

**C.R.M. 11146 of 2020**

Re : An application for anticipatory bail under Section 438 of the Code of Criminal Procedure in connection with Amdanga Police Station Case No. 763 of 2020 dated 15.11.2020 under sections 376(2)(f)/376AB of the Indian Penal Code read with Section 6 with POCSO Act.

**In re : Rafik Ali Mondal . ... Petitioner.**

Mr. Sumanta Chakraborty,  
Mr. Sukanta Chakraborty ... for the Petitioner.

Mr. Rudradipta Nandy ... for the State.

The present application under Section 438 of the Code of Criminal Procedure, 1973 filed at the instance of Rafik Ali Mondal is taken up for hearing and order.

Upon hearing petitioner and learned advocate for State, we record that Amdanga Police Station be read as Chinsurah Police Station.

It is submitted on behalf of the learned advocate appearing for the petitioner that though the accusation against the petitioner is under Section 376AB of the Indian Penal Code which debars the petitioner from filing an application under Section 438 of the Code of Criminal Procedure, he is entitled to file such application as section 6 of the POCSO Act has also been attracted. He points out that as the punishment in Section 6 of the POCSO Act is higher than

that of Section 376AB of Indian Penal Code, the instant petition under Section 438 of the Code of Criminal Procedure is maintainable.

The State produces the case diary and opposes the prayer of the petitioner.

Section 438 (4) of the Cr.P.C. is reproduced below:-

*“4. The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.”*

In view of the said provision of law, we are inclined to hold that as the petitioner has been accused under Section 376AB of the Indian Penal Code besides other provisions of law, the present application under Section 438 of the Cr.P.C. is not maintainable. The petitioner shall be at liberty to make out his case before the Learned Trial Court with regard to sentence to be imposed upon him, if convicted.

The application for anticipatory bail is, accordingly, dismissed.

C.R.M. 11146 of 2020 is disposed of.

**( Arindam Sinha, J. )**

**( Suvra Ghosh, J. )**

