

# Power Play

An Allahabad High Court judgment which released the powerful politician accused of rape has brought into question the rules to be considered while deciding bail applications

By Srishti Ojha



**T**HE Allahabad High Court recently granted bail to former Union minister and BJP leader Swami Chinmayanand who was accused of sexually exploiting a 23-year-old LLM student of SS Law College, Shahjahanpur, where he was a director. The order by Justice Rahul Chaturvedi came after dismissal of his bail application by the district and sessions judge of Shahjahanpur. Justice Chaturvedi in his order said “both had used each other” and the case was the

**QUID PRO QUO**  
While granting bail to Chinmayanand, the court not only said that “both had used each other” but also called the case a conspiracy to extract more

result of conspiracy hatched with greed for extracting more.

The order grabbed eyeballs not only because the person accused was powerful but due to the unusual nature of the bail order, especially in a case of serious allegations of rape and sexual exploitation. In a country where so many accused spend decades in prison for minor misdemeanour, granting bail to a person accused of a serious offence is bound to be criticised.

The nature of the bail order can be questioned on various grounds. The

Court acknowledged the “word of caution” provided by the Supreme Court in its recent judgment, *Shri P. Chidambaram v. Central Bureau of Investigation*, where disapproval was expressed about the practice of giving any finding on the merits while deciding bail applications. This, however, has not been applied in this case because the order focuses mainly on the merits of the case, placing doubt on the victim and her story.

The Court acknowledged the judgment of the apex court in *State of UP through CBI vs Amarmani Tripathi* (2005), laying down factors to be considered in a bail application such as “character, behaviour, means, position and standing of the accused” but failed to apply it in the current order. The Court not only ignored the superior position held by the accused, but analysed the character of the complainant.

**T**he Court was also supposed to consider the likelihood or reasonable apprehension of evidence being tampered with. Even after acknowledging that the accused was an important personality and in a position to tamper with the evidence, the Court decided to release him on bail.

In India, cases of rape, sexual harassment and exploitation are common, and have often taken uncommon and unexpected turns. Besides the reluctance of the police to register such cases, society is judgemental about the victim and often shames her. The current bail order is yet another example of what a rape or sexual harassment case can turn into.

The same day that the bail order was passed, a 16-year-old rape survivor suffered an acid attack, allegedly by the family members of the accused in Uttar Pradesh's Hapur after she refused to withdraw her rape complaint against the accused.

In August last year, a JNU student had accused the police of refusing to register an FIR when she went to report rape and seek help. In 2017, the Punjab and Haryana High Court passed an



#### DEBATABLE ORDER

Justice Rahul Chaturvedi (above), made some unusual statements while granting bail to Swami Chinmayanand in Allahabad HC

order granting bail to three law students from Jindal Global Law School who were accused of rape. This order was heavily criticised not just for granting bail to those with serious rape allegations against them, but because it was peppered with statements seen as some of the worst examples of victim shaming. The victim was reprimanded for drinking, smoking and not confiding in her parents that she was being abused. People had taken to social media to express their anger and dissatisfaction at this order and filed online petitions condemning it. Some high courts have also assumed that the absence of injuries on the body of the survivors implies consent and is a ground to release the accused.

In the current bail order, the Court relied on a common rape myth—of the survivor not speaking up or complaining when she was sexually exploited. They also called the relationship a matter of complete *quid pro quo* and said: “A girl, whose virginity is at stake, not uttering a

**The Court relied on a common rape myth—of the victim not speaking up when sexually exploited. It completely ignored the trauma she might have faced due to accused's position of power.**

single word to her own parent or before the Court regarding the alleged incident, is an astonishing conduct which speaks volumes about the ingeniousness of the prosecution story.” The Court assumed that the girl was a willing party because she did not speak up, completely ignoring the possibility of mental or psychological trauma that she may have undergone when the accused was in a position of power. This was acknowledged by the Court in the bail order. It's true that not every rape allegation is true and not every accused in such cases is guilty. While looking at a case, the courts need to form a balance between the concerns of the survivors, demands of society, rights of the accused, and reformatory and rehabilitative justice.

Orders based on stereotypes and assumptions take away the hard-won victories of women's rights and legal equality and harm rape survivors. In a society where patriarchy is deep-rooted, and rape and sexual harassment stigmatised, even talking about them is taboo.

Until 2003, Section 155(4) of the Indian Evidence Law allowed victim shaming in a way by letting the accused go scot-free by proving that the victim was of immoral character. It states that if a man is prosecuted for rape or attempt to ravish, “it may be shown that the prosecutrix was of generally immoral character”. This could be used to infer that her testimony was false. This was deleted on the recommendation of the Law Commission which said it was detrimental to a survivor's reputation and self-respect.

Even though sensitivity in dealing with allegations of rape and sexual assault has often been demanded, it is not being adhered to. In the current order, the accused was not charged with rape even after the survivor stated that she had been raped numerous times. The order has not only ignored the rules to be considered while deciding bail applications, but stuck to stereotypes and gender prejudices.

A gender-equal and progressive society is still a long way off. ■