

A.F.R.

Reserved on 03.01.2023

Delivered on 09.02.2023

Court No. - 85

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 11542 of 2022

Applicant :- Minor 'X' Through His Guardian/Father, District Prayagraj

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Rakesh Pathak, Shashank Shekhar Tiwari

Counsel for Opposite Party :- G.A., Prem Shankar Pandey

Hon'ble Mrs. Jyotsna Sharma, J.

1. It appears that name of the applicant-jvenile has been disclosed in the memo of revision. This fault from the side of applicant escaped detection by the Registry. The concerned section of Registry is directed to remove the name of the applicant-minor from the title of the revision as fed and shown in the data on official website and represent him as "**Minor 'X' Through His Guardian/Father, District Prayagraj.**"

2. Heard Sri Rakesh Pathak, learned counsel for the applicant and Sri O.P. Mishra, learned AGA for the State on the point of maintainability of this anticipatory bail application.

3. The present application has been filed on behalf of minor 'X' through his guardian/father seeking anticipatory bail in F.I.R./Case Crime No. 0362 of 2022, under Sections 307, 504 and 506 IPC, Police Station Karchhana, District Prayagraj.

4. It is contended on behalf of the applicant (who admittedly is a minor) that a minor cannot be deprived of protection available under Section 438 Cr.P.C. just because he is not an adult. The contention is ardently opposed by the State.

5. Before coming into effect of the Juvenile Justice (Care and Protection of Children) Act, 2015, the Juvenile Justice (Care and Protection of Children) Act, 2000 was applicable. In the statement of objects and reasons for enactment of the new Act of 2015, it is mentioned that numerous changes were required in the existing Act of 2000 to address several issues. It was proposed that the existing Act of 2000 shall be repealed as the need for **comprehensive legislation** was felt intensely inter alia to provide for general principles of care and protection; the procedure to be applied; rehabilitation and social re-integration measures for such children, adoption of orphan, abandoned and surrendered children, and offences committed against children. It was expected that the legislation would thus ensure proper care, protection, development, treatment and social re-integration of children in difficult circumstance by adopting a child-friendly approach keeping

in view the best interest of the child. *The statement of objects and reasons clearly indicate that the legislature intended to provide for exhaustive statutory provisions to deal with children involved in offences with certain far reaching object in mind while carefully treading a path illuminated by the principle of best interest of the child.*

6. Section 1(4) of the Juvenile Justice Act, 2015 contains a non-obstante clause and is being reproduced for ready reference as below:-

“(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters 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.”

Besides using the phrase "Notwithstanding anything contained in any other law", Section 1 (4) uses two more phrases which are meaningful in present context. They are “**all matters**” concerning the child in conflict with law and secondly the word “including” apprehension, detention, prosecution, penalty or imprisonment rehabilitation and social investigation of children in conflict with law. The provisions are clear, plain and free from obscurity. **The unmistakable conclusion which can be drawn is that this Act seeks to deal exhaustively with all matters concerning child offenders including their apprehension, detention and prosecution.** No doubt the broader objective of the Act is to bring back the child in main stream of the society while applying a reformative approach without forgetting the need to balance the demands of justice of the victim and the society at large. Lets briefly see how this objective is sought to be achieved by this Act.

7. Before jumping to any conclusion, it shall be useful to go through some provisions of this enactment which will shed light on the line of difference which has been scrupulously maintained by the legislature while giving a final shape to this law as compared to the provisions of Cr.P.C.

8. It may be noted that Section 4(2) of the Cr.P.C. says that all the offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions of Cr.P.C., but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. On the basis of above provisions, it can be said that the provisions of Cr.P.C. shall apply only where the special enactment is silent on a particular issue.

9. Now a question arises whether the applicability of Section 438 Cr.P.C. is ruled out by implication or otherwise in cases where the Juvenile Justice Act, 2015 is applicable?

First lets go through Section 438(1) Cr.P.C. which is as below:-

"Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:-

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application"

Section 438 Cr.P.C. speaks of "apprehension of arrest".

10. Chapter V of the Cr.P.C. deals with the arrest of persons. There are number of provisions from Sections 41 to 60(A) dealing with arrest, who may arrest; how an arrest can be affected; the matters incidental thereto. The provisions of Juvenile Justice Act consciously, conspicuously and deliberately avoided the use of word "**arrest**", instead the word "**apprehension**" has been used in relation to a child in conflict with law. And this replacement is not without reason.

11. **Chapter IV of the Juvenile Justice Act, 2015** deals with the procedure in relation to child in conflict with law; this Chapter also contains most important **Section 10 to Section 12** which inter-alia provide for "**first appearance**" before the Board (this word is being used in its comprehensive sense here).

Sections 10, 11 and 12 of the Juvenile Justice Act, 2015 are being reproduced herein below to give a clearer picture which has been envisaged in the Act in relation to children in conflict with law.

"Section 10. Apprehension of child alleged to be in conflict with law. (1) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:

Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lockup or lodged in a jail.

(2) The State Government shall make rules consistent with this Act,—

(i) to provide for persons through whom (including registered voluntary or non-governmental organisations) any child alleged to be in conflict with law may be produced before the Board;

(ii) to provide for the manner in which the child alleged to be in conflict with law may be sent to an observation home or place of safety, as the case may be.

Section 11. Role of person in whose charge child in conflict with law is placed. Any person in whose charge a child in conflict with law is placed, shall while the order is in force, have responsibility of the said child, as if the said person was the child's parent and responsible for the child's maintenance:

Provided that the child shall continue in such person's charge for the period stated by the Board, notwithstanding that the said child is claimed by the parents or any other person except when the Board is of the opinion that the parent or any other person are fit to exercise charge over such child.

Section 12. Bail to a person who is apparently a child alleged to be in conflict with law- (1) When any person, who is apparently a child and is alleged to have committed an available or non-available offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home [or a place of safety, as the case may be] in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail."

It is conspicuous that just after apprehension, he shall be put either in observation home or place of safety and neither in jail nor lockup and shall be treated with care.

This too is quite clear that this Chapter of the Act of 2015 contains all the provisions right from apprehension of child alleged to be in conflict with law; ● appearance of such child before the Board; ● grant of bail to him; ● how to deal with a child when bail is not granted; ● where to place the child allegedly in conflict with law before his production (without apprehension) or production after apprehension before the Board; ● before grant of bail or after grant of bail; ● the holding of an inquiry (which commences from the very first production before the Board under Section 14); ● the manner and the time limit for completion of an inquiry; ● the orders which may be passed against him; the orders which cannot be passed against him; ● the places where he can be detained; ● and several other matters in relation to all the above. The word arrest is conspicuous by its absence.

12. It is quite apparent from reading of Section 8(1) of the Juvenile Justice Act 2015 that the Juvenile Justice Board has been given exclusive power to deal with all the proceedings under the Act relating to children in conflict with law.

Section 8(1) of Juvenile Justice Act is as below:-

“Notwithstanding anything contained in any other law for the time being in force but save as otherwise expressly provided in this Act, the Board constituted for any district shall have the power to deal exclusively with all the proceedings under this Act, relating to children in conflict with law, in the area of jurisdiction of such Board.”

Section 8(2) of Juvenile Justice Act is as below:-

“The powers conferred on the Board by or under this Act may also be exercised by the High Court and the Children’s Court, when the proceedings come before them under section 19 or in appeal, revision or otherwise.”

On the one hand the powers given to the Board are exclusive unless saved by any express provisions in the Juvenile Justice Act, 2015 itself. On the other hand no window appears to have been left open for meddling with the affairs of juvenile offenders in terms of provisions of Section 438 Cr.P.C. The Juvenile Justice Act has nowhere said that Section 438 Cr.P.C. shall have application to the children in conflict with law. Though Section 8(2) of the Juvenile Justice Act gives similar powers to the High Court or the Children Court but only when matter is brought before it in appeal or revision or otherwise. There is no express provision empowering Children Court or Sessions Court or High Court to assume jurisdiction on itself for grant of anticipatory bail by virtue of provisions of Section 8(2) of the Juvenile Justice Act.

13. Under the scheme of adjudicating hierarchy under the Juvenile Justice Act, 2015 the Board functions as court of original jurisdiction, the Children Court functions at intermediary level and in certain cases also as a trial Court (for children who are tried as adult). The appeals shall ordinarily lie to Children Court (Section 101) and the revision to High Court (Section 102). It may also be usefully noticed that the Children’s Court here is not equal to a Sessions Court or vice versa. The Children Court has been defined under Section 2(20) of the Juvenile Justice Act as a Court established under the Commissions for Protection Of Child Right’s Act, 2005 or a Special Court under the POCSO Act, 2012 and where there are no such Courts, then only the Court of Sessions. While the powers under Section 438 Cr.P.C. are available to the High Court or to the Court of Sessions only. It does not stand to reason to assume that powers under Section 438 Cr.P.C. shall be exercisable by Children Court (or shall be exercisable by the Sessions Court) in relation to children in conflict with law just because the Section 438 Cr.P.C. mentions Sessions Court. If such an interpretation is done, it shall disturb the whole of the scheme of the ‘Courts’ in Juvenile Justice Act, 2015.

14(i). It may further be noted that while an adult can ordinarily be arrested for every offence which is cognizable by the police but in case of child in conflict with law, he cannot ordinarily be apprehended/arrested in a cognizable cases. It will be the narrowest interpretation possible to say that legislature replaced the word ‘arrest’

with ‘apprehension’ merely to sound child friendly. This replacement is purposeful in line with the objectives of the Act.

14(ii). The reasons/grounds enabling arrest of child offender as provided in Juvenile Justice Act, 2015 are qualitatively different from reasons/grounds of arrest of adults and a paradigm shift is quite discernible. It may simultaneously be noted that there is an express bar against registration of even an FIR except where the case is of heinous nature or where it is alleged to have been committed jointly with adults. Rule 8 of the Juvenile Justice (Care and Protection) Model Rules, 2016 speaks of registration of FIR and also of apprehension:-

“8. Pre-Production action of Police and other Agencies.- (1) No First Information Report shall be registered except where a heinous offence is alleged to have been committed by the child, or when such offence is alleged to have been committed jointly with adults. In all other matters, the Special Juvenile Police Unit or the Child Welfare Police Officer shall record the information regarding the offence alleged to have been committed by the child in the general daily diary followed by a social background report of the child in Form 1 and circumstances under which the child was apprehended, wherever applicable, and forward it to the Board before the first hearing:

Provided that the power to apprehend shall only be exercised with regard to heinous offences, unless it is in the best interest of the child. For all other cases involving petty and serious offences and cases where apprehending the child is not necessary in the interest of the child, the police or Special Juvenile Police Unit or Child Welfare Police Officer shall forward the information regarding the nature of offence alleged to be committed by the child along with his social background report in Form 1 to the Board and intimate the parents or guardian of the child as to when the child is to be produced for hearing before the Board.

(2).....

(3).....

(4).....

(5).....

(6).....

(7).....

(8).....

(9).....

14(iii). The reasons/cause of arrest/apprehension may not have much to do with the nature of the offence. The line of difference maintained between cognizable and non-cognizable offence is some what blurred in case of juveniles. He/she can only be apprehended (arrested) where offence is heinous in nature or where such a step is necessary for best interest of the child. The proviso to Section 8(1) thereafter adds a provision about apprehension in petty offences and serious offences. There is clear implication that power of apprehension is to be exercised in suitable cases only irrespective of its cognizability and rather it shall depend on other considerations. And in my view if we try to induct this provisions of Section 438 Cr.P.C. in the scheme of things, it will be akin to forgetting correct path before reaching the destination.

15(i). An FIR cannot be registered where offence fell in the category of petty or serious offence. Here no distinction has been maintained on the lines as provided in Cr.P.C. The provisions do not say that FIR can be registered if the offence is cognizable. Moreover as discussed

earlier a child allegedly in conflict with law cannot be apprehended unless it is in the best interest of the child or in a cases of heinous offence. He cannot ordinarily be legally apprehended in a case of petty and serious offence.

15(ii). Where the powers of apprehension are legally exercisable, the child is to be placed under the charge of the Special Juvenile Police Unit or the Child Welfare Police Officer. In no case the child can be lodged in a police lockup. Even before production of the child before the Board, if required, he shall be kept in an observation home not in a lockup. He cannot be hand-cuffed, chained or otherwise fettered. Even the Child Welfare Police Officer is required to be in plain clothes and not in uniform.

15(iii). All the provisions referred to above clearly point out that though there is some commonality between the term arrest and apprehension, however a milder term of apprehension has been preferred over the other to clinch the idea behind enactment of this special law and to bring home the essential difference with the term arrest in the sense used in other statutes. To summarise ordinary implications of an 'arrest' are missing. The custody of a juvenile is not punitive in nature and is a protective one.

15(iv). Rule 9 of the Model Rules, 2016 becomes applicable only when a child in conflict with law is apprehended. When such apprehended child is produced before the Board, the Board may send him to an observation home or a place of safety or a fit facility or a fit person. He cannot be sent to jail.

16. After noting down the above provision, I come back to Section 12 of the Juvenile Justice Act, 2015. (It has been reproduced in Para-10).

As is very clear from the language of Section 12 that no distinction has been maintained for applicability of provisions of bail on the lines as has been maintained under the provision of Section 436 to 439 of Cr.P.C.; Section 12 of the Juvenile Justice Act, 2015 is equally applicable to bailable and non-bailable offences. Secondly, this provision of law speaks of three situations which are as below:-

(i) where a child allegedly in conflict with law is apprehended and detained by the police;

(ii) where he appears (definitely such a situations arises when he is not apprehended and the information is sent to his/her guardian for appearing before the Board as per proviso to Rule 8(1) of the Model Rules, 2016); and

(iii) when he brought before the Board (that situation arises when he has been put in charge of the Child Welfare Police Officer or the Special Juvenile Police Unit).

Section 12 again uses phrase in middle of sub-section (1) which says that 'Notwithstanding anything contained in the Code of Criminal Procedure, 1973 for the time being in force' be released on bail with or without surety or placed under the supervision of a probation officer or

under the care of any fit person. The natural and literal meaning of this provision indicate that notwithstanding with the category of offences for which the child in conflict with law has been produced or brought before or appeared before the Board, he may be released on bail or he may not be so released and placed under the supervision of a probationary officer or under the care of any fit person. When he is not being released, he can only be kept in an observation home or a place of safety. The provisions as discussed above are fundamentally different from the provisions of bail under Cr.P.C. **The apprehension of arrest which is a necessary pre-requisite for applicability of Section 438 Cr.P.C. is altogether out of place in cases of juveniles.** In my view the word "arrest" is not replaceable by the word "apprehension" in the sense used under the provisions of the Juvenile Justice Act.

17. In my firm view, a distinct and special procedure with regard to a child offender has been put in place in the Juvenile Justice Act, 2015 so as to comprehensively deal with all the aspects which may arise where a criminal case, whether initiated by filing of FIR or not begins. There are many indicators which rule out forming of a view or an opinion that provisions of anticipatory bail shall apply to protect the liberty of a juvenile. The Act has a scheme which deals with such juveniles at pre-production and post-production stages. Some of the points have already been dealt with and some more points can be added. The factors which ought to be taken into consideration while dealing with the release of a child on bail, expressly include the likelihood of his coming into association with known criminals, likelihood of his exposure to physical, moral or psychological danger or otherwise defeating the ends of justice. Above factors are enough to deduce that the provisions of Section 12 have been enacted keeping in mind the best interest of a child. It may be noted that there may be circumstances where keeping a child in a child care institution may be the best option to serve the best interest of a child, a principle which finds place in the opening of this Act under Section 3. Chapter II of Section 3 enumerates 16 principles which are necessarily to be kept in mind by the Central Government or the State Government and other agencies, as the case may be including the Board while implementing the provisions of this Act. These principles, very importantly include the principle of safety which says that all measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter. In my view, a holistic machinery of law has been put in place to deal with the child in conflict with law. By implication, such gaps, if any, need to be excluded where a child can be dealt with under regular law of procedure. In case, the provisions of Section 438 Cr.P.C.

are allowed to hold field in the matters of juvenile, the aim and object of the Act shall be defeated. The interpretation of law cannot be devised in a way, so as to put a hurdle in the broader and solemn aim which is sought to be achieved by this enactment.

18. The applicant, while stressing the point of maintainability of this anticipatory bail application has placed before me, the judgment of High Court of Bombay, Aurangabad Bench given in ***Raman and Others vs. State of Maharashtra and Another; 2022 SCC OnLine Bom 1470*** in which the question of maintainability was considered and was answered by the Division Bench as below:-

“A ‘child’ and a “child in conflict with law” as defined under the Juvenile Justice (Care and Protection of Children) Act, 2015 can file an application under Section 438 of the Code of Criminal Procedure, 1973.”

19. In view of the discussion above, I respectfully disagree with the opinion of High Court of Bombay. My opinion finds ample support from the judgment of Allahabad High Court in ***Shahaab Ali and Another vs. State of U.P.; 2020 (2) ADJ 130***. I am of the firm view that the Juvenile Justice Act is a comprehensive legislation containing all provisions with regard to children in conflict with law and that the provisions of Section 438 Cr.P.C. have no application being extraneous and incompatible with the scheme as well as aim and objective sought to be achieved by the Act.

20. The anticipatory bail application is **dismissed as not maintainable.**

Order Date :- 9.2.2023

#Vikram/-

Note- Copy of the order be sent to concerned Section of the Registry for immediate compliance of direction given in Para-1 of the order.