

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Criminal Miscellaneous No.5845 of 2018**

Arising Out of PS.Case No. -139 Year- 2017 Thana -DARBHANGA District- DARBHANGA

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Pramod Gupta @ Pramod Kumar Gupta S/o Late Ram Deo Gupta, R/o  
Vill.- Mohalla- Masaraf Bazar, P.S.- Darbhanga Town District- Darbhanga.

.... .... Petitioner/s

Versus

The State of Bihar

.... .... Opposite Party/s

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**Appearance :**

For the Petitioner/s : Mr. Gagan Deo Yadav

For the Opposite Party/s : Mr. Humayou Ahmad Khan

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**CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY**  
**ORAL ORDER**

3      06-02-2018                      All the cases have been placed on the issue of maintainability of the applications in view of bar under Section 76(2) of the Bihar Prohibition and Excise Act, 2016.

This Court has called upon the lawyers to satisfy this Court that de hors to the fact mentioned in each case, whether the petition under Section 438 of the Cr.P.C. will be maintainable on the basis of the statement made in the F.I.R..

It will be relevant to quote Section 76(2) of the aforesaid Prohibition and Excise Act, 2016, which reads as follows:-

*“76(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 this Act.”*

The issue of maintainability of anticipatory bail has been discussed and decided in two anticipatory bail applications with two conflicting views and, later on, this issue came for consideration before the Division Bench of this Court, and to draw final view, it will be appropriate to consider the views discussed in the aforesaid orders.

The first case with the issue of maintainability came for consideration in Cr. Misc. No. 26109 of 2017 wherein the Co-ordinate Bench of this Court has held that as there is a specific prohibition of entertaining anticipatory bail application as provided under Section 76(2) of the Prohibition Act, the office was directed not to entertain the application in view of the bar stipulated therein. The issue of maintainability again came for consideration before another Bench in the case of Manish Kumar @ Lokesh Kumar Vs. State of Bihar (Cr. Misc. No. 21578 of 2017) wherein learned Single Judge has held that the Bar 76(2) of the Prohibition Act is void but, for authoritative pronouncement,



the Single Bench referred the matter to the Division Bench on two points firstly, whether Section 76(2) of the Prohibition Act is void in view of non-compliance of the requirement of Article 254 of the Constitution of India and, secondly, whether the Registry can be restrained to entertain bail application in view of the order of Coordinate Bench dated 7.7.2017 passed in Cr. Misc. No. 26109 of 2017.

The case of Manish Kumar (supra) was considered by the Single Bench and the Division Bench, as per reference made by the Single Bench, the Division Bench has held that as the vires, validity and the repugnancy of the provision of Section 76(2) of the Act is subjudice before the Apex Court, in such circumstances, it will not be proper to go into the issue and decide the issue of repugnancy in view of non-compliance of the provision of Article 254 of the Constitution of India. So this issue with regard to voidness of Section 76(2) of the Excise Act has been left open but, the Court with regard to second issue of entertaining the application under Section 438 of the Cr.P.C., it has been held that the Registry does not have a jurisdiction to prohibit the registration of the application under Section 438 of the Cr.P.C., it is the Bench which will decide as to whether the case is made out under the Prohibition Act or not and if the case is made out under



the Prohibition Act, the bar of Section 76(2) of the Act will apply but, in a case, when the facts of case itself depict that no case is made out under the Prohibition Act, the power can be exercised under the 438 of the Cr.P.C. Thus, the fact of each case will decide the maintainability of the application under Section 438 Cr.P.C. and only because the Registry has registered the case will not ipso facto be treated to be maintainable but, it is the Bench, which will decide the maintainability and applicability of Section 76(2) of the Prohibition Act.

In view of the above, this Court now proposes to consider all the cases on its merit and the maintainability of petition will be dependent on the fact of each case.

Heard learned counsel for the petitioner and learned counsel for the State.

In this case, the petitioner is apprehending his arrest in connection with Darbhanga Town P.S. Case No. 139 of 2017 registered for offences under sections 30(a) of the Bihar Prohibition and Excise Act, 2016.

As per allegation made in the First Information Report, the police, on secret information, has raided the shop of the petitioner, from there, the illegal liquor was recovered and one person was arrested who told the police that the shop belongs to



the present petitioner.

This Court is of the view that Section 76(2) of the aforesaid Prohibition Act, 2016 will apply in the present case and, accordingly, the same is not maintainable under Section 438 of the Cr.P.C.

This petition is, accordingly, dismissed.

However, if the petitioner surrenders, the court below, taking into consideration that other co-accused persons have been granted bail, will consider the prayer for bail of the petitioner on the same day of his appearance without being prejudiced by this order.

**(Shivaji Pandey, J)**

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