

**AFR**

Neutral Citation No. - 2025:AHC:94152

**Court No. - 74**

**Case :- APPLICATION U/S 528 BNSS No. - 36693 of 2024**

**Applicant :- Sitam @ Prince Minor**

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

**Counsel for Applicant :- Amit Kumar Srivastava**

**Counsel for Opposite Party :- G.A.**

**Hon'ble Saurabh Srivastava,J.**

1. Heard Sri Aryan Srivastava, learned counsel appearing on behalf of applicant and learned AGA for State.

2. Present application has been preferred with prayer to set aside the impugned cognizance/summoning order dated 7.10.2024 passed by learned Special Judge, POCSO Act/Additional Sessions Judge, Bareilly as well as entire proceedings arising out of Case Crime no. 375 of 2024 (State vs. Arun & another) under sections 70(2), 89, 123, 351(3) of BNS and 4(2), 5(j)(ii)/6 and 5(1)/6 of POCSO Act, 2012, PS- Aonla, District Bareilly, pending in court of Special Judge, POCSO Act/Additional Sessions Judge, Bareilly.

3. It is the case of the applicant that after institution of case at Case Crime no. 375 of 2024 which culminated into conduction of the detailed investigation by concerned Investigating Officer who preferred charge sheet in pursuance to sections 123/65(1)/351(3)/89 of Bhartiya Nyaya Sanhita (in short "BNS"), 2023 and 4(2) of Protection of Children From Sexual Offences Act, 2012 only against one Arun son of Mahesh and the applicant has been exonerated at the time of preferring charge sheet. But later on, once, charge sheet along with entire Case Diary has been put before learned court of Special Judge, POCSO Act, 2012 by taking

cognizance of offence, applicant has been summoned on the basis of the statement recorded by the victim herself under Section 183 BNS, 2023 in pursuance to Section 70(2), 89, 123, 351(3) of BNS, 2023 and Section 4(2), 5(j)(ii)/6, 5(l)/6 of POCSO Act, 2012.

4. Learned counsel for the applicant submitted that the summoning of the applicant once, not implicated in the charge sheet is bad in the eye of law since provision available under Section 210 of Bhartiya Nagrik Suraksha Sanhita (in short "BNSS"), 2023 shall apply in *mutatis mutandis* while taking cognizance by learned court of Session under Section 213 of BNSS, 2023 but at the same time, applicability of the Special Act, i.e. the Protection of Children from Sexual Offences Act, 2012 wherein the procedural power of Special Court in respect of taking cognizance of offence is mentioned under Section 33 and it has been mentioned that Special Court may take cognizance of any offence without the accused being committed for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts and as such the scope available under Section 210 of BNSS, 2023 which automatically covered under Section 213 of BNSS, 2023 is not available in respect of Section 210(1)(c) of BNSS, 2023 wherein the cognizance of offence can be taken up upon information received from any person other than a police officer, or "upon his own knowledge".

5. Learned counsel for the applicant submitted that the word knowledge has been derived in the instant matter from the statement recorded under Section 183 BNSS, 2023 which might be in judicious conscious applied by learned Sessions Court being a Special Court for taking cognizance of offence in pursuance to the Protection of Children from Sexual Offences Act, 2012 but at the same time it is apparent error of law on face of record that while exercising power vested under Section 33 of POCSO Act, 2012 there is no scope for exercising power vest with Section 210 which is applicable under Section 213 of BNSS, 2023 also, since section 33 of POCSO Act, 2012 deals only with the taking cognizance of offence in

respect of receiving a complaint of fact which constitutes such offences or upon a police report of such facts and there is hardly any word available "upon his own knowledge" which is mentioned under Section 210 of BNSS, 2023.

6. Per contra, learned AGA vehemently opposed the prayer as made in the application and rebutted the stand taken up by learned counsel for the applicant and submitted that learned Special Court summoned the applicant in pursuance to the section mentioned in the order dated 07.10.2024 in pursuance to BNS, 2023 and there is hardly any illegality involved therein and the instant application is liable to be dismissed.

7. After hearing the rival submissions extended by learned counsel for the parties, one thing is crystal clear that there is slight difference between the normal procedure available under BNSS, 2023 as well as in comparison to the procedure available under POCSO Act, 2012. However, it is mentioned under Section 31 of Protection of Children From Sexual Offences Act, 2012 that application of Code of Criminal Procedure, 1973 to proceeding before a Special Court shall be applicable, is related to the procedure for commencement of trial so far as regarding the procedure for taking cognizance of offence, it is specifically mentioned under Section 33 of POCSO Act, 2012 and so far as regarding power vest with Section 33 of POCSO Act, 2012 is concerned, it deals with Section 42(A) of POCSO Act, 2012 wherein, it is specifically mentioned that the provision of this Act shall be in addition and not in derogation of any other law for the time being in force and in case of any inconsistency the provisions of this Act shall have overriding effect on the provision of any such law to the extent of inconsistency. In the strict consonance of Section 42(A), it is Section 33 of POCSO Act, 2012 which will be applicable before the learned Session Court for taking cognizance of offence, if the same has been taken in pursuance to the certain offences made out in pursuance to Protection of Children From Sexual Offences Act, 2012.

**8.** In view of aforementioned facts and circumstances, impugned cognizance/summoning order dated 07.10.2024 is not sustainable in the eye of law since the same has been passed not in pursuance to the police report or the complaint which attracted the offence carried out by the applicant whereas the same has been passed in pursuance to the statement record by the victim under Section 183 BNSS, 2023.

**9.** Impugned order dated 07.10.2024 is set aside. Matter is remitted back to learned Special Judge, POCSO Act/Additional Sessions Judge, Bareilly for passing fresh order in pursuance to strict consonance of the Section 33 of Protection of Children From Sexual Offences Act, 2012.

**10.** The instant application stands **allowed** accordingly.

**Order Date :-** 30.5.2025

Shaswat

**(Saurabh Srivastava,J.)**