

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.70606 of 2018**

Arising Out of PS. Case No.-136 Year-2017 Thana- BAUSI District- Purnia

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1. Bibi Rasula @ Rasula wife of Shamser Alam
 2. Md Mobsir @ Md Mobasasir son of Hafiz Hasim Both resident of Village-
Paharia Uttar Tola Ward No. 10, P.S. Baisi, District Purnea.

... .. Petitioners

Versus

The State Of Bihar

... .. Opposite Party

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Appearance :

For the Petitioners : Mr. Ram Prawesh Kumar, Advocate.

For the Opposite Party: APP

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL ORDER

4 28-02-2019 Heard learned counsel for the petitioners and learned
APP for the State.

2. The petitioners apprehend their arrest for the offences alleged under Section 273 of the Indian Penal Code and Sections 30(a) and 38(i) of Bihar Prohibition and Excise Act, 2016 (hereinafter referred to as 'the Excise Act, 2016') registered in connection with Special Excise Case No. 1843 of 2017 arising out of Baisi P.S. Case No. 136 of 2017

3. At the very outset, this Court takes note of an order passed by a co-ordinate Bench of this Court in Ashok Sahani Vs. The State of Bihar, 2017(3) PLJR 632. After a detailed deliberation over the effect of Section 76(2) of the Excise Act, 2016, it was categorically opined in paragraph-14 that the privilege of pre-arrest bail under Section 438 of the Cr. P.C. is not available to person accused of having committed an offence



under the Excise Act, 2016. Certain guidelines (not exhaustive) were also laid out in paragraph-30, indicating circumstances where bail should normally be granted to the accused persons on their production by the police or on their surrender. The Registrar General was also directed to ensure that stamp reporters would not place applications filed under Section 438 of the Cr. P.C. arising out of the cases under the Excise, Act, 2016 before the Bench as defect free cases henceforth.

4. The aforesaid order in Ashok Sahani's case (supra) came to be considered of another co-ordinate Bench of this Court passed in Cr. Misc. No. 21578 of 2017 (Manish Kumar @ Lokesh Kumar Vs. The State of Bihar) which, by order dated 10.08.2017, held the earlier judgment per incuriam, apart from holding the provisions of Section 76(2) of the Excise Act, 2016 as void in view of Article 254 of the Constitution of India. The question whether the Registry could be restrained from entertaining anticipatory bail petitions as directed in Ashok Sahani's case (supra), was referred to a larger Bench.

5. By another judgment dated 03.10.2017 passed by a third co-ordinate Bench of this Court in Cr. Misc. No. 42985 of 2017 (Barun Kumar Vs. The State of Bihar), the issue relating to maintainability of anticipatory bail petitions in respect of offences under the Excise Act, 2016 came to be considered yet again. The decision in Manish Kumar's case (supra) was found to



have been passed in oversight of the relevant provisions of the Constitution of India as well as Section 4 of the Cr. P.C. which could not be placed before it. As such the decision in Ashok Sahani's case (supra) was held to be binding on a co-ordinate Bench wherein it had been held that an anticipatory bail petition under Section 438 of the Cr. P.C. cannot be maintained in cases of offences arising out of the Excise Act, 2016.

6. The reference to the Larger Bench in Cr. Misc. No. 21578 of 2017 (Manish Kumar @ Lokesh Kumar Vs. The State of Bihar) was answered by the Division Bench in its order dated 06.11.2017, opining that the Registry could not be restrained from entertaining anticipatory bail petition in compliance of the order passed in Ashok Sahani's case (supra). However, in paragraph-9 of the said order, it was specifically stated that the aspect of the vires/validity/repugnancy of Section 76(2) was not being considered as the same was already sub-judice before the Apex Court. The principles noticed by an earlier Division Bench in Bisheshwar Mishra Vs. The State of Bihar, 2016 (4) PLJR 1058 in the context of a similar bar to grant of anticipatory bail under the provisions of SC/ST Act in the light of the Apex Court's decision in Vilas Pandurang Pawar Vs. State of Maharashtra, (2012) 8 SCC 795 were taken note of in paragraph-13, which cast a duty upon the Court considering the pre-arrest bail of an accused, to look into the allegations made in the F.I.R./complaint



to find out whether ingredients of the offence under the SC/ST Act were prima facie made out or not before exercising its judicial discretion under Section 438 of the Cr. P.C. It was therefore held that the law regarding consideration of an application under Section 438 of the Cr. P.C. for grant of pre-arrest bail to the accused under an Act where there is a bar to grant of anticipatory bail, had been settled as such.

7. In view of the decision of this Court in Ashok Sahani's case (supra) as reiterated in Barun Kumar's case (supra), therefore this Court is constrained to hold that the anticipatory bail petition in respect of offences alleged against the petitioners under the Excise Act, 2016 is not maintainable.

8. Learned counsel for the petitioners has also not been able to satisfy this Court that looking to the allegations made in the F.I.R., the ingredients of the offences alleged against the petitioners have not been made out.

9. The anticipatory bail petition accordingly stands dismissed. It is made clear that if the petitioner surrenders and seeks for regular bail before the Court below, the same shall be considered and disposed of on the same day on its own merits.

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(Vikash Jain, J)

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