

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.5891 of 2018

Arising Out of PS.Case No. -603 Year- 2017 Thana -BARACHATTI District- GAYA

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Vikash Kumar, S/o Raju Paswan, R/o Village- Kahudag, P.S.- Barachatti,
District- Gaya.

.... Petitioner

Versus

The State of Bihar

.... Opposite Party

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Appearance :

For the Petitioner/s : Mr. Sanjay Kr. Sinha, Advocate

For the Opposite Party/s : Mr. Ashok Kumar Singh, 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 petitioner and learned counsel for the State.

In this case, the petitioner is seeking anticipatory bail in connection with Barachatti P.S. Case No.603 of 2017, registered for the offence punishable under Section 30(D) of the Bihar Prohibition and Excise Act, 2016.

Allegation has been made that a vehicle was intercepted by the police and from the said vehicle *Mahua* was recovered. Three persons managed to flee away and one person, namely, Baby Kumar, was arrested, who disclosed the name of



three persons including the present petitioner.

Learned counsel for the petitioner submits that *Mahua* is not an intoxicant as Section-40(v) of the Bihar Prohibition and Excise Act, 2016, provides any substance from which the liquor may be distilled and which is declared by the State Government by notification in the official Gazette to be an intoxicant for the purpose of this Act.

Learned counsel for the State is not in a position to point that that *Mahua* has been declared by the State Government as an intoxicant.

Though *Mahua* can be a substance for production of the liquor, but ipso facto unless the notification is there *Mahua* cannot be said to be an intoxicant.

From the narration of the facts, this Court is of the view that prima facie the bar of Section 76(2) will not apply in the present case.

Looking to the entire facts and circumstances of the case, let the petitioner, namely, Vikash Kumar, be released on anticipatory bail in the event of his arrest or surrender before the learned Court below within a period of six weeks from today, on furnishing bail bonds of Rs.10,000/- (Rupees Ten Thousand Only) with two sureties of the like amount each to the satisfaction of the



Special Judge, Excise, Gaya, in connection with Barachatti P.S.
Case No.603 of 2017, subject to the conditions as laid down under
Section 438(2) of the Code of Criminal Procedure.

(Shivaji Pandey, J)

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