

Court No. - 74

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438
CR.P.C. No. - 1135 of 2024

Applicant :- Krishna

Opposite Party :- State Of Up And 3 Others

Counsel for Applicant :- Intekhab Alam Khan, Vaibhav Shandilya

Counsel for Opposite Party :- Ajay Sengar, G.A.

Hon'ble Shekhar Kumar Yadav, J.

1. Heard Sri Vivek Shandilya, learned Senior counsel assisted by Mr Vaibhav Shandilya, learned counsel for the applicant, Mr Ajay Sengar, learned counsel for the informant, Mr R. K. Srivastava, learned counsel appearing for the State and perused the record.

2. The applicant seeks anticipatory bail in Complaint Case No. 03 of 2023, under Sections 363, 376(3) IPC and Section 3/4 of POCSO Act, 2012, P.S. Kuthaundh, District Jalaun, during the pendency of trial.

3. At the outset, learned AGA for the State raised preliminary objection that sub-section (4) of Section 438 of Cr.P.C, explicitly excludes the application of the provision relating to pre-arrest bail in relation to any case involving the arrest of any person on accusation of having committed an offence under subsection (3) of Section 376 IPC as such the application for pre-arrest bail is not maintainable.

4. Section 438 of the Cr.P.C. provides for issuing directions for granting bail to a person apprehending arrest. The amendment [Code of Criminal Procedure Amendment Act, 2018] introduced to Section 438 (4) reads as follows:

"438(4). Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code."

5. In reply to the said argument, learned counsel for the applicant has submitted that the new section (438 Cr.P.C.) inserted in the State of Uttar Pradesh vide Uttar Pradesh Act No. 4 of 2019, (assented by the President on June 1, 2019), does not exclude the person seeking pre-arrest bail for an offence committed under Section 376 (3) IPC. Section

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438(6) reads as follows:-

438 (6) Provision of this section shall not be applicable-

(a) to the offences arising out of,--

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

6. Learned counsel for the applicant has further drawn attention of the court towards Article 254(2) of the Constitution of India to contend that in case of repugnancy, if any, between the State Act and Central Legislation on a subject in the concurrent list, would stand cured if the State Act receives the assent of the President under Article 245(2) of the Constitution of India and such repugnancy cannot therefore be a ground to invalidate the State Act. It is further submitted that the whole purpose of the Article 254(2) is to protect the State enactment when it ran contrary to the central legislation. In support of his argument, learned counsel for the applicant has relied upon the cases of **Hoechst Pharmaceuticals Ltd Vs State of Bihar, 1983 4 SCC 45;** and **C.S. Gopalakrishnan Etc Vs The State of Tamil Nadu and others, 2023 LiveLaw (SC) 413.**

7. Article 254 of the Constitution of India provides for the method of resolving conflicts between a law made by Parliament and a law made by the Legislature of a State with respect to a matter falling in the Concurrent List and it reads:

"254 (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall if it has been reserved for the consideration of the President and has received his assent, prevail in that State.

Provided that nothing in this clause shall prevent Parliament from enacting at any

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time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

8. In the case of M. Karunanidhi VS Union of India, AIR 1979 SC 898, the Supreme Court has laid down certain guidelines with respect to matters in the concurrent list:

1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.

2. Where however a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with clause (2) of Article 254.

3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List trenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List an entrenchment, if any, is purely incidental or inconsequential.

4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254.

9. In the case of Hoechst Pharmaceuticals Ltd (supra), wherein under paragraph no. 66, it has been held as under:-

" Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Cl. (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in cl. (1), cl. (2) engrafts an exception, viz., that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to cl. (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as

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the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together."

10. Learned counsel for the applicant has, however, further contended that there is no absolute bar for the grant of bail, if a prima facie case of commission of the offences mentioned therein is not made out against the applicant. Reliance was placed on the three-Judge Bench decision of the Apex Court in **Prathvi Raj Chauhan v. Union of India and Others [(2020) 4 SCC 727]**.

11. Learned AGA has further drawn the attention of the Court to the Code of Criminal Procedure (Uttar Pradesh Amendment) Act, 2022, which aims to include offences under Protection of Children from Sexual Offences Act (POCSO) and offences relating to rape enumerated in Sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB, 376-E of the IPC in the exceptions to the provision of anticipatory bail. To the contrary, learned counsel for the applicant has submitted that the said bill is still pending for assent of the President and as such has no legal sanctity as yet.

12. In the light of the above quoted provisions and after having considered the arguments of the respective parties, the argument of the learned counsel for the applicant that the state amendment would prevail over the Central Act find force as there is no bar to exclude the application of the provision relating to pre-arrest bail in relation to any case involving the arrest of any person on accusation of having committed an offence under subsection (3) of Section 376 IPC in view of the amendment in the State of UP under Section 438 Cr.P.C. as amended vide UP Act No. 04 of 2019, as such the application for pre-arrest bail would be equally maintainable.

13. Moreover, it is no doubt true that the provision of pre-arrest bail enshrined in Section 438 of Cr.P.C. is conceptualised under Article 21 of the Constitution of India, which relates to personal liberty. The law presumes an accused to be innocent till his guilt is proven. As a presumably innocent person, he is entitled to all the fundamental rights, including the right to liberty guaranteed under Article 21 of the Constitution of India. In **Sushila Aggarwal v. State (NCT of Delhi) and Another (AIR 2020**

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SC 831), the Apex Court held that the provision for pre-arrest bail was specifically enacted as a measure of protection against arbitrary arrests and humiliation by the police, which Parliament itself recognised as a widespread malaise on the part of the police and inasmuch as the denial of bail would amount to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438 Cr.P.C.. In **Bhadresh Bipinbhai Sheth v. State of Gujarat (AIR 2015 SC 3090)**, the Apex Court held that the provision of pre-arrest bail enshrined in Section 438 of Cr.P.C calls for liberal interpretation in the light of Article 21 of the Constitution of India. In **Hema Mishra v. State of Uttar Pradesh and Others [(2014) 4 SCC 453]**, the Apex Court emphasised the mandate of a constitutional court to protect the liberty of a person from being put in jeopardy on account of baseless charges. It was held that a writ court is even empowered to grant pre-arrest bail despite a statutory bar imposed against the grant of such relief.

14. Now the merits of the case.

15. As per case of prosecution, on 14.10.2022, while minor daughter of the informant, who is said to be a student of high school, had gone to school at 8 in the morning, the applicant is said to have reached the college and seduced her daughter and took her to Som Plaza Guest house and kept her locked in a room for two hours and did wrong things by molesting the delicate parts of her body. It is also alleged that even prior to this, the applicant also molested her daughter many times and on complaint to applicant's family but of no avail.

16. Learned counsel for the applicant has contended that the applicant is innocent of the offences alleged against him and he has been falsely implicated in the case. The counsel further submitted that no materials are on record to connect the applicant with the alleged crime; hence, he is entitled to get pre-arrest bail. It is further submitted that in the present case, the FIR was filed by the informant in relation to the incident that happened with his minor daughter, in which the final report was presented in the court by the Investigating Officer at earlier point of time. It is further submitted that thereafter a protest petition was filed by the informant on which the order to register it as a complaint was passed on 20.06.2023. After this, the statement of the informant was

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recorded under Section 200 Cr.P.C. and his witnesses under Section 202 Cr.P.C. and on the basis of evidence, the applicant was summoned by the court in the said crime on 03.11.2023. It is further stated that thereafter the applicant approached this Court by filing application u/s 482 No. 43276 of 2023 to quash the said summoning order, which came to be disposed of vide order dated 16.12.2023 with a direction to the applicant to appear and apply for bail before the court below within three weeks.

17. It is further contended by learned counsel for the applicant that relying on the statement of the victim said to have been recorded under Sections 161 & 164 Cr.P.C. as well as the medical report, the incident was found to be untrue by the Investigating Officer and hence no offence under Section 376(3) IPC is made against the applicant. It is further submitted that the victim in her statement under Section 164 Cr.P.C. has not stated about rape but later on after nine months of the incident she has given her statement under Section 202 Cr.P.C. and changed her statement that she was raped by the applicant. The victim in her statement under Section 164 Cr.P.C. has herself admitted that she is 16 years of age and the applicant is aged about 17 years nine months. The applicant has no criminal history. It is further submitted that the entire allegation against the applicant is false and concocted. There is no credible evidence against him. The applicant undertakes to co-operate during proceedings before the Court below and trial and he would appear as and when required by the Court. It has been stated that in case, the applicant is granted anticipatory bail, he shall not misuse the liberty of bail and will co-operate during proceedings before the Court below and would obey all conditions of bail.

18. Learned counsel for the informant as well as learned AGA has opposed the prayer for bail and submitted that the evidence on record reveals that the accusation made against the applicant therein is very serious in nature.

19. On due consideration to the arguments advanced by learned counsel for the applicant as well as learned A.G.A. and considering the nature of accusations and antecedents of the applicant, the applicant is liable to be enlarged on anticipatory bail in view of the judgment of Supreme Court in the case of **Sushila Aggarwal Vs. State (NCT of Delhi), (2020) 5 SCC 1**. The future contingencies regarding the

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anticipatory bail being granted to applicant shall also be taken care of as per the aforesaid judgment of the Apex Court.

20. In view of the above, the anticipatory bail application of the applicants is allowed.

21. Let the accused-applicant- **Krishna** be released forthwith in the aforesaid complaint case on anticipatory bail till the conclusion of trial on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the trial court concerned with the following conditions:-

1. The applicant shall not leave India during the currency of trial without prior permission from the concerned trial Court.

2. The applicant shall surrender his passport, if any, to the concerned trial Court forthwith. His passport will remain in custody of the concerned trial Court.

3. That the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to the Court or to any police officer;

4. The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence and the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law to ensure presence of the applicants.

5. In case, the applicant misuses the liberty of bail, the trial Court concerned may take appropriate action in accordance with law and judgment of Apex Court in the case of Sushila Aggarwal and others Vs State (NCT of Delhi) and another, (2020) 5 SCC 1.

6. The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court default of this condition is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of his bail and proceed against them in accordance with law.

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7. The trial court would make every endeavor to conclude the trial of the case within a period of six months in accordance with law.

22. With the aforesaid directions, this application stands disposed of finally.

Order Date :- 13.5.2024

RavindraKSingh