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HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

AFR  
Court No. - 12

Case :- BAIL No. - 8227 of 2021  
Applicant :- Rohit  
Opposite Party :- State Of U.P. Thru. Secy. Home Lko.  
Counsel for Applicant :- Piyush Kumar Singh  
Counsel for Opposite Party :- G.A.

Hon'ble Vivek Chaudhary,J.

1. Heard learned counsel for the applicant Sri Piyush Kumar Singh, Sri Anurag Verma, Sri Jayant Singh Tomar and Sri Shaunak Singh learned AGA for the State and Sri Rahul Kumar Singh as amicus curiae, who has also assisted the Court by placing relevant laws before the Court.
2. The present bail application is filed by the accused-applicant-Rohit, who is involved in F.I.R./Case Crime No.0091 of 2021, under Sections 363, 366 and 376 I.P.C. and Sections 3 /4 of Protection of Children from Sexual Offences Act, 2012 (POCSO Act), Police Station-Achalganj, District-Unnao.
3. In this bail application, the applicant had initially impleaded the complainant by name as opposite party no.2. The Registry while reporting raised an objection that the complainant is made a party and, thus, learned counsel for the applicant deleted the name of the complainant as opposite party no.2. Therefore, two questions arose before the Court for consideration; (i) whether the complainant or any person on behalf the child victim is to be made a party to the proceedings; and (ii) if any such person is to be made opposite party in the bail application, what should be the mode of service upon such a person, as the Court is required to ensure that the identity of the child victim is not disclosed at any time during the course of investigation or trial.
4. With regard to the first question, whether the complainant or any other person on behalf of the child victim is required to be heard in the bail application is concerned, so far as a child up to the age of 16 years is concerned, suffice would be to refer to Section 439(1-A) of the Criminal Procedure Code, 1973 (Cr.P.C.). The aforesaid Section 439(1-A) of Cr.P.C. is incorporated by amendment made by Act No.22 of 2018 w.e.f. 21.4.2018. It reads:

"439. Special powers of High Court or Court of Session regarding bail- .....

(1-A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860)."

5. Sections 376(3), 376-AB, 376-DA and 376-DB of I.P.C. refer to sexual offences against a child below the age of 16 years and 12 years. Thus, as per sub-section (1-A) of Section 439 of Cr.P.C., the presence of the informant or any person authorized by him is mandatory at the time of hearing of the bail application with regard to sexual offences. Thus, in all such cases, it is incumbent upon the Court to ensure service of notice of bail application upon the informant.
6. A question still arises, that, as to whether under the POCSO Act, with regard to sexual offences against the child up to the age of 18 years, any person on behalf of the child victim is required to be given an opportunity to oppose the bail application. Section 2(1)(d) of the POCSO Act defines a child as "a person below the age of 18 years'.
7. Section 40 of the POCSO Act reads:
- "40. Right of child to take assistance of experts, etc.- Subject to the proviso to section 301 of the Code of Criminal Procedure, 1973 (2 of 1974), the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act: Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them."

8. Learned counsel for the applicant submits that under Section 40 of the POCSO Act, only assistance of a legal counsel is provided to the child. It does not give any power of hearing to them for opposing the bail application. The said Section does not give any special right to the guardian or family of the child or puts any obligation upon the Court as Section 439(1-A) of Cr.P.C. does.
9. Opposing the contention of learned counsel for the applicant, learned AGA and Sri Rahul Kumar Singh advocate submit that Section 40 of the POCSO Act read with the Rules of 2020 makes it incumbent upon the Court to give an opportunity of hearing to the family/guardian of the child victim at the time of hearing of the bail application.
10. A perusal of Section 40 of the POCSO Act, if made cursorily, would only indicate that it provides entitlement of legal assistance through a counsel of their choice or through Legal Services Authority, to the family or guardian of the child. However, such legal assistance would be meaningless if the family or guardian of the child is not aware of the said legal proceedings. A proper and effective legal assistance can be given to a person only when such a person is made aware of the pending proceedings. If the person is not made aware of the proceedings, no legal assistance can be given to him.
11. The Protection of Children from Sexual Offences Rules, 2020 (for short "the Rules of 2020") are framed to give effect to the purpose of the POCSO Act. Rules 4(13) and 4(15) relevant for the purpose of this case, which read:  
"4. Procedure regarding care and protection of child-  
(13) It shall be the responsibility of the SIPU, or the local police to keep the child and child's parent or guardian or other person in whom the child has trust and confidence, and where a support person has been assigned, such person, informed about the developments, including the arrest of the accused, applications filed and Court proceedings.  
(14) .....  
(15) The information to be provided by the SJPU, local police, or support person, to the child and child's parents or guardian or other person in whom the child has trust and confidence, includes but is not limited to the following: -  
(i) the availability of public and private emergency and crisis services; (ii) the procedural steps involved in a criminal prosecution;  
(iii) the availability of victim's compensation benefits;  
(iv) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;  
(v) the arrest of a suspected offender;  
(vi) the filing of charges against a suspected offender;  
(vii) the schedule of Court proceedings that the child is either required to attend or is entitled to attend;  
(viii) the bail, release or detention status of an offender or suspected offender;  
(ix) the rendering of a verdict after trial; and  
(x) the sentence imposed on an offender."

12. A perusal of Rule 4(13) itself shows that it is the duty of the SJPU or local police to keep the child and his/her parent/guardian or other person in whom the child has trust and confidence, informed about the developments including the arrest of the accused, applications filed and other Court proceedings. The "applications filed and the other Court proceedings" is a wide worded phrase which also includes within its ambit bail applications filed before any Court whatsoever. Therefore, the bail applications filed, either before the Special Court or before the High Court, are also included in the same and, thus, it is the duty of the SJPU or the local police to inform the parent/guardian of the child victim with regard to the same. Similarly, Rule 15 sub-rules (vii) and (viii) also makes it incumbent upon the SJPU and local police to inform the child and parent or guardian with regard to the schedule of the Court proceedings that the child is either required to attend or is entitled to attend and bail, release and detention status of the offender or suspected offender.
13. Therefore, from the reading of Section 40 of POCSO Act as well as Rule 4(13) and 4(15) of the Rules of 2020, it is clear that this Court is required to ensure that the SJUP or the local police informs the family or guardian of the child and also provide them legal assistance as required with regard to all proceedings, including the bail applications filed by the accused. Thus, it is necessary to implead the complainant, and in case the complainant is not a family member or guardian of the child, then the family member or guardian of the child as opposite party along with the complainant in the bail applications filed before this Court.
14. There is yet another reason to serve notice of the bail application in every POCSO offence case upon the parent/guardian of the child. A perusal of provisions of POCSO Act and Rules of 2020 casts a duty upon every person involved with the matter including the courts to provide circumstance and atmosphere wherein the victim child and his family feels safe and secure. Providing complete knowledge of judicial proceeding and opportunity to participate in the same would be a step in right direction in making the victim child and his family to maintain its faith in the justice delivery system of the society and thus feel safe and secure.
15. So far the second question, with regard to the manner in which notices is to be served, ensuring that identity of the child is not disclosed is concerned, such a duty is cast upon the Special Court under Section 33(7) of the POCSO Act. Section 33(7) reads as under:  
"33. Procedure and powers of Special Court-  
(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial."

16. This Court as well as the Supreme Court repeatedly, in number of judgments, have emphasized to protect the identity of the child in every possible manner by every person concerned. Therefore, in case the guardian or family member or any other person of the child is made opposite party by name and notices are served upon them in normal course, there is every possibility that the identity of the child may get revealed to the public at large.
17. In view thereof, it would be appropriate that the complainant, and where complainant is not a family member, along with him, parent/guardian is made opposite party in the following format:  
"Complainant in Case Crime No. ...., Police Station-....., District-....., service of notice through Investigating Officer/S.H.O. of the Police Station"  
or as per the requirement in a case along with complainant, "Parent/Guardian of the victim in Case Crime No. ...., Police Station-....., District-....., service of notice through Investigating Officer/S.H.O. of the Police Station."
18. Notice in every case shall be served through Investigating Officer/S.H.O. of the Police Station concerned upon such complainant and/or parent/guardian of the child. The Investigating Officer/S.H.O. of the Police Station concerned shall ensure that identity of the child does not get disclosed in any manner whatsoever during investigation, trial or during service of notice.
19. It has also come in the knowledge of this Court that in large number of cases, due to poverty or other similar circumstances, the parents of the victim-child are unable to engage a counsel and make a proper representation before the Court.
20. Under Section 40 of the POCSO Act, the family or guardian of the child is entitled to assistance of a legal counsel of their choice or if they are unable to afford a legal counsel, the Legal Services Authority is duty bound to provide a legal counsel.
21. In the given circumstances, since in large number of cases, family members are unable to engage a counsel and represent in the bail applications, the notice shall also include in hindi language, that, in case the person so desires, he will get free assistance including a lawyer to represent him from the Legal Services Authority at High Court, Lucknow Bench, Lucknow and for the same he can contact:  
"Dr. Satyabhan Singh, H.J.S.,  
Registrar(J)(Listing)/Secretary,  
High Court Legal Services Sub-Committee,  
Chamber No.9, High Court, Lucknow Bench, Lucknow.  
Mobile No.9935299286,  
Email:- "[email protected]"

22. Every notice issued to the complainant or to the family/guardian of the child shall also include the aforesaid details in Hindi language to enable him, in case he so desires, to take assistance from the Legal Services Authority.
23. The Senior Registrar of this Court shall ensure compliance forthwith.
24. In view of the aforesaid, in the present case, learned counsel for the applicant is permitted to implead the complainant as opposite party no.2 during the course of the day, in the manner provided in this order.
25. Issue notice to opposite party no.2 returnable in week commencing 31.8.2021.
26. List in week commencing 31.8.2021.
27. Meanwhile, learned A.G.A. may file counter affidavit.

[Vivek Chaudhary,J.]

Order Date :- 6.8.2021  
Sachin