

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

ANTICIPATORY BAIL APPLICATION NO.913 OF 2022

PRADIP PRAKASH NIMBALKAR
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Applicant : Mr. Gade Akash D.
APP for Respondent-State : Ms. V. S. Choudhari.
Advocate for Complainant-Respondent No.2 : Mr. R. K. Ingole.
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CORAM : S. G. MEHARE, J.

**RESERVED ON : 21.09.2022
PRONOUNCED ON : 06.10.2022**

ORDER :-

1. The applicant is seeking anticipatory bail under Section 438 of the Criminal Procedure Code (in short, "Cr.PC.") for the offences punishable under Section 376(2)(n), 506 of the IPC read with Section 4 and 12 of the POCSO Act registered by Police Station Parali (City), District Beed, bearing FIR No.0059 of 2022.

2. The victim has alleged that the applicant is the nephew of her mother's friend. He went to her home four times. The accused told her "he liked her very much and wanted to marry her". They were talking on the phone. On 06.03.2022, her mother and her brother went to their native. The accused

called and told her he was coming to meet her. She told him not to come. She was alone at home, but the accused went to her home at 11.00 a.m. He asked her for sex. She said to get married first, but he pulled her close to him, pressed her chest and did forceful sex with her. He also threatened that if she disclosed the incident to anybody, he would kill her, her mother and her brother. She told the incident to her mother and brother in the evening. Since they were frightened, they did not lodge the report. However, she lodged the report on 08.04.2022.

3. The applicant has a case that he is pursuing his post-graduation and doing a part-time job. In 2020, his mother was searching for a bride for him through common relatives and mediators. They got the proposal of the victim through his relative. He received her biodata. In her biodata, her date of birth was 13.12.2002. It was written in her biodata that the victim had cleared her 11th standard. Accordingly, they got married on 10.01.2021. The applicant's mother bore the marriage expenses. The marriage of the applicant was never consummated. The applicant intended to educate the victim further. Therefore, he asked to persuade her to bring her school leaving certificate and other relevant documents from her

college. However, she avoided getting the certificates. Meantime, he learnt that she was not a major at the time of the marriage. The applicant also realized that they had been cheated. Since the marriage was not legal, the applicant decided to annul the marriage. The victim and her parents agreed to annul the marriage. However, suddenly, they refused. Since the applicant declined to cohabit due to fraud played with him, her mother brought 10 to 15 persons to his home, pelted stones, and damaged his two-wheeler. He lodged the report of the said incident. The Police captured photographs of the spot of the incident. The complainant and her relatives assaulted his relatives also. A crime has been registered on his paternal uncle's report against the mother and brother of the victim. Lastly, on 31.03.2022, the victim's mother executed a notarized agreement in favour of his mother. As per the said agreement, she received Rs.2,90,000/- cash and a golden chain of 15 grams from his mother. It was contended in the said agreement that their engagement had been cancelled. In the said agreement, it was contended that the applicant and victim had no physical relations. Despite the settlement, after a long gap, on 06.04.2022, the victim lodged a report to Police Station Parali (City) alleging that she was residing at Parali with her mother and brother, and her father was no more. It

was also alleged that one Meera, the friend of the victim's mother, went to her house with the applicant, due to which they got acquainted. In sum and substance, it is the case of the applicant that a fraud has been played with him hiding her date of birth. However, he did not cohabit and did sex with her. Since, he denied to cohabit with the victim, her family was angry and assaulted his family and relatives many times. He and his mother have been falsely implicated in the crime. No incident as such happened. Since the marriage was broken on 31.03.2022 itself, the applicant has no reason to meet the victim at her home. Nothing is to be recovered from him.

4. Learned counsel for the applicant has vehemently argued that the documents on record support the contention of the applicant that soon after realizing that the incorrect date of birth. He immediately decided to annul the marriage. He never had a sexual relationship with her. The victim and her family were annoyed and aggressive. Lastly, the mother of the victim and the applicant settled the dispute by agreement. The money and the golden ornaments were returned. Even then, a false report has been lodged against them. The applicant is now pursuing his education. He has a good future. But due to false

allegations, he may ruin his life. Hence, the application may be allowed.

5. Learned APP has vehemently opposed the application contending that the victim was a minor at the time of the incident. Therefore, sex done with her by the applicant is a sexual assault. He did repeated sex with her. Hence, Section 376(2)(n) would attract. The offence is grave. Thus, the applicant is not entitled to anticipatory bail.

6. Learned counsel appearing for the victim has argued that the victim was below 15 at the time of marriage. Therefore, the marriage was invalid. The applicant did forceful sex with her. Even in the worst case, her consent is immaterial, as she was below 18 years at the time of marriage. At the time of the marriage, the victim was below 15. In the facts and circumstances, section 376 (3) of IPC would apply to this case. In view of the facts, he raised an objection that the applicant is not entitled to anticipatory bail as barred under section 438 (4) of the Code of Criminal Procedure.

7. Learned counsel for the applicant has referred to the Maharashtra Amendment to Section 438 and vehemently argued that Sub Section (4) of Section 438 did not find a place

in the said amendment. Therefore, a bar inserted in Sub Section 4 of Section 438 would not come in the way. Besides this, learned counsel for the applicant relying on the case of *Dr. Subhash Kashinath Mahajan Vs. State of Maharashtra* reported in *(2018) 6 SCC 454* and *Rahna Jalal Vs. State of Kerala and another* reported in *(2021) 1 SCC 733*, has vehemently argued that there is no absolute bar in granting pre-arrest bail when no *prima facie* case is made out. Exclusion cannot be applied when mala fide version is put forward. Exclusion of the Court's jurisdiction is not to be read as absolute. Bar granting anticipatory bail will not apply when no *prima facie* case is made out. In the case of *Dr. Subhash Mahajan (supra)*, the crime was registered for the offences punishable under Section 319, 326 and 32 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 with Section 182, 192, 193, 203 and 219 read with Section 34 of the IPC were also applied. In the case of *Rahna Jalal (supra)*, the offence punishable under Section 7 of the Muslim Women (Protection of Rights on Marriage) Act 2019 was applied.

8. In both cases above, there was a bar granting anticipatory bail as provided in Section 438 of the Cr.P.C. The Hon'ble Supreme Court analyzed the relevant provisions of the

law barring the jurisdiction granting anticipatory bail and observed in the middle of the paragraph No.50 of the case of Subhash Mahajan (*supra*) that "if a person is able to show that, *prima facie*, he has not committed any atrocity against the member of S.C. or S.T. and that the allegation was mala fide and *prima facie* false and that *prima facie* no case was made out, we do not see any justification for applying Section 18 in such cases. Consistent with this view was taken in *Bolothia's* case, ***State of M.P. Vs. Ram Kishna Balothia*** reported in **(1995) 3 SCC 221**. It can indeed be said that innocent persons against whom there was no *prima facie* case or patently false case cannot be subjected to the same treatment as the persons who are *prima facie* perpetrators of the crime".

9. In the case of *Rahna Jalal (supra)*, the Hon'ble Supreme Court has observed in paragraph No.25 as follows :

"Thus, even in the context of legislation, such as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, where a bar is interposed by the provisions of Section 18 and Sub-section (2) of Section 18-A on the application of Section 438 of the CrPC, this Court has held that the bar will not apply where the complaint does not make out "a prima facie case" for the applicability of the provisions of the Act. A statutory exclusion of the right to access remedies for bail is construed strictly, for a purpose. Excluding access to bail as a remedy, impinges upon human liberty. Hence, the decision in Chauhan (supra) held that the exclusion will not be attracted where the

complaint does not prima facie indicate a case attracting the applicability of the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989."

10. After analyzing the provisions barring the jurisdiction of the Criminal Court granting anticipatory bail under Section 438 of Cr.P.C., the Hon'ble Supreme Court in both cases has laid the ratio where there is no *prima facie case* against the accused. The application under Section 438 of the Cr.P.C. can be entertained. The same rule of interpretation would be applied while considering the bar under sub-section (4) of Section 438 of Cr.P.C. in the cases where sections 376(3), or 376-AB, or 376-DA or 376-DB were applied.

11. The arguments of learned counsel for the applicant in section 438 Cr. P.C., substituted by the State of Maharashtra, sub-section (4) of Section 438 has been deleted, is concerned, the State of Maharashtra has substituted section 438 of Cr.P.C., for the State before the enactment of Cr.PCode (Amdt.) Act, 25 of 2005. Sub-section 4 to section 438 has been inserted by Act 22 of 2018, s. 22 (w.e.f. 21.04.2018). The law is settled that when a State law contradicts the Central Law on the same subject, the law passed by the Parliament prevails. Therefore, the arguments of the learned counsel for the applicant can be

declined for two reasons, firstly, the State amendment was prior to the insertion of sub-section (4) to section 438, and secondly, the State cannot amend the law contracting the law passed by the Parliament.

12. The applicant has a specific case that his marriage was not consummated. Besides the above, he also has a case that since the marriage was performed, sub-section (2)(n) and (4) of section 376 of IPC would not attract. He tried to convince the Court that the term 'same woman' in sub-section (2)(n) and 'woman' in sub-section (4) of section 376 of IPC is distinct from the term 'his own wife' provided in exception 2 of section 375 of IPC. The issue before the Hon'ble Supreme Court in the case of Independent thought v Union of India (2017) 10 SCC 800 was "whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is a rape? Considering exception 2 to section 375 of IPC, the Hon'ble Supreme Court has answered that Exception 2 to section 375 of the Indian Penal Code, 1860 (the IPC) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is a rape regardless whether she is married or not. The exception carved out in the IPC creates an unnecessary and artificial distinction between a married girl

and unmarried girl child and has no rational nexus with the objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and definitely not in the best interest of the child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in the international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice."

13. The law laid down in the above case has removed the confusion about the term 'women' and 'own wife' as well as the terms 'married and unmarried girl below the age of 18 years'. The protection has also been granted to a married girl below 18 years of age from non-consensual intercourse by her husband. In other words, married and unmarried girls below the age of 18 years have been brought to par.

14. The marriage of the applicant was performed on 10.01.2021. The applicant did not plead when he learnt first time that the victim was a minor. He barely contended in his application that when he asked her to pursue to get her college leaving certificate and Adhar card, she avoided on evasive grounds. He then contended in his application that on

28.03.2022, the mother of the victim with 10 to 15 persons came to his house and pelted stones on his house and damaged his two-wheeler. He did not contend when the victim left his home or how long she was in his house. In the same way, the victim also did not narrate in the FIR that before 06.3.2022 she was residing with the applicant. On the contrary, she narrated that when the applicant sought sex to her, she told him to marry her first. The agreement between the victim's mother and the applicant's mother shows a new story that the betrothal of the victim and applicant was done on 10.10.2021 at Ambejogai. As against this, the applicant has a case that he got married to the victim on 10.01.2021 at Ambejogai. If the applicant's case is accepted, then it must be presumed that after the marriage, the victim must have gone to his house and resided there for some days, and during those days, the applicant must have sexual intercourse with her. The victim was admittedly below 18 at the time of her marriage. Therefore, clause sixth to section 375 of IPC would attract and her consent becomes immaterial.

15. As far as the agreement between the victim's mother and the applicant's mother is concerned, it appears against the case of the applicant and the facts of the case. It does not bear the

consent of the victim. Hence, it cannot be considered at this juncture. As far as the medical report is concerned, though the Medical Officer has not given an opinion, the Court can read the clinical findings in medical examination report. The facts remain that the applicant did sexual intercourse with the victim for a considerable time. Therefore, no signs of fresh sexual intercourse would find in her medical examination. Another reason for no signs of fresh sexual intercourse is the victim was examined belatedly. The Medical Officer found the hymen ruptured, and the old healed hymenal tear was also found. At this juncture, it is a sufficient evidence to believe that the sexual intercourse was done with the victim girl. The defence that in her marriage biodata, her birth date was shown as 13.12.2002 is a matter of fact. Hence, it would be inappropriate to believe at this juncture that incorrect information was given in her marriage biodata. The birth certificate issued by the Birth and Death Registrar would prevail, in which the victim's birth date is 9.10.2007.

16. Bearing in mind the law laid down by the Hon'ble Supreme Court in the Independent thought case (supra), there is no distinction between unmarried and married girls below 18 years of age; sub-section (3) of section 376 of IPC may

attract. Hence, the bar provided under sub-section (4) of Section 438 of Cr.P.C. shall apply to this case.

17. The principle laid down in the case of *Subhash Mahajan's* case (supra) that exclusion of the Court's jurisdiction not to be read as absolute. Bar granting anticipatory bail will not apply when no *prima facie* case is made out, do not help the applicant, as this Court, after considering the facts of the case, is of the opinion that a *prima facie* case is made out against the applicant and there appears no mala fide in lodging the report.

18. For the above reasons, the application stands rejected.

19. Needless to state that the findings recorded in this order are restricted to the present application only.

(S. G. MEHARE, J.)

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vmk/-