

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.5920 of 2018

Arising Out of PS.Case No. -137 Year- 2017 Thana -TANKUPPA District- GAYA

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1. Sanjay Yadav

2. Ajay Yadav

Both Sons of Rajo Yadav @ Raju Yadav, R/o Village- Ashurain,
P.S.- Tankuppa, District- Gaya.

.... Petitioners

Versus

The State of Bihar

.... Opposite Party

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Appearance :

For the Petitioner/s : Mr. Lilawati Singh, Advocate

For the Opposite Party/s : Mr. Md. Arif, APP

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY
ORAL ORDER

2 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 petitioners and learned counsel for the State.

In this case, the petitioners are seeking anticipatory bail in connection with Tankuppa P.S. Case No.137 of 2017, registered for the offence punishable under Sections 272 and 273 of the Indian Penal Code and under section 30(ka) (g), (gh) of the Bihar Excise Act, 2016.



In the present case, on receipt of secret information that the accused persons including the petitioners are indulged in manufacturing and selling of *Mahua* wine at village Ashurain, the police party reached there. Upon seeing the police party, the petitioners managed to flee away and from there *Mahua* liquor was recovered.

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 petitioners surrender before the Court below and pray for bail, the Court below will consider the bail application of the petitioners and will pass appropriate order on merit without being influenced by the order of this Court.

(Shivaji Pandey, J)

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