoning that Section 76 (2) of the Act itself is void in view of Article 254 of the Constitution of India. After having held so, Hon’ble single Judge has allowed the application for grant of anticipatory bail in case of **Manish Kumar (supra)**. Following are the concluding paragraphs of the said decision of this Court in case



of **Manish Kumar** (*supra*), on the question of maintainability of anticipatory bail application:-

“It is made clear that since I am of the opinion that judgment of the single Bench is per incuriam as well as section 76 (2) of the Act is void in view of Article 254 of the Constitution of India there is sufficient reason to entertain the present petition on merit. On merit it is evident that petitioner name has come only on confessional statement of co-accused and as such it is a fit case for grant of privilege of anticipatory bail.”

5. It also transpires from the said order of this Court, in case of **Manish Kumar** (*supra*), that after having held as above, the matter has been directed to be placed before Hon'ble the Chief Justice, so that the issue may be finally adjudicated upon by a larger Bench. It appears that the matter has yet not been finally adjudicated upon by the Division Bench.

6. This application has been filed for grant of anticipatory bail as the petitioner apprehends his arrest in connection with Sono P.S. Case No. 122 of 2017, registered for the offence punishable under Sections 272 and 273 of the Indian Penal Code (*hereinafter*



referred to as 'the IPC') and Sections 30 (a), 41 and 47 of the Act.

In view of the two divergent views of the Co-ordinate Benches, as noticed above, a question has arisen as to whether this application can be maintained or not.

7. In view of the reasoning assigned in case of **Manish Kumar** (*supra*), it has been held that an application for anticipatory bail can be maintained because the provision under Section 76 (2) of the Act is itself void. In that background, the question is, should the opinion of this Court, in case of **Manish Kumar** (*supra*), that Section 76 (2) of the Act is void, in view of Article 254 of the Constitution of India, be treated to an exposition of law, having binding effect on this Court, while keeping in mind that reference has been made to a larger Bench. Said differently, if the said decision, rendered in case of **Manish Kumar** (*supra*), is to be followed, the Court will be required to treat Section 76 (2) of the Act to be void, being *ultra vires*, the provisions of the Constitution of India.

8. There are two aspects of the matter. Firstly, the *vires* of statutory provision can be adjudicated only by a Division Bench of this Court, in view of Standing Order No. 3 of Chapter XXI-C of the Patna High Court Rules. [Re: **Ranchi Timber Traders**



Association & Ors. Vs. State & Ors., reported in *1997 (1) PLJR 133*].

9. Before proceeding to the second aspect, I must take note of the observations made by this Court in case of *Manish Kumar (supra)*, which are as follows:-

“Before dealing with the objection regarding maintainability of the anticipatory bail petition it is necessary to incorporate certain provision of the Constitution of India. So far Criminal Law and Criminal Procedure Code is concerned both are under item – 1 and 2 respectively of List-III i.e. concurrent list in Schedule 7 of the Constitution of India. Meaning thereby that on those subjects Government of India as well as State are having concurrent jurisdiction to make enactment. However Article 254 of the constitution of India suggest that if state makes any legislation repugnant to the provision of the Parliamentary Act such enactment shall be treated as void.

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It is made clear that if the State makes any legislation repugnant to the Parliamentary Act the said provision to that extent shall be treated as void unless in view of clause (2) of Article 254 of the Constitution of India State government before enactment takes assent of the president of India. While enacting no assent of the President was obtained. Certainly the provision i.e. Section 76(2) of the Act being repugnant to the Central Act i.e. Code Of Criminal Procedure [Section 438 of the Code of Criminal Procedure] it may be termed as void and as such there can be no restriction to entertain anticipatory bail petition.

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Accordingly, the court is of the considered opinion that section 76 (2) of the Act being repugnant to the Central Act i.e. Code of Criminal Procedure (i.e. Section 438 of the Cr.P.C.) shall be termed to be void and as such, there can not be any restriction either to file anticipatory bail petition or to maintain anticipatory bail petition.



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On perusal of the judgment of the co – ordinate bench i.e. judgment dated 07.07.2017 passed in Cr. Misc. No. 26109 of 2017 it is evident that the point regarding the legislative competence was not argued before him however since there is already co-ordinate Bench judgment of this court it would be appropriate for this court to refer the matter to the division bench to settle as to whether if the provision i.e. Section 76(2) of the Act is void in view of requirement of Article 254 of the constitution of India, the Registry can be restrained to entertain anticipatory bail petition in compliance with the order of co-ordinate bench i.e. order dated 07.07.2017 in Cr. Misc. No. 26109 of 2017.”

(Emphasis supplied)

10. I am of the definite opinion, in view of specific provision under the Patna High Court Rules that any amount of observation made by this Court, holding the provisions under Section 76 (2) of the Act to be void, cannot bind this Court to treat the said provision, under Section 76 (2) of the Act, to be void. There is



presumption of the validity of an enactment, made either by the State Legislature or Parliament, till it is held to be invalid by a competent Court. Having opined so, the question of maintainability of this application for anticipatory bail will have to be considered in the light of the provision under Section 76 (2) of the Act, treating the same to be valid.

11. Secondly this view I am taking because Section 76 (2) of the Act, enacted by the State Legislature, cannot be said to be repugnant to the provisions of the Code, which is an Act enacted by the Parliament itself, in view of the clear provision under Section 4 of the Code, which reads thus:-

“4. Trial of offences under the Indian Penal Code and other laws.-(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating,



inquiring into, trying or otherwise
dealing with such offences.”

12. On close reading of Section 4 of the Code, it can be easily discerned that it is mandate of the Code that all offences under IPC shall be investigated, inquired into, tried and ‘otherwise dealt with’ according to the provisions of the Code. Sub-Section (2) of Section 4 of the Code prescribes that all offences under any other law (*i.e.*, other than IPC) shall also be investigated, inquired into, tried and ‘otherwise dealt with’ according to the same provision, but subject to any enactment for the time being in force, regulating the manner or place of investigating, inquiring into, trying or ‘otherwise dealing with such offences’. Section 4 (2) of the Code contemplates a procedure different from the procedure prescribed under the Code, which can be prescribed for investigation, inquiry or ‘otherwise dealing with’ the offences punishable under any law other than the IPC. The language of sub-Section (2) of Section 4 of the Code is unambiguous and clear and states that if any procedure has been prescribed by an enactment for investigation, inquiry or ‘otherwise dealing with’ for offence punishable under any law other than IPC, the procedure prescribed under the Code shall be subject to such procedure prescribed for the said other law.



13. On reading of the decision in case of **Manish Kumar** (*supra*), I notice that probably Section 4 of the Code was not brought to the notice of My Lord, while passing the order.

14. In the present case, the offence is punishable under the provisions of Bihar Prohibition and Excise Act, 2016. Chapter-VIII of the Act prescribes procedure for detection, investigation and trial of offences. Section 76 (2) of the Act falls under Chapter-VIII. In my view, in view of Section 4 (2) of the Code, the procedure prescribed under the Code for dealing with the offences under the Act shall be subject to the procedure prescribed for the said purpose, under the Act. Said differently, the procedure, under the Code, shall be subject to the procedure prescribed under the Bihar Prohibition and Excise Act, 2016. Seeing constitutional and statutory provisions in that perspective, in my view, there cannot be said to be any conflict or repugnancy, attracting operation of Article 254 of the Constitution of India on the basis of which Section 76 (2) of the Act could be, even, *prima facie*, said to be void.

15. I may further indicate that the enactments can be made on the subjects in List-III of Schedule 7 of the Constitution of India, either by the Parliament or by the State Legislature. Observation made in case of **Manish Kumar** (*supra*) that such enactments,



made by the Government of India and the State, are possibly because the relevant provisions of the Constitution of India could not be placed before this Court, in case of **Manish Kumar** (*supra*).

16. Discussed as above, since this provision, under Section 76 (2) of the Act, cannot be treated to be void and *ultra vires*, the provisions of the Constitution of India, despite the observations which have been made in case of **Manish Kumar** (*supra*), this Court has no other option, but to apply the said provision to consider the question of maintainability of the present anticipatory bail application. I am of the view that the decision rendered by this Court, in case of **Ashok Sahini** (*supra*), has binding on Co-ordinate Bench, wherein, it has been held that an anticipatory bail application, under Section 438 of the Code, cannot be maintained in cases arising out of the offence punishable under the provisions of Bihar Prohibition and Excise Act, 2016.

17. Before I part with, I must take note of the submission which had been advanced on behalf of the petitioner in case of **Manish Kumar** (*supra*) to the effect that there being bar under Section 437 (1) (ii) of the Code to grant bail by Magistrate, even an innocent person made accused of an offence, relating to an act in which sentence is up-to-life, is bound to be taken into custody and he can be extended privilege of bail only by learned Sessions



Judge. This submission probably could not have been made had the provisions, under Sections 84 and 85 the Act, been taken note of, which read thus:-

“84. Special Courts.-(1)

Notwithstanding anything contained in this Act or the Code of Criminal Procedure 1973 (Act 2 of 1974), the State Government may, if consider necessary in the public interest, for the purposes of trial of all or any of the offences under this Act, either appoint or designate in every District of the State, Special Court(s) in consultation with the Chief Justice of the High Court.

(2) The Special Court shall be presided over by a Special Judge who is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973 (Act 2 of 1974).

(3) The trial under this Act of any offences by the Special Court shall have precedence over the trial of any other case against the accused in any other Court (not being a Special Court) and shall be



concluded in preference to the trial of such other case.

(4) All trials and proceedings under the Bihar Excise Act, 1915 (Bihar & Orissa Act II of 1915), pending in any other Court, before the commencement of this Act, shall stand transferred to the Special Courts.

85. Procedure and Power of the Special Judge.-(1) A Special Judge may take cognizance of offences without the accused being committed to him for trial and, in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 (2 of 1974), for the trial of warrant cases by the Magistrates.

(2) Save as provided in subsection 91), the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for purposes of the said provisions, the Court of the special Judge shall be deemed to be a Court of Session and the person conducting a prosecution before a



special Judge shall be deemed to be a public prosecutor.

(3) In particular and without prejudice to the generality of the provisions contained in sub-section (2), the provisions of sections-326 and 475 of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far may be, apply to the proceedings before a special Judge and for the purposes of the said provisions, the special Judge shall be deemed to be a Magistrate.

(4) A special Judge may pass upon any person convicted by him any sentence authorized by law for the punishment of the offence of which such person is convicted.

(5) A special Judge, while trying an offence punishable under this Act, shall exercise all the powers and functions exercisable by a District Judge under the Criminal Law Amendment Ordinance, 1944 (Ord. 38 of 1944).

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the special Judge shall, as far as



practicable, hold the trial of an offence on day-to-day basis.

18. It is evident from the said provision that the Special Courts, constituted under the Act, are to be presided over by the Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge, under the Code, the bar under Section 437 (i) (ii) shall have no application. The said Courts shall certainly have powers of a Sessions Court in the matter of grant of bail.

19. This application is, accordingly, dismissed as not maintainable.

(Chakradhari Sharan Singh, J)

Praveen-II/-

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