GAHC010036692025



# THE GAUHATI HIGH COURT (HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

### Case No. : AB/446/2025

NAZIR HUSSAIN AND 3 ORS. S/O INSAN ALI R/O VILL- RANGAMATI PT. III (PANBARI P.O.RANGAMATI, P.S. GAURIPUR, DIST. DHUBRI, ASSAM PIN-783339.

2: INSAN ALI S/O ABDUL WAHAB R/O VILL- RANGAMATI PT. III (PANBARI P.O.RANGAMATI P.S. GAURIPUR DIST. DHUBRI ASSAM PIN-783339.

3: NAZINA BIBI W/O INSAN ALI R/O VILL- RANGAMATI PT. III (PANBARI P.O.RANGAMATI

P.S. GAURIPUR

DIST. DHUBRI ASSAM PIN-783339.

4: ABDUL WAHAB R/O VILL- RANGAMATI PT. III (PANBARI P.O.RANGAMATI

P.S. GAURIPUR

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DIST. DHUBRI ASSAM PIN-783339

VERSUS

THE STATE OF ASSAM REP BY THE PP, ASSAM

Advocate for the Petitioner : MR. A F N U MOLLAH, R AMIN, K ZAMAN

Advocate for the Respondent : PP, ASSAM, MR SARFRAZ NAWAZ, AMICUS CURIAE, (R-2)

## BEFORE HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

### <u>ORDER</u>

Date : 02.06.2025

**1.** Heard Mr. A. F. N. U. Mollah, learned counsel for the petitioners. Also heard Mr. R. R. Kaushik, learned Additional Public Prosecutor appearing for the State of Assam as well as Mr. S. Nawaz, learned Amicus Curiae appointed by the Court.

**2.** This application under Section 482 of BNSS has been filed by the petitioners, namely, *1. Nazir Hussain, 2. Insan Ali, 3. Nazina Bibi and 4. Abdul Wahab* who are apprehending their arrest in connection with Gauripur P.S. Case No. 15/2025 under Sections 61(2)/137(2)/303(2)/65(1)/308(2) of the BNS.

**3.** The gist of accusation in this case is that on 09.01.2025, one Nozmul Hoque had lodged an FIR before the Officer-in-charge of Gauripur Police Station, *inter alia*, alleging that on 26.11.2024, the accused persons named in the FIR (present petitioners) had kidnapped the minor daughter of the informant. However, the Police on filing of an FIR recovered the daughter of the

informant and handed over her custody to the informant.

**4.** However, it is alleged in the FIR that on 09.01.2025, the accused No. 1 again kidnapped the daughter of the informant with the help of other accused persons (the present petitioners). It is also alleged in the FIR that the petitioner No. 1 also took an amount of Rs.1,50,000/- (One Lakh Fifty Thousand) from the Almirah. It is further alleged that the petitioner No. 1 had committed sexual intercourse with the daughter of the informant on pretext of marrying her. The date of birth of the victim girl is stated to be on 07.11.2010 in the FIR.

**5.** The learned counsel for the petitioners has submitted that the daughter of the informant is not a minor and her date of birth is 07.11.2006. It is also submitted by the learned counsel for the petitioners that the informant's daughter had on her own accompanied the petitioner No. 1. It is also submitted that there is a love affair between the victim girl and the petitioner No. 1 since long back and that she has been married to the petitioner No. 1 and were staying together happily as married couple. However, the said relationship was not agreeable to her parents, therefore, only with an intention to harass the petitioners, a false FIR has been lodged.

**6.** In support of his submissions that the victim girl is not a minor, the petitioners have annexed the transfer/leaving certificate of the victim girl issued by the Bilasipara Kasturba Gandhi Balika Vidyalaya, wherein her date of birth has been stated as 07.11.2006. The learned counsel for the petitioners, therefore, submits that the victim girl was major on the date of alleged incident and she left with the petitioner No. 1 out of her own sweet will.

**7.** The learned counsel for the petitioners also submits that in the meanwhile, petitioner Nos. 2, 3 and 4 were granted interim bail by this Court by

order dated 10.04.2025 and in pursuant to the directions of this Court, they have co-operated in the investigation. He submits that all the petitioners, including the petitioner No. 1 are ready to co-operate in the investigation and, therefore, their prayer for anticipatory bail may be allowed.

**8.** At the beginning of the hearing of this anticipatory bail application, the learned Additional Public Prosecutor has raised the plea of maintainability of this anticipatory bail application as the Gauripur P.S. Case No. 15/2025 has been registered, *inter alia*, under section 65(1) of the BNS, 2023. He, therefore, submits that this application for anticipatory bail is barred by Section 482(4) of BNSS, 2023.

**9.** The learned counsel for the petitioners has submitted that on the plain reading of the Section 482(4) of BNSS, it appears that an anticipatory bail application is not maintainable in case of a person who is accused of "an offence under Section 65 and sub-Section (2) of Section 70" of BNS, 2023.

**10.** The learned counsel for the petitioners has submitted that legislature has deliberately used the conjunction "and" in Section 482(4) in place of the disjunction "or" in the said provision, hence, unless a person is accused of both the offences under Section 65 and Section 70(2) of BNS 2023, the bar of Section 482(4) will not be applicable. He, therefore, submits that as in this case, only offence under Section 65(1) is involved without any accusation under Section 70(2), the bar under Section 482(4) is not applicable to this case.

**11.** Mr. R. R. Kaushik, learned Additional Public Prosecutor, on the other hand, has submitted that if the interpretation of Section 482(4) of BNSS, 2023 as suggested by the learned counsel for the petitioners is to be made applicable, then it would result in absurdity and would defeat the purpose which

is sought to be achieved by incorporating the bar in Section 482(4) of BNSS, 2023.

**12.** Mr. S. Nawaz, learned Amicus Curiae who was appointed by this Court to assist the Court regarding the question of maintainability of an anticipatory bail application in view of the fetters contained in Section 482(4) of BNSS, has taken the Court through the legislative history of the provisions regarding anticipatory bail in the Code of Criminal Procedure, 1973 as well as BNSS, 2023. He submits that the provision corresponding to 482(4) of BNSS is the Section 438(4) of the Code of Criminal Procedure, 1973. He submits that in Section 438(4) of the Code of Criminal Procedure, 1973 it was provided that an anticipatory bail was not maintainable in the case of a person who is accused of the offence under Section 376(3) or Section 376 AB or Section 376 DA or Section 376 DB of the Indian Penal Code. He also submits that in Section 438(4) of the Code of Criminal Procedure, 1973 the disjunction "or" was used whereas in the Section 482(4) of BNSS conjunction "and" is used.

**13.** He submits that the provisions of Section 482 of BNSS are in *pari materia* with Section 438 of Cr.P.C. except for the use of conjunction "and" in the Section 482(4) BNSS instead of disjunction "or" used in Section 438(4) of the Code of Criminal Procedure, 1973.

**14.** He submits that the categories of the offences in respect of which the bar was provided under Section 438(4) of the Code of Criminal Procedure, 1973 remains same even in Section 482(4) of BNSS, 2023. Hence, if literal meaning is given to the conjunction "and" in Section 482(4) of BNSS it would mean that only if a person has committed both the offences under Section 65 and Section 70(2) of BNS, he may not be entitled to anticipatory bail. He submits that this interpretation would give rise to unnecessary mischief in as much as the offence

under Section 70(2) of BNS includes within its ambit, the erstwhile offences under Section 376 DA and 376 DB of the IPC. Whereas Section 65 of BNS covers both the offence under Section 376(3) and Section 376 AB of the IPC.

**15.** The learned Amicus Curiae submits that in the statements of object and reason of BNSS, 2023 there is nothing to suggest that the legislature intended to give a curtailed or restricted operation of Section 482 of BNSS, rather the provisions remains *pari materia* with Section 438 of Cr.P.C. which suggest that the operation of bar to anticipatory bail in respect of certain grave offences remain unchanged. He, therefore, submits that in order to avoid redundancy and to avoid the legislative intent being frustrated by giving a literal interpretation to the word "and" used in Section 482(4) BNSS, same has to be given a purposive interpretation so as to further the object which the legislature intended to achieve by enacting the said provision.

**16.** He submits that though the word "or" is normally disjunctive and the word "and" is normally conjunctive, however, there may be circumstances when these words to be read as vice-versa to give effect to the manifest intention of the legislature as disclosed from the context.

**17.** The learned Amicus Curie has submitted that in keeping with the spirit of legislation as well as legislative history behind the enacting of section 482(4) of BNSS, 2023, the word "and" appearing in the said section is required to be read down as "or". He submits that any other interpretation may lead to the adoption of a meaning that would be inconsistent with the legislative intent and historical background of the law relating to exclusion of certain category of offences from getting the benefit of anticipatory bail. To substantiate his submissions, the learned Amicus Curiae has cited following rulings: -

a) **Dr. Jaishri Laxman Rao Patil vs. The Chief Minister and another** reported in **(2021) 8 SCC 1**;

# b) Spentex Industries Limited vs. Commissioner of Central excise and others reported in (2016) 1 SCC 780.

**18.** I have considered the submissions made by the learned counsel for both sides as well as learned Amicus Curiae. I have also gone through the materials available on record, including the case diary of Gauripur P.S. Case No. 15/2025, which was called for in connection with this case.

**19.** First of all, let me take up the issue of maintainability of the present anticipatory bail application raised by the learned Additional Public Prosecutor in view of the embargo provided under Section 482(4) of BNSS. Section 482(4) of BNSS, 2023 provides as follows:-

"(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under Section 65 and sub-Section (2) of Section 70 of BNS, 2023".

**20.** Though, the learned counsel for the petitioners has submitted the the plain reading of Section 482(4) would show that an anticipatory bail application is not maintainable only in a case when a person is found to be accused of an offence under Section 65 and sub-Section (2) of Section 70 of BNS, 2023, he further submits that if the literal meaning of the conjunction "and" used in between the word "under Section 65" and "sub-Section (2) of Section 70" is considered, it would mean that only if a person is accused of offences under both the Sections i.e., Section 65(1) as well as Section 72 of BNS, the bar provided under Section 482(4) of BNSS would be applicable, otherwise not.

**21.** In this regard the submissions made by learned Amicus Curiae Mr. S.

Nawaz appears to be plausible and acceptable, which this Court is refraining itself from repeating as same has already been discussed in the foregoing paragraphs. This Court agrees with the submissions made by the learned Amicus Curiae which are reproduced in paragraph Nos. 10, 11, 12, 13, 14 and 15 herein above. Considering the strong logic and reasonableness of the submission made by the learned Amicus Curiae which has been discussed in the foregoing paragraphs, this Court does not wish to add anything to the said submissions made by the learned Amicus Curiae except for accepting the same.

**22.** We have seen that the provision contained in Section 482 of BNSS, 2023 is *peri material* with Section 438 of Cr.P.C. There is nothing in the statement of objects and reasons of enacting BNSS, 2023 to suggest that the legislature intended to give a restricted operation in respect of the exclusion clause contained in the Section 482(4) of BNSS then that of the clause which was there in the Section 438(4) of the Code of Criminal Procedure.

**23.** This Court fully agrees with the submission of the learned Amicus Curiae that if literal meaning is given to the word "and" used in Section 482(4), it would frustrate the legislative intent of restricting the operation of provisions regarding anticipatory bail in respect of certain heinous offences which was earlier provided for in Section 438(4) of Cr.P.C, 1973.

**24.** The Apex Court in the case of "*Spentex Industries Limited vs. Commissioner of Central excise and others"*(supra) has observed as follows:-

"29. We are conscious of the principle that the word "or" is normally disjunctive and "and" is normally conjunctive (see Union of India v. Kamalabai Harjivandas Parekh [AIR 1968 SC 377 : (1968) 1 SCR 463] ). However, there may be circumstances where these words are to be read as vice versa to give effect to manifest intention of the legislature as disclosed from the context".

**25.** If we look at the provisions contained in Section 65 of BNS, it appears

that it penalizes two kinds of rape i.e., under Section 65(1), it penalizes rape of a woman under the age of 16 years whereas under Section 65(2), the penalty is for rape of a woman under the age of 12 years whereas Section 70(2) penalizes gang rape (rape of a woman by one or more person constituting a group or acting in furtherance of common intention of a woman who is less than 18 years of age). The basic difference between the two penal provisions is that in case of offence under Section 65, the victim is either less than 16 years of age or less than 12 years of age and the offender is normally a single person, whereas under Section 72(1) of the BNS, the victim is under the age of 18 years and the offenders are more than one person constituting a group or acting in furtherance of common intention. There is unlikelihood of a case where a person would be charged both under Section 65 of BNS as well as under Section 70(2) of BNS. If there is a single offender and the victim is less than 16 years of age, he would be charged under Section 65 of BNS whereas if there are one or more women who is raped by one or more in a group of persons acting in furtherance of their common intention of raping the minor girl, they would be charged under Section 70(2) of BNS. To say in other words, if more than one person are involved in the offence of raping a victim under the age of 18 years, they would not be charged under Section 65 but under Section 70(2) of BNS, therefore, there is unlikelihood of a case being registered under both the sections i.e., Section 65 and Section 70(2) of BNS if there are more than one person involved and victim is less than 18 years of age.

**26.** Under such circumstances, giving a literal meaning to the word "and" and insisting that the bar of Section 482(4) would be applicable only if both the sections are involved in the case and the accused has been arrested of having his own accusations of committing offence under both the Sections i.e., under

Section 65 and Section 70(2) of BNS would result in making the bar provided in Section 482(4) of BNSS almost redundant in any case which would frustrate the legislative intent.

**27.** Hence, agreeing with the submissions made by the learned Amicus Curiae, this Court is of considered opinion that the word "and" appearing between the words "under Section 65" and "sub-Section (2) of Section 70" in Section 482(4) of BNSS shall have to be read as "or" to give effect to the manifest intention of the legislature.

**28.** In view of the above discussion, the contention of the learned counsel for the petitioners is rejected and it is hereby held that the embargo of Section 482(4) of BNSS would apply to any case involving the arrest of any person on accusation of having committed an offence under Section 65 or sub-Section (2) of Section 70 of BNS, 2023.

**29.** In the instant case, the informant who is the father of the victim girl has stated in his statement recorded under Section 181 of BNSS that his daughter is a minor and her date of birth is 07.11.2010 and in support of his statement he has submitted a copy of birth certificate issued by the Registrar of Birth and Death. Whereas, the learned counsel for the petitioners has submitted that the victim is a major and has produced the transfer/school leaving certificate wherein the date of birth of the victim girl has been shown as 07.11.2006. When two different date of births are shown of the victim girl in two different documents, namely, the first one, the birth certificate issued by the Registrar of Birth and Death whereas the second one issued by the Warden-cumteacher/Head Teacher of the school in which she had claimed to studied, the certificate issued by Registrar of Birth and Death Act, 1969, hence, the

same would have more acceptability and reliability when compared to the birth certificate issued by the school authority. Hence, relying on this said certificate at this stage, *prima facie,* it appears that the victim girl was minor on the date when the alleged offence was committed.

**30.** The victim girl in her statement recorded under Section 183 of BNSS, 2023 has stated that she herself came to the petitioner No. 1 and stayed with him as his wife and also had a physical relationship. However, considering the fact that she was a minor at that time (less than 18 years of age), the said act would still be regarded as rape within the meaning of Section 63 of the BNS, when it is read with the circumstance No. (vi) of the said section as well as with the Exception 2 of proviso to the explanation 2 of Section 63 of BNS.

**31.** As per the date of birth certificate of the victim girl issued by the Registrar of Birth and Death, which is available in the case diary she would be less than 16 years of age at the time of the alleged offence. Hence, *prima facie,* it appears that the Section 65(1) of BNS would be applicable in this case and hence the bar provided under Section 482(4) of BNSS would be applicable in this case. However, as the accusation of rape has been made only against the petitioner No. 1, the said bar would be operative against petitioner No. 1 only. Against the rest of three petitioners, the said bar shall not be operative.

**32.** Considering the progress made in the investigation as well as considering the statement of the victim girl recorded under Section 183 of BNSS, custodial interrogation of the petitioners does not appear to be necessary for fair completion of the investigation of Gauripur P.S. Case No. 15/2025. Hence, the interim anticipatory bail granted to the petitioner No. 2. Insan Ali, 3. Nazina Bibi and 4. Abdul Wahab by order dated 10.04.2025 by this Court **is hereby made absolute** with a condition that they shall co-operate in the

investigation and shall not directly or indirectly make any inducement, threat or promise to the victim girl or any other witnesses so as to dissuade them from deposing before the Investigating Officer regarding the facts involved in this case.

**33.** Though, on perusal of the case diary and considering the progress made in the investigation as well as statement of the victim girl recorded under Section 183 of BNSS, it appears that the custodial interrogation of petitioner No. 1 is also not necessary for fair completion of the investigation of the case. However, as there are *prima facie* materials against the petitioner No. 1 under Section 65(1) of BNS, 2023, hence, his application for anticipatory bail is barred by Sections 482(4) of BNSS. His prayer for anticipatory bail is, therefore, **rejected**. He may appear before either the Investigating Officer or may surrender before the learned Chief Judicial Magistrate, Dhubri and may move an application seeking bail, if so advised.

**34.** This anticipatory bail application is accordingly disposed of.

JUDGE

**Comparing Assistant**