

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

ANTICIPATORY BAIL APPLICATION NO.2164 OF 2016

Narayan Pandurang Gaikwad	... Applicant
Vs.	
The State of Maharashtra	.. Respondent

**with
CRIMINAL APPLICATION NO.40 OF 2017
IN
ANTICIPATORY BAIL APPLICATION NO.2164 OF 2016**

Manisha Narayan Gaikwad	... Applicant/ Complainant
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IN THE MATTER OF:

Narayan Pandurang Gaikwad	... Applicant
Vs.	
The State of Maharashtra	.. Respondent

Mr.Kuldeep Patil i/b P.S. Hagare for the Applicant
Mr.S.S. Pednekar, APP, for Respondent – State
Mr.J.S. Kini i/b Suresh Dubey for Complainant/Intervener

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: JANUARY 18, 2017

P.C. :

1. This is an application for pre-arrest bail as the applicant/accused is facing charges under sections 420, 494 and 376 of the Indian Penal Code as also under sections 5 and 6 of Prevention of Child Marriage Act, 1929 and under section 16 of the

Prevention of Children from Sexual Offences Act (POCSO). One Manish Gaikwad, the wife of the applicant/accused aged 32 years, is the complainant. It is her case that she is the legally wedded wife of the applicant/accused. She was harassed in various ways by the applicant/accused. She has lodged a complaint under section 498A of the Indian Penal Code in another case. She has moved application under section Prevention of Domestic Violence Act in a Court at Hyderabad as the applicant/accused was working at Hyderabad. It is the case of the complainant that during the subsistence of their marriage, the applicant/accused got married with one minor girl on 20.7.2014. The second wife remained pregnant out of the wedlock. Therefore, the first wife gave complaint to the Indapur Rural police station that she has been cheated due to the second marriage performed by the applicant/accused and the offence of rape is committed on the second wife and also, the applicant/accused has committed offence under Child Marriage Act and POCSO Act. Pursuant to the said information, C.R. No.244 of 2016 was registered by the Indapur Rural Police Station.

2. The learned Counsel for the applicant/accused has submitted that the applicant/accused has not committed any offence. The offence under section 420 of the Indian Penal Code is not made out. The offence under section 494 is non-cognisable and bailable. The complainant had filed a private complaint under section 494 in the Court of JMFC but it was withdrawn by her. He further submits that the offence under section 16 of the POCSO Act, pertains to abetment of an offence. The learned Counsel submitted that section 376 of the Indian Penal Code also cannot be made out because the complaint is not given by the second wife but it is given by the first wife. He further submitted that even if it is said that the applicant/accused has married with the second wife in 2014, then at the time of marriage, she was 17 years 11 months old.

3. Both the learned Prosecutor and the learned Counsel for the complainant have opposed the application. The learned Prosecutor has informed the Court that the date of birth of the second wife is not 8.6.1996 as stated by the applicant/accused but it was 1.6.1997. The learned Counsel for the Complainant has submitted that the offence of cheating is made out. Moreover, the

second wife at the time of marriage was only 16 years old. However, the applicant/accused has tampered the birth register of Sangam Gram Panchayat, Taluka Malshiras. The entry made in the register is forged and bogus and, therefore, the custody of the applicant/accused is necessary. The learned Prosecutor has pointed out the statement of one witness, namely, Shankar, who has attended the wedding ceremony of the applicant/accused and the second wife.

4. I have perused all the documents produced herewith and also the complaint and the statements of the witnesses. After going through the complaint and the statements, it appears that the applicant/accused has performed second marriage with the second wife when his first marriage with the complainant was in existence. However, offence of bigamy under section 494 of the Indian Penal Code is bailable and non-cognisable. Section 420 of the Indian Penal Code is a penal section and section 415 is a defining section which reads as follows:

415. Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do

or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

5. This is not a complaint by the second wife, but this offence is registered at the instance of information given by the first wife. In view of the definition of 'cheating' prima facie, she can not be said to be cheated under the laws though otherwise, in common parlance, she is cheated by him. Thus, section 420, prima facie, cannot be attracted in respect of the first wife. Section 16 of the POCSO Act is about the abetment and attempt to commit offence under POCSO Act. However, in this case, after going through the statements of the witnesses, it is found that neither the second wife nor her parents have come forward to give any complaint against the applicant/accused. As per the applicant/accused, the date of birth of second wife is 8.6.1996 and he has produced a photocopy of the birth certificate of his second wife. However, a photocopy of her school leaving certificate is produced by the police disclosing the date of birth as 1.6.1997. Thus, as per prosecution, she was 17 years at the time of marriage on 20.9.2014 and as per the birth date given by the applicant/accused, she was 18 years and 1 month old.

6. Assuming that the second wife was 17 years old at the time of the marriage, then, the offence is committed under the Prohibition of Child Marriage Act because as per the definition of 'child' under the said Act, a female who has not committed 18 years of age, is a child. Correct sections under the Act are not applied by the police. However, if any offence is committed under the Act of getting married with a child or abetment, then under section 15 of the Act, all offences are cognisable and non-bailable. However, in the statement, the second wife has denied her marriage with the applicant/accused. On query, it is informed by the prosecution and also by the applicant/accused that the second wife is staying with the applicant/accused since 2014 and a baby girl is born out of the wedlock and they are staying together. Under such circumstances, it is but natural that the second wife cannot have any grievance against the applicant/accused.

7. Insofar as the offence of rape under section 376 of the Indian Penal Code is concerned, it is cognisable and non-bailable. However, it is necessary that to constitute an offence, prima facie, a statement of the victim lady should have been recorded wherein she should have said about the offence of forcible sexual

intercourse without consent. However, nothing is there on record to that effect. Moreover, the legislature has carved out cases of forcible intercourse during marriage if wife is above 15 years as an exception to the definition of rape under section 375 of the Indian Penal Code. The Exception 2 to section 375 reads as under:

Exception 2.--Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

8. In the present case, whether the second lady can be considered as a second wife or not is an issue which can be decided at the time of trial. However, prima facie, it shows that there is a second marriage and the second wife has not made any grievance or complaint alleging any offence against the applicant/accused. Further, the submission of the learned Counsel that the offence of forgery is committed by the applicant/accused, cannot be considered at this stage because there is no material with the prosecution to show that such allegations were made by the complainant or any other person against the applicant/accused. It is an unfortunate case that the first wife had come across the second marriage performed by her husband when she is also a mother of a child from him.

9. However, considering the law laid down by the Legislation, the offences under sections 420 and 376 *prima facie* are not made out and section 494 of the Indian Penal Code being non-cognisable and bailable, I am of the view that the custody of the applicant/accused is not required. The earlier interim bail granted by this Court on 20.12.2016 is confirmed on the same bail bond and conditions.

10. Anticipatory Bail Application is disposed of accordingly.

(MRIDULA BHATKAR, J.)