

**Court No. - 70**

**Case :- APPLICATION U/S 482 No. - 3074 of 2025**

**Applicant :- Amit Nishad**

**Opposite Party :- State Of U.P. And 3 Others**

**Counsel for Applicant :- Vinay Kumar Mishra**

**Counsel for Opposite Party :- Akash Kumar Nishad,G.A.**

**Hon'ble Rajeev Misra,J.**

1. Heard Mr. Ashutosh Kumar Shukla, Advocate holding brief of Mr. Vinay Kumar Mishra, the learned counsel for applicant, the learned A.G.A. for State-opposite party-1 and Mr. Subhash Chandra Pandey, Advocate holding brief of Mr. Akash Kumar Nishad, the learned counsel representing first informant opposite party 2.

2. Perused the record.

3. By means of this application under Section 528 BNSS applicant-Amit Nishad, who is a charge sheeted accused and facing trial before Court below, has approached this Court with the following prayer:-

*"It is, therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to allow this application and quash the charge sheet 24.09.2023 and cognizance/summoning order dated 03.11.2023 as well as entire proceedings of S.T. No.2641 of 2023 (State Vs. Amit Nishad) arising out of Case Crime No.702/2022, under Sections 363, 366, 368, 376 I.P.C. & Section 3/4 POCSO Act, Police Station Barhalganj, District Gorakhpur, pending before the learned Special Judge/POCSO Act Court No.1, Gorakhpur.*

*"It is, further prayed that this Hon'ble Court may kindly be pleased to stay the further proceeding of S.T. No.2641 of 2023 (State Vs. Amit Nishad), arising out of Case Crime No.702/2022, under Sections 363, 366, 368, 376 I.P.C. & Section 3/4 POCSO Act, Police Station Barhalganj, District Gorakhpur pending before the learned Special Judge/POCSO Act Court No.1, Gorakhpur during pendency of this application before this Hon'ble Court. And/or to pass such further and suitable order as this Hon'ble Court may deem fit and proper under the fact and circumstances of the case."*

4. At the very outset, the learned counsel for applicant submits that primarily the ground urged in support of the present application has been taken note of by this Court while considering the bail application of applicant. For ready reference the order dated 30.11.2023 passed by this Court in Crl. Misc. Bail Application

No.48432 of 2023 (Amit Sahni Vs. State of U.P. and 3 Others) is reproduced herein under :-

*"Supplementary affidavit filed by the learned counsel for applicant in Court today is taken on record.  
Heard Mr. Surendra Mohan Mishra, Advocate holding brief of Mr. Vinay Kumar Mishra, the learned counsel for applicant and the learned A.G.A. for State.*

*This application for bail has been filed by applicant Amit Sahni seeking his enlargement on bail in Case Crime No.702 of 2022, under Sections 363, 366, 376, 368 IPC and Section 3/4 Pocs0 Act, police station Badhalganj, district Gorakhpur, during the pendency of trial.*

*At the very outset, learned A.G.A. submits that notice of present application for bail has been served upon first informant-opposite party-2 on 27.10.2023. However, in spite of service of notice, no one has put in appearance on behalf of first informant-opposite party-2 to oppose this application for bail.*

*Perused the record.*

*Record shows that in respect of an incident which is alleged to have occurred on 27.12.2022, a delayed first information report dated 29.12.2022 was lodged by first informant-Preeti Devi (mother of the prosecutrix) and was registered as Case Crime No.0702 of 2022, under Section 363 IPC, police station Badhalganj, district Gorakhpur. In the aforesaid F.I.R., three persons, namely, Amit Sahni (applicant herein); Roshan Kannaujia and Aditya have been nominated as named accused.*

*The gravamen of the allegations made in the first information report is to the effect that the named accused Amit Sahni enticed away the minor daughter of first informant i.e. prosecutrix namely 'X' aged about 14 years.*

*After aforesaid first information report was lodged, Investigating Officer proceeded with statutory investigation of concerned Case Crime number in terms of Chapter XII CrPC. The prosecutrix was recovered on 11.09.2023. Thereafter, the statement of the prosecutrix was recorded under Section 161 CrPC, which is on record at page 31 of the paper book. The prosecutrix in her aforesaid statement has not supported the F.I.R. To the contrary, the prosecutrix has stated that she was in love with the applicant and accordingly on 27.12.2022 at 11.00 P.M. in the night she herself went to the applicant alone and joined the applicant. The prosecutrix has further stated that she thereafter accompanied the applicant to Delhi where she is alleged to have solemnized marriage in a temple with the applicant and on account of above the parties came into co-habitation as husband and wife. Accordingly, physical relations between the parties were also established. Subsequent to above, the prosecutrix was requested for her internal medical examination, which was refused by her. Ultimately, the statement of the prosecutrix was recorded under Section 164 CrPC, which is on record at page 36 of the paper book. The prosecutrix in her aforesaid statement has rejoined her previous statement recorded under Section 161 CrPC. The*

*genesis of the said statement is to the effect that the prosecutrix herself accompanied the applicant willingly.*

*During course of investigation, Investigating Officer recovered the High School Certificate of the prosecutrix wherein her date of birth is recorded as 09.04.2006. The occurrence giving rise to the present criminal proceeding is alleged to have occurred on 27.12.2022. As such, the prosecutrix was aged about 16 years 08 months and 18 days on the date of occurrence. Investigating Officer further examined the first informant and other witnesses under Section 161 CrPC. The witnesses so examined have substantially supported the FIR. On the basis of above and other material collected by the Investigating Officer during course of investigation, he came to the conclusion that complicity of all the three named accused is fully established in the crime in question. Accordingly, he submitted the charge-sheet dated 24.09.2023, whereby applicant Amit Sahni has been charge-sheeted under Sections 363, 366, 376, 368 IPC and Section 3/4 Pocs0 Act, whereas two other named accused have been charge-sheeted under Sections 363, 368 IPC.*

*Learned counsel for applicant contends that though the applicant is a named/charge-sheeted accused, inasmuch as, the charge-sheet has been submitted against applicant on 24.09.2023 yet he is liable to be enlarged on bail. Referring to the statements of the prosecutrix recorded under Sections 161/164 CrPC, he contends that the prosecutrix is a willing and consenting party. The prosecutrix herself came and joined the applicant and thereafter accompanied the applicant to Delhi where she solemnized marriage with the applicant. On the above premise, it is thus urged that applicant cannot be said to be guilty of either kidnapping, abducting or enticing the prosecutrix. As such, no offence under Sections 363, 366 IPC can be said to have been committed by the applicant. There is no medical evidence to support the charge-sheet as the prosecutrix has herself refused for her internal medical examination. He further contends that since the prosecutrix has solemnized marriage with the applicant therefore it cannot be said that applicant is guilty of forcibly dislodging the modesty of the prosecutrix by committing rape upon her. Though the prosecutrix was below 18 years of age (16 years 08 months and 18 days) on the date of her marriage with the applicant but simply on the above ground the marriage of the prosecutrix with the applicant shall not be void but voidable at the instance of the prosecutrix alone by virtue of the provisions contained in Section 11(2) of the Hindu Marriage Act, 1955. However, up to this stage, nothing has emerged on record to show that the prosecutrix has initiated any proceeding for declaration of her marriage with the applicant as void. He therefore, contends that since the prosecutrix has solemnized marriage with the applicant therefore, the criminality committed by the applicant stands washed of. On the above premise, he therefore contends that as per the material on record the charge-sheet cannot be sustained. As such, applicant is liable to be enlarged on bail.*

*Even otherwise, applicant is a man of clean antecedents having no criminal history to his credit except the present one. The applicant is in jail since 11.09.2023. As such, he has undergone more than two and half months of incarceration. The police report under Section 173 (2) CrPC i.e. the charge-sheet has already been submitted against the applicant, therefore the entire*

*evidence sought to be relied upon by prosecution against applicant stands crystalized. However, up to this stage, no such circumstance has emerged on the basis of which it can be said that custodial arrest of applicant is necessary during the pendency of trial. It is thus contended by the learned counsel for applicant that applicant is liable to be enlarged on bail. In case the applicant is enlarged on bail, he shall not misuse the liberty of bail and shall co-operate with the trial.*

*Per contra, the learned A.G.A. has vehemently opposed the prayer for bail. He submits that since the applicant is a named/charge-sheeted accused therefore, he does not deserve any indulgence by this court. As per the material on record since the prosecutrix is below 18 years of age therefore her consent, if any, is immaterial. It is thus urged that no sympathy be shown by this Court in favour of applicant. However, he could not dislodge the factual and legal submissions urged by the learned counsel for the applicant with reference to the record at this stage.*

*Having heard the learned counsel for applicant, the learned A.G.A. for State, upon perusal of material brought on record, evidence, complicity of the accused, accusation made, nature and gravity of offence and coupled with the fact that the prosecutrix in her statements recorded under Sections 161/164 CrPC has not supported the F.I.R., the prosecutrix is a willing and consenting party, as per the admitted case of the prosecutrix she herself accompanied the applicant, the prosecutrix has categorically stated that she has solemnized marriage with the applicant, in view of above the criminality if any committed by the applicant stands washed of, though the prosecutrix was below 18 years of age on the date of her marriage with the applicant but simply on that account the marriage of the prosecutrix with the applicant shall not be void but voidable at the instance of the prosecutrix alone by virtue of the provisions contained in Section 11(2) of the Hindu Marriage Act, 1955, up to this stage no proceedings have been initiated by the prosecutrix for declaration of her marriage with the applicant as void, in spite of the fact that the charge-sheet has been submitted against applicant and therefore the entire evidence sought to be relied upon by the prosecution against applicant stands crystalized, yet the learned A.G.A. could not point out any such incriminating circumstance from the record necessitating the custodial arrest of the applicant during the pendency of trial, the judgement of Supreme Court in Sumit Subhashchandra Gangwal and Another Vs. State of Maharashtra and Another 2023 LiveLaw (SC) 373 (paragraph 5), the clean antecedents of the applicant, the period of incarceration undergone therefore, irrespective of the objections raised by the learned A.G.A. in opposition to the present application for bail but, without making any comments on the merit of the case, the applicant has made out a case for bail.*

*Accordingly, the bail application is allowed.*

*Let the applicant Amit Sahni, involved in aforesaid case crime number, be released on bail on his furnishing a personal bond with two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice :-*

*(i) The applicant shall file an undertaking to the effect that he shall not*

*seek any adjournment on the date fixed for evidence when 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.*

*(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under section 229-A I.P.C.*

*(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under section 82 Cr.P.C., may be issued and if applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under section 174-A I.P.C.*

*(iv) The applicant shall remain present, in person, before the trial court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.*

*(v) The trial court may make all possible efforts/endeavour and try to conclude the trial within a period of one year after the release of the applicant.*

*However, it is made clear that any wilful violation of above conditions by the applicant, shall have serious repercussion on his bail so granted by this court and the trial court is at liberty to cancel the bail, after recording the reasons for doing so, in the given case of any of the condition mentioned above."*

5. On the above premise, the learned counsel for applicant submits that upto this stage there is no such material on record to show that the prosecutrix has initiated proceedings under Section 12 of the Hindu Marriage Act for declaration of her marriage with the applicant as void. It is well settled that if marriage has been solemnized with the bride, who is below 18 years of age then in such a circumstance the marriage shall not be void but voidable at the instance of the other party. In the absence of any material to show that proceedings for declration of marriage as void under the Hindu Marriage Act have been initiated by the prosecutrix there is no change of the circumstances and therefore by reason of above there does not exist any ground to maintain the prosecution of applicant. Further more no application was filed by first informant/opposite party-2 for cancellation of bail granted to applicant by this Court on the ground that no marriage has been solemnized by the parties.

6. On the above conspectus, the learned counsel for applicant submits that impugned proceedings are, therefore, not only malicious but also an abuse of process of Court.
7. Referring to the judgments of Supreme Court in **K. Dhandapani Vs. State by the Inspector of Police 2022 SCC Online SC 1056 and Mafat Lal and Another Vs. State of Rajasthan 2022 SCC Online SC 433 and Criminal Appeal No.41 of 2001 (Sriram Urav Vs. State of Chhattisgarh) decided on 30.01.2025** the learned counsel for applicant submits that the Apex Court in aforementioned case quashed the criminal prosecution of the accused therein on the ground that he had solemnized marriage with the prosecutrix and secondly that Court cannot turn a blind eye to the aforesaid development. On the above premise, it is thus urged by the learned counsel for applicant that the present application is liable to be allowed.
8. Per contra, the learned A.G.A. for State-opposite party-1 and Mr. Subhash Chandra Pandey, Advocate holding brief of Mr. Akash Kumar Nishad, the learned counsel representing first informant opposite party no.2 have vehemently opposed the present application. They submit that since as per the date of birth of the prosecutrix recorded in the High School Certificate she is minor, therefore, marriage if any of the party shall be void. However they could not dislodge the factual and legal submissions urged by the learned counsel for applicant in support of this application with reference to Section 12 of the Hindu Marriage Act, 1955 as well as the judgments of the Supreme Court referred to above.
9. Having heard, the learned counsel for applicant, the learned A.G.A. for State-opposite party-1 and Mr. Subhash Chandra Pandey, Advocate holding brief of Mr. Akash Kumar Nishad, the learned counsel representing first informant opposite party no.2 and upon perusal of record, this Court finds that matter requires consideration.
10. Notice on behalf of State- opposite party 1 has been accepted by the learned A.G.A. Mr. Akash Kumar Nishad, Advocate has put in appearance on behalf of first informant opposite party no.2
11. All the opposite parties are granted 4 weeks' time to file their respective counter affidavits. Applicant will have 2 weeks thereafter to file his rejoinder affidavits.
12. List this application for admission on 03.07.2025.

13. Considering the facts and circumstances of the case and also the submissions urged by the learned counsel for applicant in support of this application as noted herein above and also the fact that the prosecutrix in her statement under Section 164 Cr.P.C. has clearly admitted the factum of her having solemnized marriage with the applicant and there is nothing on record to show that proceedings under Section 12 of the Hindu Marriage Act have been initiated for declaration of the said marriage as void as well the judgments of Supreme Court in the cases of ***K. Dhandapani (Supra)***, ***Mafat Lal (Supra)*** and ***Sriram Urav (Supra)*** respectively, as an interim measure, it is hereby provided that until further orders of this Court further proceedings in S.T. No.2641 of 2023 (State Vs. Amit Nishad), arising out of Case Crime No.702/2022, under Sections 363, 366, 368, 376 I.P.C. & Section 3/4 POCSO Act, Police Station Barhalganj, District Gorakhpur now pending before the learned Special Judge/POCSO Act Court No.1, Gorakhpur shall remain stayed.

**Order Date :- 21.4.2025**

Md Faisal