

HIGH COURT OF ORISSA
Bench: Justice Sashikanta Mishra

Date of Decision: 25 January 2024

ABLAPL No. 50 of 2024
(Application under Section 438 of Cr.P.C.)

Dr. Satyendra Prakash Verma **Petitioner**

Versus

State of Odisha & another **Opp. Parties**

Legislation and Rules:

Sections 376(2)(n), 313, 506 of IPC, Section 6 of POCSO Act, Sections 3(1)(r), 3(1)(s), 3(2)(va) of the SC & ST (PA) Act, Section 438 of Cr.P.C., Section 18 and 18-A of SC & ST (PA) Act.

Subject: Application for anticipatory bail concerning a case under the POCSO Act, IPC, and SC & ST (PA) Act, involving the petitioner, a doctor, accused of facilitating the delivery of a child resulting from a criminal act.

Headnotes:

Apprehension of Arrest – Anticipatory Bail Application – Petitioner, a doctor, apprehending arrest in connection with a case under POCSO Act and other offences – Involved in facilitating delivery and allegedly taking care of an abandoned child – Application filed under Section 438 of Cr.P.C. for anticipatory bail [Para 1, 11-12].

FIR and Charges – FIR lodged against principal accused for offenses under IPC, POCSO Act, and SC & ST (PA) Act – Petitioner not named in FIR but emerged during investigation for his role in the delivery of a minor victim's child [Para 2].

Legal Objection on Maintainability – State's preliminary objection regarding maintainability of anticipatory bail under Section 438 of Cr.P.C., citing Sections 18 & 18-A of SC & ST (PA) Act – Argument that petitioner not implicated directly in FIR [Para 4].

Judicial Interpretation of Legal Provisions – Supreme Court and High Courts' rulings indicating that bar under Section 18 and 18-A of SC & ST (PA) Act does not apply if prima facie case under the Act is not made out – Application under Section 438 of Cr.P.C. considered maintainable in such situations [Paras 6-10].

Court's Observation on Petitioner's Involvement – No direct allegations against petitioner in FIR – Involvement limited to caring for abandoned child – Absence of prima facie case under SC & ST (PA) Act against petitioner [Para 11, 13].

Decision – Anticipatory bail application allowed – In case of arrest, petitioner to be released on terms deemed fit by arresting officer, including cooperation with investigation [Para 14].

Referred Cases:

- Ramesh Chandra Vaishya vs. State of Uttar Pradesh and Another, 2023 SCC OnLine SC 668
- Prathvi Raj Chauhan vs. Union of India and others, (2020) 4 SCC 727
- Dharani Pradhan v. State of Orissa, 2014(II) OLR 720
- S. Ariharan and Ors. Vs. The Inspector of Police, Thirumangalam, 2020 CriLJ1580

Representing Advocates:

**Ajay Kumar for petitioner
Vijay Kumar for respondents**

JUDGMENT

25th January, 2024

SASHIKANTA MISHRA, J.

The petitioner is apprehending arrest in connection with Bisra P.S. Case No. 180 of 2023 corresponding to G.R. Case No. 139 of 2023 pending in the Court of learned Addl. District Judge-cum-Special Court under the POCSO Act, Sundargarh.

2. The prosecution case, in brief, as per the FIR lodged by one 'X' (name withheld) before Bisra Police Station on 24.12.2023 is that she had been working as a maid in the house of one Sanjeet Mahato since 2 to 3 years. Said Sanjeet Mahato kept physical relationship with her on the assurance of marriage. When she became pregnant, Sanjeet asked her to abort the child. On such allegation, the FIR being lodged, Bisra P.S. Case No. 180 of 2023 was registered under Sections 376(2)(n)/313/506 of IPC, Section 6 of POCSO Act and Sections 3(1)(r)/3(1)(s)/3(2)(va) of the SC & ST (PA) Act. In course of investigation, it came to light that the victim 'X' was a minor girl at the time of the occurrence and belongs to the SC category, while the principal accused belongs to the general category. It was further revealed that after coming to know about the relationship, when the family members of the victim and the villagers prevailed upon Sanjeet Mahato to accept her as his wife, he took her to his house and resided with her but he conspired with the local pharmacist, namely, Sanat Kumar Mohanty and one Sanjay Kumar Panda, the Manager of the Nursing Home for termination of pregnancy of the victim.

Thereafter, he forcibly took the victim to the Nursing Home, got her admitted with the help of Sanjay Kumar Panda, who took Rs.50,000/- from Sanjeet Kumar Mahato for the purpose. The victim however gave birth to a premature baby girl. Sanjeet did not accept the new born child and left the clinic along with the victim falsely stating that the child was born dead. Subsequently, the accused Sanjeet handed over the new born baby to the present petitioner, who being the doctor had facilitated delivery of the child. The child was being looked after by him and on receiving information, the Chairman of Child Welfare Committee (CWC), Sundargarh rescued it from the possession of his wife.

3. Heard Mr. U.C. Jena, learned counsel for the petitioner and Mr. Sitikanta Mishra, learned Addl. Standing Counsel for the State.
4. A preliminary objection is raised by the State Counsel to the effect that one of the offences alleged being Section 3 of the SC & ST (PA) Act, the anticipatory bail application is not maintainable in view of the bar under Section 18 and 18-A of the said Act. He further submits that even otherwise, the petitioner has neither been named in the FIR nor implicated in the case in any manner and therefore, his apprehension of being arrested is not justified.
5. On the point of maintainability, Mr. U.C. Jena, learned counsel for the petitioner, has relied upon the decisions of the Supreme Court in the case **Ramesh Chandra Vaishya vs. State of Uttar Pradesh and Another**, reported in 2023 SCC OnLine SC 668; **Prathvi Raj Chauhan vs. Union of India and others**, reported in (2020) 4 SCC 727; and the decision of this Court in the case of **Dharani Pradhan v. State of Orissa**, reported in 2014(II) OLR 720. Mr. Jena has also relied upon a decision of the Madras High Court in the case of **S. Ariharan and Ors. vs. The Inspector of Police, Thirumangalam**, reported in 2020 CriLJ1580.
6. As regards the maintainability of the application under Section 438 of Cr.P.C., there is no dispute that Section 18 & 18-A of SC & ST (PA) Act place bar for entertaining application under Section 438 of Cr.P.C. The provisions are quoted hereinbelow for immediate reference.

“18- Section 438 of the Code not to apply to persons committing an offence under the Act.

Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.

18-A . No enquiry or approval required.-- (1)

For the purposes of this Act,--

a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or

(b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.

(2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court.”

7. Thus, ordinarily, an application under Section 438 of Cr.P.C. would not be maintainable where the offence under Section 3 of the SC & ST Act is involved. However, the provision has been interpreted by the Supreme Court to imply that the bar operates only when the offence under Section 3 of the SC & ST (PA) Act is, prima facie, made out but where opposite is the situation i.e., the offence under SC & ST (PA) Act is not, prima facie, made out, the bar in the provision under Section 18 and 18-A of the SC & ST (PA) Act would not operate. In the case of **Prathvi Raj Chauhan** (supra) it was held as follows:

“32. As far as the provision of Section 18-A and anticipatory bail is concerned, the judgment of Mishra, J. has stated that in cases where no prima facie materials exist warranting arrest in a complaint, the court has the inherent power to direct a pre-arrest bail.

33. while considering any application seeking pre-arrest bail, the High Court has to balance the two interests : i.e. that the power is not so used as to convert the jurisdiction into that under Section 438 of the Criminal Procedure Code, but that it is used sparingly and such orders made in very exceptional cases where no prima facie offence is made out as shown in the FIR, and further

also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law. I consider such stringent terms, otherwise contrary to the philosophy of bail, absolutely essential, because a liberal use of the power to grant pre-arrest bail would defeat the intention of Parliament.”

8. A coordinate Bench of this Court in the case of **Dharani Pradhan** (supra) held that merely because the case is registered under Section 3 of the SC & ST (PA) Act, there is no bar in entertaining an application under Section 438 of Cr.P.C. and that if the offence is, prima facie, not made out, the bar would not apply. Further, considering the facts of the case before it, the Coordinate Bench found a prima facie case not made out and therefore, entertained the application under Section 438 of Cr.P.C.
9. The Madras High Court in the case of **S. Ariharan** (Supra) referring to the provision under Section 18-A of the Act and the decision of the Supreme Court in the case of **Dr. Subhash Kashinath Mahajan v. State of Maharashtra**, (2018) 6 SCC 454 held that there is no absolute bar against grant of anticipatory bail in cases under SC & ST (PA) Act, if no prima facie case is made out.
10. Having regard to the principles laid down in the case laws discussed hereinbefore this Court is also of the same view that there is no absolute bar against grant of anticipatory bail in cases under the SC & ST (PA) Act particularly when, the offences alleged to have been committed under the said Act are, prima facie, not made out.
11. Coming to the facts of the case, this Court finds that the name of the petitioner does not find place in the FIR nor in forwarding report submitted by the I.O. in respect of the co-accused persons. The only thing that has surfaced during investigation is that the petitioner being the doctor had facilitated delivery of the child and when the co-accused abandoned it, he accepted the child and took it home. The child was also rescued by the Child Welfare Committee from his wife's custody. There is not a whisper of allegation against the petitioner by the informant-victim much less of commission of the offence under Section 3 of SC & ST (PA) Act.
12. This takes the Court to the next question as to if the apprehension of the petitioner of being arrested in connection with this case is justified. Undoubtedly, the informant victim has herself not made any allegation

whatsoever against the petitioner but fact remains, he was involved in delivery of the child and also of taking the allegedly abandoned child to his home. The child was also rescued from his wife's custody. Thus, there appears to be a slender link between him and the transaction in question, though not negatively. It is quite possible that police may subsequently take him to custody to elicit further information about the occurrence. To such extent therefore, it can be said that his apprehension is reasonable. It is a case of existence of possibility more than probability of the petitioner being arrested. Either way, it justifies his apprehension.

13. Even accepting that the petitioner is involved in the alleged occurrence, the offence under Section 3 of SC & ST (PA) Act is, prima facie, not made out. The allegation of commission of the offences are directed against the coaccused persons and the petitioner, if at all, may possibly be implicated with the aid of Section 120-B of IPC. It is not disputed that the petitioner is a doctor, which obviously places him in a respectable position in the society. From the facts unearthed during investigation so far, it appears that he had taken care of the abandoned child for some time. Therefore, taking into consideration all the above facts, this Court firstly, holds that the application under Section 438 of Cr.P.C is maintainable and secondly, the petitioner is entitled to the relief thereunder.
14. In the result, the application is allowed. It is directed that in the event of arrest, the petitioner shall be released by the arresting officer on such terms and conditions as he may deem fit and proper to impose including the condition that he shall render necessary cooperation as and when required by the I.O.

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