IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.6135 of 2018

Arising Out of PS.Case No. -367 Year- 2017 Thana -MASRAKH District- SARAN

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Guddu Kumar @ Guddu Sah, Son of Sri Krishna Sah @ Bhudeo Sah, Resident of Village- Damchho, P.S. Basantpur, (Lakri Nabiganj O.P), District- Siwan, Presently residing at Village- Rajapatti Gola, P.S.- Masharakh, District- Saran at Chapra.

.... Petitioner

Versus

The State of Bihar.

.... Opposite Party

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Appearance :
For the Petitioner/s : Mr. Jeetendra Narayan
For the Opposite Party/s : Mr. Sri Anil Prasad Singh

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL ORDER

3 13-02-2018 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 dehors 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*

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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,

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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

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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 seeking anticipatory bail in connection with Masharakh P.S. Case No.367 of 2017, registered for the offence punishable under Sections 272 and 273 of the Indian Penal Code and under Section 30, 30(a), 38 and 41 of the Bihar Excise Act, 2016.

On the basis of secret information, the Police could know that Munnilal Sah and Kamlesh Sah are engaged in selling

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the liquor. The Police has raided the hotel and from a Wagon R. Car bearing registration No.BR29E-2693 huge quantity of liquor has been recovered and the arrested persons have stated that they used to purchase the liquor from the present petitioner.

Looking to the facts of this case, this Court is of the view that the bar of Section 76(2) of the aforesaid Prohibition Act, 2016, will apply and as such this application is not maintainable under Section 438 of the Cr.P.C. Accordingly, this application is dismissed as not maintainable.

If the petitioner surrenders before the Court below and prays for bail, the Court below will consider the bail application of the petitioner and will pass appropriate order on the same day without being influenced by the order of this Court.

(Shivaji Pandey, J)

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