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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 22.11.2019

+ BAIL APPLN. 741/2019

MOHD. NIYAZ ALAM

..... Petitioner

Through Mr. A.K. Suri and Mr. Ankit,
Advs.

versus

STATE

..... Respondent

Through Mr. Amit Chadha, APP with SI
Vinod Kumar

CORAM:

HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J. (ORAL)

1. The petitioner has filed the present petition under Section 438 of the Cr.P.C. for grant of anticipatory bail to the petitioner in FIR No.212/2015 under Sections 363/366/376 of the Indian Penal Code, 1860 and Section 6 of the Protection of Children from Sexual Offences (POCSO) Act, 2012, registered at P.S. Anand Vihar Railway Station.

2. The brief facts of the case as per the status report are as under:

“That on 01.12.2015, Sh. Sanjay Singh r/o village Narotapur, Lhakhi Sarai, Bihar, the complainant herein made a complaint at Police Station Anand Vihar Railway Station, Delhi with the allegations that on 27.05.2015, he was going to Bihar from village Nathopur with his family. Upon arriving at the Anand Vihar Railway Station, he purchased 4 general tickets from the ticket counter and reached at platform no. 2-3 to board the train. Since the train was late, he along with his family decided to take rest. At about 11:50pm, he woke up and found that his daughter was missing. Upon enquiry, he discovered that a boy of short

stature, wearing jeans and a shirt, took his daughter with him. The complainant searched the railway station but could not find his daughter. He then took 3 new tickets and left for Patna. Thereafter, he returned to Gurgaon to search for his daughter but failed to get to know her whereabouts. The complainant lodged an FIR no. 212/2015 under Section 363 IPC dated 01.12.2015 at Police Station Anand Vihar, Delhi. During the course of the investigation, the I.O. made all mandatory provisions for the search of the prosecutrix and the culprit but could not find them. The I.O. looked for the two persons at their native place as well but to no avail. It was also discovered by the I.O. that the accused Niyaz Alam had no previous criminal antecedents.

On 29.11.2018, the petitioner filed a bail application before Additional Sessions Judge, Karkardooma Court and the Additional Sessions Judge passed an order giving interim protection to the accused from arrest.

During investigation, accused Niyaz Alam told the I.O. that he performed Nikah (marriage) with the prosecutrix on 22.12.2016 and produced a photocopy of marriage certificate.

The prosecutrix also produced a birth certificate of her baby boy. According to the birth certificate, the baby boy of prosecutrix namely Taufik Alam was born on 26.08.2018.

The medical examination of the prosecutrix, accused and baby boy was conducted at L.B.S. hospital, Delhi and the I.O. collected the exhibits for the purpose of D.N.A. profiling from the medical officer.

I.O. also verified the date of birth of prosecutrix from Principal, Kanya Madhya Vidhyalaya Narottampur, Kajra, Lakhisarai, Bihar. As per school record, the date of birth of prosecutrix Alisha Kumari is found as 24.07.2002.

The sexual potency test of the accused was conducted on 29.11.2018 at LBS Hospital, Delhi. The medical officer opined that, "There is nothing to suggest that examined person is incapable to perform sexual intercourse."

On 30.11.2018, the statement u/s 164 Cr.P.C. of the prosecutrix was recorded by the Metropolitan Magistrate, Karkardooma Court.

The Additional Sessions Judge, Karkardooma Court rejected the bail application of petitioner on 11.03.2019.

While dismissing the bail application vide order dated 11.03.2019 observed that the prosecutrix has delivered a child on account of sexual intercourse done by the accused and that since the victim was a minor, offences u/s. 376 IPC and s.6 POCSO Act were clearly made out. The court further stated that with respect to the consent of the victim, same had no value in the eyes of the law as she was a minor at the relevant time.”

3. Learned counsel for the petitioner submitted that the investigation is complete and the victim had married the accused and they are now living together.

4. On the other hand, learned APP opposed the anticipatory bail application and submitted that the victim was minor and was only 13 years and 4 months old, as per school record, at the time of the alleged crime. Even otherwise, the offence under Section 9 of the Prohibition of Child Marriage Act, 2006 is made out against the petitioner.

5. Anticipatory bail may be granted when there is material on record to show that prosecution was inherently doubtful or where there is material on record to show that there is a possibility of false implication. However, when the element of criminality is involved and/or the custodial interrogation is required and/or the other aspects and facts are required to be unfolded in investigation, the applicant is not entitled for anticipatory bail.

6. It is also well-settled law that while considering the question of grant of anticipatory bail, the Court *prima facie* has also to look into

the nature and gravity of the alleged offence and the role of the accused. The Court is also bound down and must look into, while exercising its power to grant bail, the antecedents of the applicant and also the possibility of the applicant fleeing from justice, apart from other factors and parameters in view of the facts of each and every case.

7. The Supreme Court in the matter of ***Dr. Subhash Kashinath Mahajan v. State of Maharashtra & Anr.***, in Criminal Appeal No.416/2018, decided on 20.3.2018, held as under:

“112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

- (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
- (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;
- (iii) The possibility of the applicant to flee from justice;
- (iv) The possibility of the accused's likelihood to repeat similar or other offences;
- (v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;
- (vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;
- (vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34

and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”

8. In this case, the material on record, *prima facie* does not, in any manner, reflect that the prosecution is inherently doubtful or there is a possibility of false implication. The element of criminality is allegedly involved.

9. Taking into consideration the fact that the petitioner was minor at the time of committing of the alleged offence as well as the role of the petitioner, facts of the present case, severity of the punishment and the impact of the grant of the anticipatory bail to the petitioner upon the society, I do not find any ground for the grant of anticipatory bail to the petitioner. Accordingly, the anticipatory bail application of the petitioner is dismissed.

10. It is clarified that whatever is discussed or observed hereinabove is only a *prima facie* view of this Court and shall not tantamount to any expression or opinion on the merits of the case.

CHANDER SHEKHAR, J

NOVEMBER 22, 2019/rk

