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**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**CRM-M-39908-2017
Date of Decision: 07.11.2017**

Promila Sharma

..... Petitioner

Versus

State of Punjab and another

..... Respondents

CORAM: HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present: Mr. Arnav Sood, Advocate,
for the petitioner.

Mr. Ritesh Pandey, Advocate for
Mr. Manoj K. Sharma, Advocate,
for respondent No.2/complainant.

SUDIP AHLUWALIA J. (ORAL)

In this petition, the petitioner seeks anticipatory bail under Section 438 of the Code of Criminal Procedure in connection with Complaint Case No. 26 of 2017, dated 29.03.2014, pending in the Court of Ld. Judicial Magistrate Ist Class, Hoshiarpur, under Sections 3 and 4 of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the Act').

[2]. Her case in the application is that she has been motivatedly framed out of pure vengeance by the complainant, who bore a personal grudge against her, in view of the complaint she had made against the complainant way back in 2011.

[3]. The background of the matter is that both the complainant and the present petitioner, at one time were working as teachers in the same

school. The petitioner had made a complaint alleging that the present complainant's Degree was fake, on account of which she was not entitled to be appointed, nor retained in her Post. It is her further case that after she had made the complaint, the present complainant allegedly threatened her with serious consequences, including her implication in false cases under the Act. The petitioner, therefore, brought the fact of such threats to the notice of the Senior Superintendent of Police, Hoshiarpur, vide her Letter No. 3286-PD/12.09.2011 (Annexure P-2). It is her case that consequently the present complainant, out of vengeance, firstly approached the Police Authorities just two days later vide Complaint No. 3335-PD, dated 14.09.2011, against the present petitioner, in which the allegations constituting the offences under Sections 3 and 4 of the Act were imputed to the petitioner. But the Police, after enquiry found no truth in the aforesaid complaint and accordingly submitted its Report to that effect on 27.10.2011 (Annexure P-4).

[4]. Thereafter, the complainant is alleged to have motivatedly filed the present pending complaint in the Ld. Court below almost two and a half years later on 29.03.2014, in which again there was an inordinate delay regarding completion of the preliminary evidence, on the basis of which summons were issued upon the petitioner as late as on 22.09.2017. In this connection, it is the specific assertion of the petitioner that considering the old rivalry between the parties, and the grudge borne by the complainant on account of the challenge to her alleged fake Degree, which apparently resulted in her termination from Service in the month of November, 2014, the complainant had filed the complaint vindictively and to harass the present petitioner in her old age, just when she was on the verge of

retirement.

[5]. Ld. Counsel for the complainant has opposed the prayer for anticipatory bail by contending that the bar of Section 18 of the Act against such prayer is applicable in the present case. In this regard, decisions of the Supreme Court in “Vilas Pandurang Pawar Vs. State of Maharashtra”, 2012 (4) R.C.R. (Criminal) 761 and “Manju Devi Vs. Onkarjit Singh Ahluwalia @ Omkarjeet Singh”, 2017 (2) R.C.R. (Criminal) 421.

[6]. On the contrary, the petitioner's side has placed the decisions of various Co-ordinate Benches of this Court, in “Raj Singh @ Raju Vs. State of Haryana” bearing CRM-M No. 16169 of 2016, “Gurbir Singh Vs. Paramjit Kaur and another” bearing CRM-M No. 14970 of 2015, “Chet Ram and another Vs. Smt. Mukesh and another” bearing CRM-M No. 41778 of 2015 and “Gurmel Singh Vs. State of Punjab”, 2010 (9) R.C.R. (Criminal) 617, in which the benefit of anticipatory bail was extended to the petitioner(s) even in cases under Sections 3 and 4 of the Act.

[7]. In addition, Ld. Counsel for the petitioner has asserted that this is a fit case for intervention by this Court even under Section 438 of the Code of Criminal Procedure, in view of the decisions pronounced by the Delhi High Court in “Dr. R.K. Sangwan and another Vs. State” 2009 (112) DRJ 473 (DB), decided on 18.03.2009 and Karnataka High Court in “Sri N.B. Gungarakoppa and others Vs. State of Karnataka” 2002 CriLJ 3311, decided on 10.04.2002, in answering two references on this point regarding competence of the High Court to entertain applications under Section 438 of the Code of Criminal Procedure, in view of the statutory bar under Section 18 of the Act.

[8]. This Court has gone through both the aforesaid decisions. The

question of reference before the Delhi High Court in **Dr. R.K. Sangwan's case (Supra)** was “Whether the bar of Section 18 of the SC and ST (Prevention of Atrocities) Act, 1989 operates as a complete bar to the maintainability of petitions/applications under Section 438 of the Code of Criminal Procedure, 1973?” The Division Bench in considering the matter, in its aforesaid decision observed at the initial stage:-

“6. But, a beneficial legislation can never be permitted to be abused and converted into an instrument to blackmail and wreck personal vengeance for settling and scoring personal vendetta. A torch which is lighted to dispel darkness cannot be permitted to set on fire its surroundings.”

[9]. However, the reference was finally answered with the following observations:-

“..... In our opinion, the Court will not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegation made in the FIR or the complaint by calling for the case diary, charge sheet or any other material gathered at the time of investigation but, if the allegations in the FIR or the complaint even if they are taken at their face value are accepted in their entirety do not constitute the offence alleged, it is only in those miniscule number of cases, the Courts would be justified in entertaining the application, not because it is maintainable but clearly because the Act would be inapplicable in the facts and circumstances of that particular case. Thus the application for anticipatory bail can be entertained only on the ground of inapplicability of the Act of 1989 due to the facts of the case which will have to be gathered only from the FIR and not beyond that because once it is gathered from the FIR that the applicant is an accused

of committing an offence laid down under Sec.3 of the Act of 1989, the bar of Sec.18 would instantly operate against the person who has been made an accused of the offence under the Act of 1989. To put it differently, once it is apparent from the FIR that an offence under the Act of 1989 is even alleged, the Courts would not be justified at all in weighing or scrutinizing the preponderance of the probability of commission of the offence by the accused, but if from the FIR itself the ingredients of offences as laid down under Sec.3 of the Act itself is found to be missing, the bar created by Sec.18 would not be allowed to operate against an accused and only in that event his application for anticipatory bail would be dealt with by the concerned Court to determine whether the Act of 1989 can be said to be rightly applicable against the accused and not to enter into further inquiry into the matter so as to determine whether the allegations leveled against the accused in the FIR are true or false and there would be no justification to enter into the matter further in order to examine whether the allegations leveled against the accused are even prima facie correct or incorrect. Any other interpretation, in our opinion, would go against the letter and spirit of the clear provisions of Sec.18 of the Act of 1989 which has already stood the test of reasonableness and constitutional validity upto the level of the Apex Court."

[10]. Again in the reference before the Karnataka High Court, the decision was somewhat short of being categorical in favour of an affirmative answer. It was summed up as:-

".... In cases of anticipatory bail the relief has to be speedily obtained which means that the closest judicial authority namely the Court of Session should be accessible and this would not be the case if the

applications are restricted to the High Court. The real remedy would be to ensure that when such an application is filed before the Court of Session that the Court is put on caution and that the Court applies its mind very carefully and judiciously realising the fact that it is a superior Court in a sense and that the consideration has to proceed on an extremely responsible and judicious basis. We, therefore, hold that the powers of consideration of these applications would be available to the Court of Session, as also to the High Court in keeping with the provisions of Section 438, Cr.P.C.”

[11]. It is, therefore, seen that neither of the aforesaid two decisions specifically empower the Court to entertain an application for anticipatory bail under Section 438 of the Cr.P.C. in a blanket fashion. On the contrary, such a situation is envisaged in rather qualified situations, and there is no deviation from the well-settled position that the bar under Section 18 of the Act would not apply only in those cases where the facts alleged in the FIR/complaint do not disclose the essential ingredients to constitute the offences under Sections 3 and 4 of the Act.

[12]. In the present case, however, it is seen that there are very categorical statements imputed to the petitioner through which she allegedly insulted the complainant in public for casteiest reasons. In fact, the language imputed to her and the manner in which the same has been customized in the original complaint would rather indicate a very professional and clever drafting to make out an apparently fool-proof case under the Act so as to consciously keep it covered by the statutory bar under Section 18, notwithstanding the other undisputed background of old strained relationship between the parties, who were colleagues in the same

institution, and the grudge clearly borne by the complainant on account of her dismissal from service on the petitioner's own complaint regarding her fake degree, as well as the undue delay in filing the complaint after several years, even though the original complaint made by her before the Police Authorities just two days after the present petitioner had expressed her apprehension in view of the threat of false implication under the Act being made to her by the complainant was found to be without substance. In the opinion of the Court, this factual background is very vital for an adjudication upon the petitioner's prayer for bail on merits, but may not be of any consequence at this stage in view of the statutory bar which has been specifically invoked on behalf of the complainant.

[13]. At any rate, the decision in *Manju Devi's case (Supra)*, is the most recent one on the subject having been delivered by the Hon'ble Apex Court as laid down on 24.03.2017. Consequently, the decisions of the Delhi and Karnataka High Courts on the reference question referred to the concerned Benches on the subject, even if they were to be of any help to the petitioner to any extent, would become inconsequential in view of this latest decision of the Hon'ble Supreme Court in which it was concluded:-

“21. In view of the above discussion and in the light of the specific averments in the complaint made by the complainant, we are of the considered opinion that Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code and the High Court has committed grave error in granting anticipatory bail to the respondents. Accordingly, the order dated 03.12.2014, passed by the High Court, is set aside.”

[14]. The four judgments of Co-ordinate Benches of this Court relied upon by the petitioner, as already referred to in Paragraph No.6 earlier,

therefore, would not help her to seek anticipatory bail under Section 438 of the Cr.P.C., more particularly considering that the prominent aspect in granting such favour to the petitioners in those cases was the factual background that the complaints made against them under Sections 3 and 4 of the Act had initially been found to be baseless by the Police Authorities, which is also the situation in the present case. But in view of the decisions of the Hon'ble Supreme Court relied upon by the complainant, the petitioner cannot be rescued with any favour under Section 438 of the Cr.P.C.

[15]. Nevertheless, the petitioner has approached this Court under Section 438 of the Cr.P.C. on the apprehension as submitted by her Ld. counsel that in such cases triable by Designated/Special Courts, the summoning Courts of the Judicial Magistrates routinely deny bail to the accused persons on the erroneous premise that they have no jurisdiction to entertain such bail applications even after the accused persons appear before them in compliance of the summons issued by those very Courts. This is, however, an unconvincing proposition. Both sides are *ad idem* that no bar exists in the concerned statute which would come in the way of the summoning Magistrate entering into the merits for the purpose of deciding a bail application after the concerned accused appears and surrenders before the Court. The legal position in this regard is undisputed. In “**Manoj Kumar Sharma Vs. State of U.P. & others**” 2008 (1) RCR (Criminal) 51, a Division Bench of the Allahabad High Court has unambiguously observed:-

“4. The submission of the learned counsel for the petitioner is that even according to the F.I.R., it is a petty offence but the allegation under Section 3(1)(x) S.C.S.T. Act has been falsely made so that the petitioner may not get bail easily. His argument is that the Magistrates do not entertain bail applications

under Section 3(1)(x) S.C.S.T. Act and leave it to be decided by the Sessions Judge on the assumption that the Magistrates do not have jurisdiction in the matter as the case is triable by a Court of Session.

5. *We would like to make it clear that the provisions of Section 437, Criminal Procedure Code read with the provisions of Schedule Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act No.33 of 1989) do not create bar for consideration of bail in such matters by Magistrates.*

12. *In view of the above discussion, we expect that the bail application in the matter if moved by the accused shall be considered on its merit by the Magistrate concerned in accordance with the provisions of Section 437, Criminal Procedure Code and he shall pass appropriate order in accordance with law.”*

[16]. Similarly, in “**Sanjay Narhar Malshe Vs. State of Maharashtra.**” 2005(4) RCR (Criminal) 252, a Division Bench of the Bombay High Court in answering the question relating to, “a question of law, important and interesting which is sought to be raised in this Petition relates to the powers of the Judicial Magistrate in respect of the grant or refusal of the bail to accused persons in cases which are exclusively triable either by the Session Courts or Special Courts established under a special statute”, had after granting interim bail to the concerned petitioner also held that there is no bar to the summoning Magistrate in entertaining a bail application under Section 437 of the Cr.P.C. on merits even in relation to the cases triable exclusively by the Session or Special Courts and observed inter alia -

“10. *We are fortified in the above view by the decision of the Kerala High Court and the Allahabad*

High Court which are relied upon by the learned advocate for the Petitioner. In fact the decision of the Kerala High Court is directly in relation to the offence under the said Act. In the case of Shanu (2001 (1) Crimes 292) (supra) the Learned single Judge of the Kerala High Court after taking note of the provision of the said Act as well as Section 437 of Code held that "it is clear that the J.F.C.M.'s Court has got jurisdiction to grant bail to the persons accused of the offence punishable under any of the sub-clauses (i) to (xv) of sub-section (1) of Section 3 of the Act". While delivering the said decision the learned single Judge after taking note of Section 437 of Criminal Procedure Code has observed that "the Magistrate is competent to release an accused, either appeared or brought before him, if the offence alleged is not punishable with death or imprisonment for life." Similarly in Ram Bharoshi's case (2004(3) Crimes 651) (supra) the learned Single Judge of Allahabad High Court held that "it is abundantly clear that there is no prohibition on a Magistrate to grant bail in a Sessions triable case, unless it is punishable with death or imprisonment for life, and it is absolutely necessary that the Magistrate give up the erroneous practice of refusing to consider or grant bails in such cases where there is no prohibition under the Code of Criminal Procedure." While delivering the said Judgment it was observed thus

"13. There are a number of offences in the Penal Code which are not punishable with death or imprisonment for life, but they are triable by the Court of Sessions, where the Magistrates invariably refuse bail, because they entertain a wrong notion that they are disentitled to grant bails in such cases, even if the case is one where

*bail ought to have been granted on merits. This approach is also in the teeth of a Division Bench decision of this Court, **Vijay Kumar Vs. State of U.P., (1989(26) All Cri C 480).***

14. The result of this unhealthy practice is that a person against whom an FIR is lodged relating to any Sessions triable offence, which on a plain reading appears to be a case of false or malicious prosecution, uncorroborated by any independent material, the accused is left at the mercy of the police, in whose favour the Magistrate has virtually abdicated his jurisdiction. An accused may have to remain in jail for some time before his bail application is heard and granted by the Sessions Court, after the Magistrate's routine rejection of his prayer for bail even in those minor Sessions triable offences where there may be no need for taking an accused in custody for the purpose of investigation, or where palpably he appears to have been implicated falsely, and there are no other attendant circumstances disentitling the accused from an order of bail. A stint in jail can be a source of great humiliation for a maliciously prosecuted accused who enjoys some social status.”

We are in respectful agreement with the view expressed by the learned single Judge of the Kerala High Court as well as Allahabad High Court in the above referred judgments.

11. Liberty to the Petitioner to raise the point regarding insufficiency of the materials to frame the charge before the concerned court, as it is too premature for this Court to express any opinion in that regard, and the issue in that regard can be very well

raised before the concerned court after committal of the proceedings. We make it clear that we have not expressed any opinion on this point.

12. For the reasons stated above, therefore, the petition partly succeeds. Meanwhile the Magistrate while committing the proceedings consequent to the filing of the charge-sheet is expected to exercise his discretion judiciously in relation to power to grant or refuse the bail to the petitioner in case an application for bail is filed by the petitioner and to pass an appropriate order in that regard in accordance with the provisions of law bearing in mind the observation made herein above on the point of jurisdiction of the Magistrate to entertain and decide such bail application.

13. In view of the filing of the charge-sheet the Petitioner has to appear before the concerned Magistrate within ten days whereupon the Magistrate will have to pass an appropriate order as stated above. Meanwhile the interim relief granted to the Petitioner to continue till the appropriate order is passed by the Magistrate.”

[17]. In this view of the matter, and considering the express bar against entertainment of an application under Section 438 of the Cr.P.C., this Court is not inclined to cross the line in the present case, when clearly an effective remedy exists for the petitioner by way of seeking bail on merits from the summoning Court itself under Section 437 Cr.P.C. to which there is no statutory bar.

[18]. Consequently, the present petition is disposed off with the observation that while the same is not entertainable in view of the statutory bar under Section 18 of the Act, yet the petitioner is at liberty to exhaust her remedy by appearing before Ld. Summoning Court and seeking bail

thereafter, in which case, the Ld. Magistrate concerned shall give her adequate hearing on merits and shall then decide the bail application purely on merits very shortly thereafter.

07.11.2017

Bhumika

**(SUDIP AHLUWALIA)
JUDGE**

1. Whether speaking/reasoned: Yes/No
2. Whether reportable: Yes/No