R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 16th DAY OF JUNE, 2021

BEFORE

THE HON'BLE MR. JUSTICE K.NATARAJAN

CRIMINAL PETITION NO.1173 OF 2021

BETWEEN

MR. RAHUL @ NAYAZ PASHA
S/O. CHOTU SAB,
AGED ABOUT 24 YEARS,
RESIDENT OF 11TH CROSS,
CHAMUNDESHWARI EXTENSION,
GANDHINAGAR, TIPTUR TOWN,
TIPTUR TALUK,
TUMAKURU DISTRICT – 572 106.

... PETITIONER

(BY SRI M.S. VENUGOPAL, ADVOCATE)

AND

1. STATE OF KARNATAKA
REPRESENTED BY TIPTUR TOWN POLICE,
TIPTUR TOWN, TUMAKURU DISTRICT,
REPRESENTED BY STATE PUBLIC PROSECUTOR,
HIGH COURT OF KARNATAKA,
BENGALURU – 560 001.

2. MRS. SHAHINABANU
W/O. ABDULKUDDUS,
AGED ABOUT 40 YEARS,
RESIDENT OF 11TH CROSS,
CHAMUNDESHWARI EXTENSION,
GANDHINAGAR, TIPTUR TOWN,
TIPTUR TALUK,
TUMAKURU DISTRICT – 572 106.

... RESPONDENTS

(BY SRI K. NAGESHWARAPPA, HCGP for R-1;
SRI SHARAN N. MAJAGE, ADVOCATE for R-2.)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 439 OF THE CODE OF CRIMINAL PROCEDURE, PRAYING TO ENLARGE THE PETITIONER ON BAIL IN CRIME No.126/2020 OF TIPTUR TOWN POLICE STATION, TUMKURU DISTRICT FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 363, 343, 114, 506 AND 376 READ WITH SECTION 34 OF THE INDIAN PENAL CODE AND SECTIONS 4, 17 AND 18 OF THE POCSO ACT AND SECTIONS 9 AND 10 OF THE CHILD MARRIAGE ACT.

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 11.06.2021 AND COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

This petition is filed by the petitioner-accused No.1 under Section 439 of Cr.P.C., for granting regular bail in Crime No.126/2020 registered by Tiptur Town Police for the offences punishable under Sections 363, 342, 114, 506, 376 read with Section 34 of IPC, Sections 4, 6, 17, 18 of the Protection of Children from Sexual Offences Act and Sections 9 and 10 of the Child Marriage Restraint Act.

2. Heard learned counsel for the petitioner as well as the learned High Court Government Pleader for respondent No.1.

3. The case of the prosecution is that on the complaint of one Shahinabanu, the mother of the victim, filed a complaint to the Police on 05.10.2020 alleging that her daughter, the victim girl, aged about 15 years was abducted by petitioner-accused No.1. The petitioner being the neighbour used to speak with her daughter whenever she goes to her tailoring class. That on 27.09.2020 at about 11.00 p.m., her daughter was sitting by holding the mobile phone. Thereafter from 28.09.2020, she was missing from the house. Then she searched for her daughter, but could not find her anywhere. On 03.10.2020, at about 2.00 p.m., the victim girl came back by weeping. When she enquired her, the victim informed her mother that on 27.09.2020, when she was sitting with her mobile phone, the petitioner forcibly abducted her by gagging her with napkin and took her in his Goods Vehicle 407 to his relative's house, kept her for three days and not allowed her to talk with anybody. He has also threatened her. Later, in the night hours, the petitioner took her to a lonely place and obtained her signature. Thereafter, on

01.10.2020, at about 12.00 p.m., the wife of the accused took the victim and left her in a house where the petitioner is said to have sexually assaulted her. On 03.10.2020, at about 5.00 p.m., the victim escaped from the custody of the petitioner. After registering the case, the Police arrested the petitioner and remanded him to judicial custody. Therefore, the petitioner approached the Sessions Judge for bail, which came to be rejected. Hence, the petitioner is before this Court.

4. Learned counsel for the petitioner contended that the petitioner and the victim fell in love with each other. Both of them eloped and married in the presence of Mutavali and the marriage is a registered marriage. A copy of the marriage certificate is also produced. Though the petitioner is a married man, accused No.2 is the wife of the petitioner and the victim is presently residing in the house of the petitioner-accused No.1. Learned counsel for the petitioner further submits that the medical records reveal that there is no sexual assault on the victim. She has

given history to the doctor that she has not stated anything about the sexual assault. Therefore, he contended that the petitioner-accused No.1 is entitled for bail.

5. Learned High Court Government Pleader seriously objected the bail petition.

6. Notice was served to respondent No.2, the complainant. Respondent No.2 appeared through the advocate. He has filed the affidavit of the victim showing the age of the victim as 17 years and the victim has stated that she has married the accused on 01.10.2020 and her mother was not happy with the marriage and without her consent, she went along with the petitioner-accused. Therefore, she prayed for allowing the bail petition.

7. Upon hearing the arguments and perusal of the records reveal that admittedly the age of the victim is 15 years as on the date of the incident as her date of birth is 27.09.2005. It is also pertinent to note that accused No.2

is none other than the wife of the petitioner. She is also involved by abetting accused No.1 while committing the offence. The marriage certificate is said to be issued by some Mosque by its Secretary or Mutavali, wherein the signature of the victim was obtained and the marriage was performed showing the age of the victim as 19 years. By suppressing the fact that the victim is a minor girl, the petitioner along with the other accused took the victim minor girl and performed the marriage in the presence of Mutavali or mosque people. In the complaint given by respondent No.2, the mother of the victim, she has categorically stated that she was found missing from the house and later, on 03.10.2020, the victim came back. On enquiry, the victim revealed the fact of abduction and committing rape on her. Of course, the statement of the victim reveals that she herself voluntarily went and married the accused as per their customs on 01.10.2020 and she is residing in her matrimonial home. The age of the victim is 15 years and her consent is immaterial. Though the second marriage is permissible under the

Mohammedan Law, but the personal law cannot override the Special Law of POCSO, Child Marriage Restraints Act and General Penal Code of this Country. Merely the parties are Mohammedan that does not mean that the petitioner-accused No.1 has right to marry a minor girl by enticing and abducting her. The consent or will of the victim minor girl is immaterial and even if she has voluntarily went with the accused, that amounts to abduction or kidnapping under Section 363 of IPC. The accused not only abducted the victim minor girl aged about 15 years, he got married her which attracts Sections 9 and 10 of the Child Marriage Restraint Act. Apart from that, he has sexually assaulted her which also attracts Sections 4 and 6 of POCSO Act.

8. Learned counsel for the petitioner though contended that the medical certificate does not reveal sexual assault, but on perusal of the medical records of the victim, she has refused to allow the doctor for doing physical examination on her private parts. The doctor has

categorically stated that the victim initially gave consent for examination, but she was not co-operative for internal examination. The opinion of the FSL is still awaited. There may be little contradiction in her statement under Sections 161 and 164 of Cr.P.C., but as held above, the age of the victim being 15 years, her capacity of understanding cannot be on par with an adult person who has completed 18 years. Therefore, even otherwise, if she has given consent for abduction or marriage or sexual intercourse, her consent is immaterial as she was minor and even notice was issued to respondent No.2, the complainant and the *de facto* complainant appeared through an advocate and produced the affidavit of the victim stating that the victim herself went along with the accused and got married and she is residing in the house of the petitioner-accused. That cannot be taken as her consent for granting bail. Even if the victim stated 'no objection', but as she is a minor girl, it cannot be considered as a valid 'no objection' as it is against the law. It appears that the accused and the relatives of the accused were putting fear on the victim

and her family and they might have obtained the consent of 'no objection' by fear. Therefore, I am of the view that even if the victim says 'no objection' for grant of bail, her consent is immaterial to the Court for considering the bail petition of the petitioner-accused No.1 who is a married person and abducted the minor girl said to be married and committed rape on her. Apart from that, the victim has made her statement under Section 164 of Cr.P.C., she has categorically stated they threatened her to marry the accused and taken her to his first wife's house (accused No.2's house) and there the accused had sexual intercourse. Section 164 of Cr.P.C. is foremost important for considering the bail petition of the accused. Even if the minor girl gives 'no objection' to release the accused in an heinous crime like rape on a minor girl and granting bail to the accused is nothing but giving license to the offender to commit similar offences which would dilute the Special Act enacted by the Parliament for protecting the children from sexual offences and also deviating the provisions of Sections 9 and 10 of Child Marriage Restraint Act apart

from the provisions of Section 375 of IPC and it will send a wrong message to the Society. Therefore, in the interest of public at large and with an intention to curtail such type of sexual offences, the Court shall ignore the consent of a minor girl giving 'no objection' for granting bail to the accused and the Court should deal with such an heinous offence with an iron hand.

9. The Hon'ble Supreme Court also in a similar circumstance in the case of ***Satish Kumar Jayanti Lal Dabgar –vs- State of Gujarat*** reported in ***(2015) 7 SCC 359,*** has held as under;

> ***"A.*** *Penal code, 1860 – Ss.375 Sixthly and 376 – Rape of minor below 16 yrs – Irrelevance of consent*
>
> *-Held, if S.375 Sixthly gets attracted, it makes consent of prosecutrix to sexual intercourse immaterial and inconsequential – Legislature has introduced aforesaid provision with sound rationale and an important objective behind it is that a minor*

is incapable of thinking rationally and giving any consent – Whether it is civil law or criminal law, consent of a minor is not treated as valid consent – A girl child who is not only minor but less than 16 yrs of age can be easily lured into giving consent for such an act without understanding implications thereof – Such consent, is treated as not informed consent given after understanding pros and cons as well as consequences of intended action – Therefore duty is cast on other person in not taking advantage of so-called consent given by such a minor girl, and the other partner in such sexual act is treated as a criminal who has committed rape – The law leaves no choice to him to plead that the act was consensual – So-called consent of prosecutrix below 16 yrs of age cannot be treated as mitigating circumstance – In a heinous and abhorrent crime of sexual assault if consent of minor is treated as mitigating circumstance, it may lead to disastrous consequences particularly in view of Protection of Children from Sexual Offences Act,

2012 – Protection of Children from Sexual Offences ACT, 2012, SS. 2, 4, 6, 8 and 10."

10. In view of the principle laid down by the Hon'ble Supreme Court and looking to the facts and circumstances, I am of the view that the petitioner-accused No.1 is not entitled for bail and the criminal petition deserves to be dismissed.

Accordingly, the criminal petition is dismissed.

Sd/-
JUDGE

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