

CIRCUIT BENCH OF CALCUTTA HIGH COURT
AT
JALPAIGURI

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE BIBEK CHAUDHURI

C.R.M. 405 of 2021
With
CRAN 1 of 2021

Miss Surabhi Jain (Minor) & Ors.
Vs.
The State of West Bengal

Mr. Aniruddha Biswas, Adv.
Ms. Rima Sarkar, Adv.
Mr. Sidhi Sethia, Adv.
For the Petitioners

Mr. Aditi Shankar Chakraborty, Ld.
A.P.P.
Mr. Niloy Chakraborty, Adv.
Mr. Ujjwal Luksom, Adv.
Mr. Tapan Bhattacharjee, Adv.
Mr. Sekhar Basu, Senior Advocate –
amicus curiae
For the State

Judgment On: 23.08.2021

Harish Tandon, J.:

A piquant situation arose on the maintainability of an application under Section 438 of the Code of Criminal

Procedure at the behest of three petitioners two of whom are admittedly minors apprehending arrest in connection with Bagdogra Police Station Case no. 51 of 2021 registered under Section 341/325/354/506/34 of the Indian Penal Code read with Section 12 of Prevention of Children from Sexual Offences Act, 2012.

The Counsels appearing for the petitioners and the prosecution are not ad-idem on the proposition of law pertaining to extension of benefit of pre-arrest so far as it relates to the first two petitioners who are admittedly minors, because of the divergent stands having taken by the respective Counsels and the reliance made on a several decisions of the different High Courts touching upon the rights of the minor to avail the benefit under Section 438 of Cr.P.C..

We appointed Mr. Sekhar Basu, Learned Senior Counsel as amicus curiae to assist and advice the Court to arrive at the correct decision. The aforesaid exercise was further augmented because of the Co-ordinate Bench decision of this Court delivered in case of *Krishna Garai & Ors. Vs. State reported in 2016 5CHN 157*. The Co-ordinate Bench held that the Juvenile

Justice (Care and Protection of Children) Act, 2015 is a complete code by itself providing the rights, procedure and the manner of sentencing of the juvenile including restoration, rehabilitation and reintegration of the children in conflict with law and, therefore, in view of Section 5 of the Code of Criminal Procedure which saves the applicability of the special Act, the provision relating to the Juvenile Act and its applicability thereof cannot be whittled down nor can be superseded by any provision of the Code of Criminal Procedure including Section 438 thereof.

Being unoblivion of the legislative intent behind the incorporation of the special statute i.e. the Juvenile Act dealing with the children below the age of 18 years, the general procedure of law in conflict with the procedure of the Juvenile Act shall be deemed to have been excluded. The Juvenile Act is an exhaustive law concerning the children not only in need of care and protection but also in conflict with law and several safeguards are envisioned to protect the dignity of such children and erode the stigma which may be imputed more particularly, to the children in conflict with law.

The special forum and procedure of dealing with the case relating to the child in conflict with law are exhaustively provided in the Juvenile Act and, it is no gain saying that the provision of the other Act, if in conflict with the aforesaid provision, shall stand excluded.

A prelude to the genesis of the promulgation of the Juvenile Justice System is required to be recapitulated before we embark the journey on the seminal issue indicated hereinabove. The Indian Penal Code enacted in 1860 contained the provision relating to an offence committed by a child of a varied age. Sections 82 and 83 are the stepping stone where no offence shall be treated to have been done by a child below the age of 7 years (Section 82) and between the age of 7 and 12 provided he has not attained sufficient maturity of understanding as to the nature and consequences of his conduct on that occasion (Section 83). Several discourses were made at the international level and on stepping of the United Nations proclaiming charter to promote the holistic approach with regard to the development, care and protection of the children and the children coming in conflict with the law

under the Juvenile Justice System. The Juvenile Justice Act of 1986, though promulgated on the international agreement and on the convention of the United Nations to which the India as a signatory state ratified, does not subsequently appear to achieve the object and the purpose for which it was so envisioned. Subsequently in response to a United Nation Committee of the right of the child's recommendation, the Juvenile Justice (Care and Protection) Act, 2000 was promulgated covering the various aspects of the children and a special legal forum to avoid any kind of abuse or the rigorous provisions of the procedure of law. The first step, which is evident from the aforesaid exercise of the Parliament, is to provide a special forum to deal with the children in conflict with law upon formation of the Juvenile Justice Board. The said Act not only provides the procedure to be adopted by the Juvenile Justice Board in dealing with the case of the children in conflict with law but the manner of sentencing and the other care and protection to be extended to such children. Section 12 Sub-Section (1) of the said Act of 2015 manifest the age-old golden principle that the bail is the rule, the rejection

is an exception. However, proviso appended thereto bestowed discretion upon the Juvenile Justice Board to reject the application for bail if there is a reasonable ground to believe that the release is likely to bring such person in association with the known criminals or expose him/her to moral, physical or psychological danger or would defeat the ends of justice. The aforesaid provision has been projected by the prosecution that the power to grant bail is within the exclusive domain of the Juvenile Justice Board and in view of the existence of a non-obstante clause, the provision of the Code of Criminal Procedure has been impliedly excluded.

Reliance is heavily placed upon the Co-ordinate Bench decision of this Court in case of Krishna Gorai (Supra) in support of the contention that the application for anticipatory bail before the High Court is not maintainable. The Co-ordinate Bench decision has taken note of the conflicting judgments on such issue delivered by the different High Courts. The Co-ordinate Bench analysed the Section 5 of the Code of Criminal Procedure being the saving clause and arrived at the decision that since it saves the special law and

the Juvenile Act is a special law, the Code of Criminal Procedure is excluded and logically arrived at the conclusion that the application for anticipatory bail is not maintainable before the High Court at the behest of the child in conflict with law in these words:

“6. Saving clause for convenience sake is as follows:

5. Saving- nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

7. The 2000 Act is a special Act carved out from the 1973 Act and meant especially for juveniles. This Act therefore will prevail over the 1973 Act and having held that the 2000 Act will prevail over the 1973 Act this application on behalf of the petitioner no.2 is not maintainable and is dismissed as not maintainable. The decisions cited for the proposition that an anticipatory bail application is maintainable will not apply as in 2005 CRI L.J. 3271 it

was held that the juvenile would be entitled to file an application under Section 439 Cr. P.C. only after he had exhausted remedy available under 12 of 2000 Act. The said case is therefore distinguishable on facts as in the instant case no application under Section 12 has been filed. 2007 CRI L.J. 3047 is distinguishable on facts as it was dealing with the Scheduled Caste and Schedule Tribes (Prevention of Atrocities) Act, 1989 and the 2000 Act. The said 1989 Act is not in question in the said case. In 2013 CRI L.J. 851 Section 4(2) Cr. P.C. and the saving clause being Section 5 Cr. P.C. were not considered.”

In contrast to the Co-ordinate Bench decision, the petitioner relies upon a Single Bench judgment of the Gujarat High Court wherein it has been held that there is no exclusion of the provision contained under Section 438 of the Cr. P.C. as the Juvenile Justice Act is silent in this regard and, therefore, the application for anticipatory bail before the High Court at the instance of a child in conflict with law is maintainable. It

would be apposite to quote the relevant excerpts from the said judgment which runs thus:

“22. The aforesaid view of the Madurai Bench of Madras High Court considers a point that in case of rejection of any bail application by the juvenile by the High Court would render the juvenile remediless. In this regard, it is pertinent to observe that for any child in conflict with law, necessary procedure to be adopted as prescribed under Section 12 of the Act, 2015 and therefore, even where the application under Section 438 of the Code is decided in any which way, the protection of Section 12 of the Act will always be available.

22.1 The question with regard to fruitfulness to invoke Section 438 of the Code for the child in conflict with law may arise, in other words, even of invoking Section 438 of the Code no useful purpose will be served as the child in conflict with law have to undergo the process of Section 12 of the Act, 2015. The parameters of practical usage and/or application of parameters cannot

lead to inferring of bar of application of a provision, Section 438 of the Code in the present case.

22.2 Moreover, considering the Section 1(4) of the Act, 2015, it is clear to the extent that it does not exclude the application of other Acts. CRPC in the present case and therefore, this Court in respectful disagreement with the view expressed by the Madurai Bench of Madras High Court in case of Suriya v/s. State of Tamilnadu (Supra).”

At the first blush, we felt undeterred when the Co-ordinate Bench decision was cited and have its binding efficacy on the another Co-ordinate Bench and the Single Bench judgment of the other High Courts may not lead to a binding efficacy as it is merely persuasive in nature. However, after the meticulous examination of the several provisions of the said Act and the object and purpose underlying the incorporation of the Juvenile Justice Act, we embark the journey of revisiting the views expressed as above.

The ‘offence’ has not been defined in a Juvenile Act of 2015 though it was so in the Act of 2000. It was so defined to

mean an offence punishable under any law for the time being in force but the same has been dissected in two categories in the Act of 2015 by giving different meanings to heinous and the serious offences. Section 1, Sub-Section (4) of the Juvenile Justice Act of 2015 starts with a non-obstante clause and excludes the provision of any other law for the time being in force pertaining to the children in need of care and protection and children in conflict with law more particularly, in relation to the apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social integration as well as the procedure and the decisions or order in relation thereto. The said provision is quoted as under:

“Section 1(4): Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all members concerning children in need of care and protection and children in conflict with law, including
(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

(ii) procedures and decisions or orders relating to rehabilitation, adoption, re-integration and restoration of children in need of care and protection.”

It is axiomatic to say that the aforesaid provision excludes the operation of any other law in relation to the subject indicated therein concerning the children in need of care and protection and the children in conflict with law. The word ‘arrest’ has not been used anywhere in the said Act and what is used is the word ‘apprehension’ and, therefore, it is a first and foremost duty of us to understand such distinction apropos the object and purpose of the Special Act. The word ‘apprehends’ generally means to seize under the process of law; to take custody of or make prisoner. In Concise Law Dictionary the “apprehension” is defined as “the seizing of taking hold of a man; the act of arresting or seizing under process of law; arrest; the apprehension of criminals or sometimes may be used as detention.” Though the apprehension conveys the said same meaning that of the arrest but it is distinguished because of the legislative

conscious decision in omission of such word in the said Act .

The reason as one could visualise is the special procedure and a special prosecuting agency and the dealing with the children in conflict with law in a discreet manner in comparison to the other. Section 10 of the Juvenile Justice Act deals with the apprehension of the child in conflict with law wherein such child is required to be placed before the charge of the Special Juvenile Protection Unit or Designated Child Protection Officer who, without any loss of time will produce him before the Juvenile Justice Board within 24 hours of such apprehension. The proviso makes it abundantly clear that such child shall not be placed in a police lock-up or put in a jail. Section 12 deals with the bail of such child by the Board and the distinguishing feature can be seen therefrom that such child will be released on bail with or without surety. In the event, the bail application of such child is refused on recording a proper ground in exercise of the powers under the proviso appended to Section 12(1) of the said Act, sub-Section (2) thereof mandates the keeping of such child in observation home in such manner as may be prescribed. Both Section 10

and Section 12 deals with a situation where the child is apprehended and placed before the Juvenile Justice Board and does not contain any specific provision relating to pre-apprehended situation. The subsequent provision contained in the said Act relates to various remedial measures to be undertaken for protection and welfare of the child in conflict with law. None of the provisions, as indicated above, are pointer to an issue raised in the instant application whether the child in conflict with law can approach the High Court seeking anticipatory bail under Section 438 of the Cr.P.C.

The right of personal liberty is sacrosanct and inviolable in nature except by established procedure of law. The aforesaid article primarily deals with the freedom from physical restraint of a person by incarceration or otherwise by passage of time and the advancement of the law in relation to the right of personal liberty. It has expanded its horizon and engulfed diverse aspects. We do not want to elongate such aspect in this application except for the limited purpose of the liberty, which the citizen enjoins under the Constitution. The expression 'procedure established by law' is probably used in

the sense of the enacted law either by the Parliament or by the State and not in an abstract or general sense embodying the principle of natural justice. The Juvenile Justice Act, 2015 does not conceive of any situation i.e., pre-apprehension stage. A specific provision has been provided like Section 12 of the Act which operates post-apprehension stage. Section 5 of the Code of Criminal Procedure was misplaced by a Co-ordinate Bench that it excludes the provision of the Code of Criminal Procedure because of the language having used therein. The said provision aimed at saving the special or local law for the time being or any special jurisdiction of power conferred under the aforesaid law but the word “in absence of a specific provision to the contrary” appears to have been overlooked by the Co-ordinate Bench. The harmonious reading of the language used therein leaves no ambiguity that the Code of Criminal Procedure shall not affect any special law or local law or special jurisdiction or the power or the special form of procedure so prescribed if there be the contrary provisions contained in the Code of Criminal Procedure. The assimilation of the reason assigned hereinabove make it galore that the

special act like Juvenile Justice Act does not have any specific provision for anticipatory bail to be granted by the Juvenile Justice Board or any other special forum and, therefore, the right of the juvenile cannot be foreclosed if otherwise available under the general law. The matter can be viewed from another angle. The Constitution does not make a distinction between an adult or the minor. The fundamental right guaranteed under the Constitution is equal to all and a special protection can be provided to marginalised person or a person with some disability to augment their need in juxtaposition with the individual invoking the provision for anticipatory bail but the child in conflict with law shall be denied such right when the special law applicable does not contain any such provision, is unacceptable to us. There is no contrary provision contained in the Juvenile Justice Act which runs counter to the provision of the Code of Criminal Procedure more particularly, under Section 438 of the Cr.P.C. We do not find any justification in maintainability of the application of the anticipatory bail filed by the child in conflict with law.

We are conscious of the proposition of law that the Co-ordinate Bench decision binds the another Co-ordinate Bench and it would not be proper to take a contrary view. The certainty and uniformity in the decision is the hallmark of the judicial dispensation system and if the Co-ordinate Bench is not agreeing with the law expounded by the earlier Co-ordinate Bench, the proper course is to refer the matter to the Chief Justice to constitute a Larger Bench to decide the point. Following such dictum and with all humility and the respect to the decision of the earlier Division Bench, we are unable to persuade ourselves to agree with the decision of the Co-ordinate Bench that an application for anticipatory bail is not maintainable at the instance of the minor who is in conflict with law.

We request the Hon'ble Chief Justice to constitute of the Larger Bench for answering the following reference: (a) whether the application for anticipatory bail under Section 438 of the Code of Criminal Procedure is maintainable at the instance of the child in conflict with law before the High Court; (b) whether the provision of the Juvenile Justice(Care and

Protection of Children)Act, 2015 excludes the operation of the provision of Section 438 of the Code of Criminal Procedure in view of the provisions contained under Section 12 thereof.

Since we have taken a conscious decision that the point of law as referred above is required to be decided by the Larger Bench, we do not find any justification in denying such benefit to the Petitioner nos. 1 and 2. We have perused the statement of the victim girl recorded under Section 164 of the Cr. P.C wherein we find that there is complete lack of the elements constituting an offence under the POCSO Act and, therefore, the petitioners are entitled to the benefit of the provisions contained under Section 438 of the Cr. P.C.

Accordingly, in the event of the arrest of the Petitioner nos. 1 and 2 in connection with the aforementioned case they shall be released on bail in conformity with the provisions contained under Section 12 of the Juvenile Justice (Care and Protection) Act, 2015 after making themselves available before the concerned Juvenile Justice Board at 11 am to 2 pm on 1st October, 2021 with further condition that they shall not directly or indirectly make any individual promised to any

person committed to the facts of the case so as to dissuade from disclosing such fact to the court or to arresting officer hampering the police investigation nor shall play mischief with the evidence collected or to be collected and shall abide by all the conditions as may be prescribed by Board as further sequence.

In the event of the arrest of the Petitioner no. 3 who is admittedly the father of the Petitioner nos. 1 and 2 shall be released on bail with two sureties obtained of five thousand each one shall be local subject to the satisfaction of the arresting officer with further conditions as enshrined under Section 438(2) of the Code of Criminal Procedure.

Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Bibek Chaudhuri, J.)

(Harish Tandon,J.)