

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.10772 of 2020

Arising Out of PS. Case No.-978 Year-2019 Thana- FORBESGANJ District- Araria

JIWACH SAH @ JIWACHH SAH Son of Ganga Sah Resident of Village-
Miya Hat, Choura Parwaha, Ward No.09, P.S.-Forbesganj, District-Araria.

... .. Petitioner/s

Versus

The State of Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s : Mr.Ramesh Kumar Singh

For the Opposite Party/s : Mr.Indu Kumari Srivastava

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
ORAL ORDER

2 10-06-2020 Heard the learned counsel for the petitioner and the
learned A.P.P. for the State.

This is an application for grant of anticipatory bail in connection with Forbesganj PS case no. 978 of 2019 registered for the offences punishable under Section 30(a) of Bihar Prohibition and Excise Act, 2016 (hereinafter referred to as the ‘Act, 2016’).

The allegation is regarding recovery of 04 liters of illicit liquor from the house of the petitioner.

The learned counsel for the petitioner has submitted that the petitioner is innocent, having clean antecedent and has been falsely implicated in the present case. The learned counsel for the petitioner has submitted by referring to paragraph no. 10 of the present petition that there is a clear cut violation of



mandatory provision of Section 100(4) Cr.P.C. in preparation of the seizure list, inasmuch as seizure list neither bear the signature nor the thumb impression of any family members of the petitioner. It is further submitted that the petitioner was not present at the place from where the illicit liquor has been recovered, hence it can be said that the alleged recovery of illicit liquor is not attributable to the petitioner herein. It is also submitted by the learned counsel for the petitioner that in view of the aforesaid facts and circumstances of the case, no case is made out under the provisions of the Bihar Prohibition and Excise Act, 2016, hence the bar of Section 76(2) of the Act, 2016 shall not be applicable in the present case. In such view of the matter, it is submitted that the petitioner is entitled to the privilege of anticipatory bail.

The learned APP for the State has vehemently opposed the prayer for bail.

I have heard the learned counsel for the parties and gone through the materials on record.

At the outset, it would be relevant to delve upon the law pertaining to entitlement of an accused to the remedy under Section 438 Cr.P.C. in cases where such an accused is alleged to have committed offences under an Act where there is a bar to



grant of anticipatory bail. The law in this regard is no longer res integra, inasmuch as the learned Division Bench of this Court in a judgment dated 06.11.2017, passed in ***Cr. Misc. no. 21578 of 2017 and other analogous cases (Manish Kumar @ Lokesh Kumar v. the State of Bihar)*** has already set to rest any misconceptions regarding the aforesaid issue, pertaining to cases under the Act, 2016, in the following terms :-

“12. Having considered the various submissions we observe that the present one is not a solitary case where the statute has barred remedy under Section 438 of the Code. A Bench of this Court in the case of Bisheshwar Mishra vs. The State of Bihar [2016(4) PLJR 1058] considered in great length issue regarding grant or refusal of the pre-arrest bail by this Court in relation to offence under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short ‘SC/ST Act’) wherein also remedy of Section 438 of the Code has been barred. The Division Bench relying upon the judgment of the Hon’ble Apex Court in the case of Vilas Pandurang Pawar v. State of Maharashtra [(2012) 8 SCC 795] has ruled as under:-

“25. It is clear from a close reading of the decision of the Supreme Court, in Vilas Pandurang Pawar (supra), that though Section 18 of the Act creates a bar in invoking Section 438 of the Code, a duty is cast on the Court to verify the averments in the Complaint/First Information Report to find out whether an offence, under Section 3 of the Act has been prima facie made out against the accused seeking pre-arrest bail or not. In case, a prima facie case, under the Act, is made out against the accused, the bar, under Section 18 of the Act, would, immediately, come into play.

26. On a careful consideration of the provisions prescribed under Section 18 of the Act, the law laid down by the Patna High Court Cr. Misc. No. 25276 of 2016 Supreme Court, in State of M.P. vs. Ram Kishna Balothia (supra) and Vilas Pandurang Pawar (supra) and by the Full-Bench of the Rajasthan High Court, in



Virendra Singh (supra), and othe other decisions of the different High Courts noticed hereinabove the answer to the first three questions framed by us becomes abundantly clear.

27. In view of specific embargo of Section 18 of the Act and the binding precedents of the Supreme Court noticed above, we hold that pre-arrest bail, under Section 438 of the Code, is not available to persons committing offences under the Act. We further hold that Section 18 of the Act totally bars a court from either making a judicial scrutiny of the case or granting pre-arrest bail to the accused of committing offence under the provisions of the Act. However, from the law laid down by the Supreme Court in Vilas Pandurang Pawar (supra), it becomes clear that notwithstanding the embargo created by Section 18 of the Act against grant of pre-arrest bail, a duty is cast upon the Court, hearing an application under section 438 of the Code, to determine, on the basis of the statements, made in the complaint/First Information Report, if the ingredients of any offence, under the Act, are made out or not. If the ingredients of the offence are attracted against a person seeking pre-arrest bail, the embargo of Section 18 of the Act would, Patna High Court Cr. Misc. No. 25276 of 2016 immediately, come into play against such person; but merely because a criminal case is instituted against a person under the Act without there being any allegation against him of having committed an offence under the Act, the Court can very well entertain an application under Section 438 of the Code and under such circumstance, the embargo, created under Section 18 of the Act, would not come into play inasmuch as the legislative intent is to exclude the power of the Court to grant pre-arrest bail to a person apprehending arrest, who is alleged to have committed an offence under the Act and not a person, whose name finds place in the column of the accused either in Complaint or in the First Information Report without there being any accusation against him of having committed an offence under the Act.”

13. In respect of SC/ST Act where there is statutory bar to the exercise of power of grant of anticipatory bail under Section 438 of the Code, the Hon'ble Apex Court in the case of Vilas Pandurang Pawar (supra) and the judgment of the Division Bench of this Court in the case



of Bisheshwar Mishra(supra) 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 are prima facie made out or not before exercising its judicial discretion under Section 438 of the Code. The law regarding consideration of application under Section 438 of the Code for grant of pre-arrest bail to the accused under an Act where there is a bar to grant of anticipatory bail has been settled as aforesaid. This aspect of the matter was obviously not brought to the notice of the learned Single Judge while passing the order dated 07.07.2017 in Cr. Misc. No. 26109 of 2017 when the Registry of the Court was restrained from entertaining anticipatory bail petition in respect of the offence under the Act. As a result application under Section 438 of the Code in respect of offence punishable under the Act would not be presentable for filing. The effect of the same is that applicants-petitioners are being denied consideration of their prayer for pre-arrest bail by the Court in terms of the law as noticed above.”

The aforesaid aspect of the matter, as settled by the learned Division Bench of this Court in the case of **Manish Kumar @ Lokesh Kumar (supra)** has also been approved by the learned Full Bench of this Court by a judgment dated 17.05.2019, passed in **Cr. Appeal (SJ) no. 431 of 2019 (Ram Vinay Yadav v. the State of Bihar)**, relevant extract whereof are reproduced hereinbelow :-

*“36. In the aforesaid backdrop now the terms of references are being answered in following terms:-
Questionnaire No.1,2,4, 5, -The Division Bench in the case of Manish Kumar @ Lokesh Kumar vs. The State of Bihar reported in 2017(4) PLJR 369 has rightly shrunked itself in answering the terms of reference as, it would tantamounts to intrusion within the sphere of the Apex Court in the background of order passed in Special Leave to Appeal (C) Nos.29749/2016 inconsonance with Transfer Petition (Civil) Nos.2089-2090/2016. That means to say, till the vires is tested by*



the Apex Court, it will not be prudent for the full Bench to delve over the issue and record its finding.

Questionnaire No. 3-Before answering the same first of all the matter is to be seen. In Ashoka Sahani case none of the parties referred, about pendency of appeal before the Apex Court at the instance of State against an order of this Court declaring the Act ultra vires, and in likewise manner, with regard to other writ petitions challenging the vires of amendment Act followed with subsequent order of the Apex Court staying. In likewise manner, on the issue of absence of assent at the end of President in compliance with Article 254(2) of the Constitution also being subject to consideration hence, the High Court, (Single Bench) would not have taken recourse in a manner, as adopted. In likewise manner, when the judgment of Manish Kumar (Single Bench) 2017(4) PLJR 369 has been gone through. Two important quotations recorded at different stages need to be recorded.

“11. In view of the facts and circumstances particularly constitutional provision the court is of the considered opinion that there is no restriction either for the Registry to accept such petition or to any person apprehending his/her arrest relating to a offence under the Act to approach this court for grant of anticipatory bail under Section 438 of the Cr.P.C. Accordingly the objection raised by learned State counsel stands overruled and it is held that anticipatory bail even in case relating to allegation under the Bihar Prohibition and Excise Act, 2016 is maintainable and Registry is required to entertain anticipatory bail petition. On perusal of the of the judgment of the co-ordinate bench i.e. judgment dated 07.07.2017 passed in Cr. Misc. No. 26109 of 2017 it is evident that the point regarding the legislative competence was not argued before him however since there is already co-ordinate Bench judgment of this court it would be appropriate for this court to refer the matter to the division bench to settle as to whether if the provision i.e. Section 76(2) of the Act is void in view of requirement of Article 254 of the constitution of India, the Registry can be restrained to entertain anticipatory bail petition in compliance with the order of co-ordinate bench i.e. order dated 07.07.2017 in Cr. Misc. No. 26109 of



2017. Accordingly this matter is directed to be placed before the Hon'ble the Chief Justice so that this issue may be finally be adjudicated by a larger Bench.

12. It is made clear that since I am of the opinion that judgment of the single Bench is per incuriam as well as section 76 (2) of the Act is void in view of Article 254 of the Constitution of India there is sufficient reason to entertain the present petition on merit. On merit it is evident that petitioner name has come only on confessional statement of co-accused and as such it is a fit case for grant of privilege of anticipatory bail."

37. From perusal of the Manish Kumar (Single Bench-2017 (4) PLJR 369), it is evident that the Bench was not at all appraised with subsequent development after pronouncement of 2016(4) PLJR 369 having under challenge before the Apex Court wherein operation of the judgment has been stayed. Not only this, the stay of further proceeding of two writ petitions by the Apex Court concerning the issue in hand, (subsequent amendment in the Act) also not been brought up before the Bench. Had there been, then in that circumstances, no such finding would have. Be that as it may, as is evident in both the petitions, the subsequent development relating thereto (vires of the Act) has not been urged, hence the observation so made under para-12 of Manish Kumar (Single Bench) could not have been. Moreover, as per Patna High Court Rules, the Division Bench identified proper forum to decide the validity, legality of the Act. Apart from the fact that both the issue was beyond the subject. Moreover, recording of Single Judge in Manish Kumar, as per-incurium is also found duly covered with the lis so pending before the Apex Court as the same happens to be based in terms of non-adoption of procedure in accordance with Article 254(2) which, unless disproved by the Apex Court would not be.

38. Though there was no reference to the Division Bench (Manish Kumar) but the way it followed in order to search out the solution, relating to the existing controversy, is being approved keeping the power of the High Court under Article 226 of the Constitution as



well as Section 482 Cr.P.C immuned.

88. Without being periphrastic, the question no. 1 is answered as follows: Till the time, the vires of the Act of 2016 is tested / adjudicated by the Supreme Court of India, which would include a decision on the correctness / justification of a State Legislature in providing / legislating a complete bar to the grant of anticipatory bail to accused persons of offences under the Act, anticipatory bail petitions shall otherwise not be maintainable, unless from the facts of the case, it would prima facie appear that none of the ingredients of the offences under the Act of 2016 are made out for attracting the bar of Section 76 (2) of the Act. For coming to the aforesaid conclusion as to whether the offence can be said to be made out from the facts of the case, no detailed / roving enquiry is to be made.

89. While saying so, I have relied on the principles enunciated in Shri Gurbaksh Singh Sibbia; Nikesh Tarachand Shah; Joginder Kumar; Arnesh Kumar; Vilas Pandurang Pawar; and Shakuntala Devi (supra).

6. It is not in dispute that Section 76(2) of the Act 2016 clearly bars the application of Section 438 of the Criminal Procedure Code in the offences arising out of Act 2016 but from perusal of sub-section (2) of Section 76 of Act 2016, it would appear that above stated bar is applicable only if an offence under the Act 2016 is made out because in sub-section (2) of Section 76 of the Act 2016 the sentence “ on an accusation of having committed an offence under this Act” has been used and, therefore, it is explicit clear that if a person commits an offence punishable under the Act 2016, in that event petition filed under Section 438 of the Cr.P.C. cannot be entertained but if a person does not commit any offence punishable under the Act 2016, then in that event, the said person has right to file a petition under Section 438 of the Cr.P.C. and the bar imposed under sub-section (2) of Section 76 of the Act 2016 shall not come in his way. Therefore, even if a person has been made accused in a case registered under the provisions of Act 2016 but from bare perusal of the accusation levelled against him does not disclose any offence of the Act 2016, the said person has right to file petition under



Section 438 of the Cr.P.C. in spite of bar imposed under Section 76 (2) of the Act, 2016 because if the offence under the provisions of Act 2016 is not made out from the very face of the accusation, the bar imposed under Section 76(2) of the Act 2016 shall not come in picture. In Vilas Pandurang Pawar & Anr. vs. State of Maharashtra & Ors. reported in (2012) 8 SCC 795 and in Bisheshwar Mishra & Anr. vs. The State of Bihar reported in 2016 (4) PLJR 1058, the Hon'ble Apex Court as well as Hon'ble Division Bench of this court respectively while dealing with the cases registered for the offences of SC/ST (Prevention of Atrocities) Act, 1989 held that the court has power to look into the allegations made in the FIR/ complaint to find out whether ingredients of the offence under the SC/ST (Prevention of Atrocities) Act, 1989 are prima facie made out or not before exercising its judicial discretion under Section 438 of the Cr.P.C. The perusal of above stated decisions of Hon'ble Apex Court as well as Division Bench of this Court go to show that in spite of bar imposed under Section 18 of SC/ST (Prevention of Atrocities) Act, 1989 to entertain petition under Section 438 of the Cr.P.C. in the offences arising out of SC/ST (Prevention of Atrocities) Act 1989, the Hon'ble Apex Court as well as Hon'ble Division Bench of this Court held that court can examine prima facie case from the very face of FIR/ complaint and if the court finds that no case under the provisions of SC/ST (Prevention of Atrocities) Act, 1989 is made out from perusal of FIR/complaint, the court can entertain petition filed under Section 438 of the Cr.P.C. even in the cases registered for the offences punishable under SC/ST (Prevention of Atrocities) Act, 1989. Almost, similar position is in respect of Act 2016 and I am of the considered view that if accusation made against a person does not make out any offence under the provisions of Act 2016 from the perusal of FIR/complaint itself, the court can entertain petition under Section 438 of the Cr.P.C. even if the case has been registered for the offences of Act 2016. The learned Division Bench in Manish Kumar @ Lokesh Kumar case (Supra) also dealt with the above stated position at para 13 of the judgment and, therefore, it is obvious that the learned Division Bench in Manish Kumar @ Lokesh Kumar case (Supra) has already



answered the question regarding the maintainability of the petition filed under Section 438 of the Cr.P.C. in the offences arising out of Act 2016.

7. Re. Question nos. 1 and 4-Brother Shri Aditya Kumar Trivedi, J. as well as Brother Shri Ashutosh Kumar, J. while dealing with the reference (question no. 1) as well as reference (question no. 4) are unanimous on this point that the learned Division Bench in the case of Manish Kumar (Supra) rightly recused from giving any finding on the vires of Section 76(2) of the Act, 2016 till the vires is tested by the Hon'ble Apex Court in Special Leave to Appeal (C) Nos. 29749/2016 as well as Transfer Petition (Civil) Nos. 2089-2090/2016. Brother Trivedi, J. as well as Brother Ashutosh, J. are of the view that till final adjudication by the Hon'ble Apex Court in respect of vires of Section 76(2) of the Act 2016, the time gap arrangement as suggested by the learned Division Bench in Manish Kumar (Supra) case should continue because adjudication by this court on the aforesaid point shall amount to intrusion within the sphere of the Apex Court and judicial propriety demands from this court not to adjudicate vires of Section 76(2) of the Act 2016 till final adjudication by the Hon'ble Apex Court in respect of vires of Section 76(2) of the Act as it is bounded duty of this court to maintain its decorum and dignity. Therefore, in the aforesaid circumstance, I also endorse the views of Brother Aditya Kumar Trivedi, J. as well as Brother Ashutosh Kumar, J. on the aforesaid point."

Thus, the law regarding consideration of application under Section 438 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 is well settled and in such cases, the duty has been casted upon the court considering the pre-arrest bail of an accused, to look into the allegations made in the FIR to find out whether ingredients of the offences under such an act, are prima facie made out or not, before exercising its judicial discretion under Section 438 Cr.P.C. and in



cases where no case is made out under the provisions of such an Act, from a bare perusal of the FIR/ complaint and materials on record, the court concerned can entertain a petition filed under Section 438 Cr.P.C., even in cases registered for the offences punishable under the provisions of the Bihar Prohibition and Excise Act, 2016.

Having regard to the submissions made by the learned counsel for the parties and considering the law settled by the learned Division Bench of this Court in the case of *Manish Kumar (supra)* and by the learned Full Bench of this Court, in the case of *Ram Vinay Yadav (supra)* respectively, this Court upon perusal of the materials on record of the present case finds that prima facie no case is made out against the petitioners, under the provisions of the Act, 2016, hence the bar under Section 76 (2) of the Act, 2016 shall not come in the way of this Court for the purposes of considering the prayer of the petitioner for grant of anticipatory bail to the petitioner herein.

Considering the facts and circumstances, as aforesaid as also taking into account the fact that no recovery of illicit liquor has been made from the conscious possession of the petitioner and there is no compliance of Section 100 Cr.P.C. while preparing the seizure list which renders the same illegal, I deem it fit and appropriate to admit the petitioner to the privilege of anticipatory bail. Accordingly, the abovenamed petitioner, in the event of his arrest or surrender before the court below within a period of six weeks from the date of



receipt/ production of a copy of this order, is directed to be released on anticipatory bail on furnishing bail bond of Rs. 10,000/- (Rs. Ten thousand) with two sureties of the like amount each to the satisfaction of learned 2nd Additional Sessions Judge-cum-Special Judge, Araria in connection with Forbesganj PS case no. 978 of 2019 subject to the conditions as laid down under Section 438(2) of Code of Criminal Procedure.

(Mohit Kumar Shah, J)

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