

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 18 OF 2019

Udhav S/o Gyanoba Budhwant,
Age: 30 years, Occu: Agril.,
R/o: Jamb (Bk) Tq. Jintur,
Dist. Parbhani.

...APPELLANT

VERSUS

1. The State of Maharashtra,
Through Police Station, Jintur
Dist. Parbhani.
2. The District Superintendent of Police,
Parbhani.
3. Deepali W/o Narayan Thoke
Age: 26 years, Occup. Household
R/o : Nilaj, Tq. Jintur,
Dist.: Parbhani.

...RESPONDENTS

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Mr. R.S. Shinde Advocate holding for
Mr. V.P. Latange, Advocate for appellant
Mr. P.G. Borade, APP for respondents No. 1 and 2
Ms. Sheetal Eknath Wagmare, Advocate for respondent No. 3

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CORAM : K.K. SONAWANE, J.

**RESERVED ON : 12th FEBRUARY, 2019.
PRONOUNCED ON : 27th FEBRUARY, 2019.**

JUDGMENT :-

1. Heard. **Admit.** The present appeal is taken up for final hearing on merit with the consent of both sides.
2. The appellant preferred present appeal under Section 14-A(2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "Act of 1989")

for the sake of brevity) for the relief of pre-arrest bail in crime No. 417 of 2018 registered at Police Station Jintur, District Parbhani under section 365 read with Section 34 of the Indian Penal Code(for short "IPC") and under Section 3(2)(va) and 3(1) (a) of the Act of 1989 and agitated the validity and propriety of the impugned order dated 31-12-2018, passed by the learned Additional Sessions Judge, Parbhani rebuffing relief of anticipatory bail in Criminal Misc. (Bail) Application No. 775 of 2018.

3. It has been alleged on behalf of prosecution that on 15-11-2018 first informant Dipali Narayan Thoke lodged the report to the Police of Jintur Police Station and ventilated the grievance that on 09-11-2018, when she was at home, at that time co-accused of the crime, namely, Bhaskar Rathod, labour contractor resident of Jam tanda informed the brother in law of the first informant on his cell phone that his brother Ramesh Pandurang Thoke did not repay the amount of Rs.4,00,000/- paid to him in advance for harvesting the sugar cane crop nor he completed the agricultural work. Therefore, they kidnapped the Narayan Pandurang Thoke, husband of the first informant in a bid to recover the amount of Rs. 4,00,000/- remained outstanding towards his brother Ramesh Thoke. It has also been alleged that, on following day i.e. 10-08-2018 at about 10.00 a.m. victim Narayan Thoke also informed the wife Dipali on her cell phone

that co-accused Bhaskar Rathod kidnapped him in Cruiser Jeep bearing No MH-22-U-6278. He further informed that his vehicle Scooty was also given to somebody else by the accused and he was confined in the premises of Kranti Agragani Sahakari Sakhar Karkhana Kundal Tq. Palus District Sangli. According to first informant, her husband informed her to make necessary arrangement for payment of amount received from accused Bhaskar Rathod and others and get him release from the custody of accused.

4. Pursuant to FIR of first informant Dipali Thoke, Police of Jintur Police Station registered the crime No. 417 of 2018 for the offence punishable under section 365 read with section 34 of IPC and under section 3(2)(va) and 3(1)(a) of the Act of 1989 and set the penal law in motion.

5. Investigating Officer (IO) visited to the spot of incident and drawn the panchnama of scene of occurrence. He recorded the statements of witnesses acquainted with the facts of the case. The IO also collected caste certificates of the first informant and others. The IO apprehended in all eight accused in this case for the sake of investigation. During the course of investigation, it was transpired that the vehicle cruiser Jeep bearing No. MH-22-U-6278 used in the crime was owned by present appellant. The IO was on trail of appellant for the sake of investigation. Therefore, apprehending the arrest, appellant knocked the door

of Court of Additional Sessions Judge, Parbhani for the relief of pre-arrest bail as envisaged under section 438 of Code of Criminal Procedure (Cr.P.C.). But, the learned Sessions Judge found reluctant to grant relief in favour of appellant and rejected the application. The impugned order of rejection of application bearing Criminal Misc. (Bail) Application No. 775 of 2018 is challenged in this appeal.

6. The learned counsel for appellant vehemently submitted that the learned trial Court failed to appreciate the attending circumstances on record in its proper perspective and committed error while rejecting the application for anticipatory bail. There are no allegations against appellant in regard to commission of crime of kidnapping of the husband of first informant. It has been alleged that the appellant is owner of the vehicle, which was used for commission of crime. There is no necessity of custodial interrogation of the appellant. He is ready to abide condition, if any imposed on him and also co-operate with the IO for the sake of investigation. Learned counsel further added that other co-accused in this crime were released on bail. Therefore, in view of rule of parity, present appellant be released on anticipatory bail.

7. Learned APP raised objection and submits that Section 18A of the Act of 1989 put embargo on the Court for exercising powers under section 438 of the Cr.P.C. The appellant committed crime against person, who is a member of Scheduled

Caste community. The appellant and his accomplices are aware that victim Narayan was from "Buddha" community. Therefore, the application for relief under Section 438 of Cr.P.C. cannot be entertained for anticipatory bail prayed on behalf of appellant. The circumstances reflect from the FIR are sufficient to make out the offence under sections 3(2)(va) and 3(1)(a) of the Act of 1989. Learned APP produced on record the relevant documents of investigation of the crime for perusal.

8. It is to be noted that this Court in the decision of Criminal Appeal No. 787 of 2018 (***Kiran Madhukar Ingle Versus State of Maharashtra and another***), elaborately dealt with the issue of applicability of Section 18 of the Act of 1989 to entertain the application for pre-arrest bail under Section 438 of the Cr.P.C. and made observations in paragraph Nos. 13 and 15 as under :-

13. It is explicitly made clear that the Court of Sessions or High Court can entertain the application for pre-arrest bail to ascertain its maintainability. The law does not permit to reject the application for anticipatory bail merely because the case has been registered under section 3 of the Act of 1989. But, it is incumbent on the part of the Court to examine as to whether the applicant at all is a fit person to be treated as accused of the crime registered under the Act of 1989. Section 18 of the Act of 1989 does not bar judicial scrutiny of the accusation made in the complaint. When the Court is held competent to enter into scrutiny of the allegations to determine whether the person can be treated as accused of commission of offence under the Act of 1989, then question would arise as to what extent the Court would be justified to examine material to determine the *prima facie* case against him.

14. xx xx xx xx xx xx xx

15. The exposition of law as referred above unequivocally pointer to the inference that the application for anticipatory bail can be entertained only on the ground of inapplicability of the provisions of Act of 1989 and it would be ascertainable only on perusal of recitals of the FIR or complaint and not beyond that, because once it is gathered from the FIR that the applicant is accused of committing the offence prescribed under section 3 of the Act of 1989, a bar under section 18 of the Act of 1989 would instantly operate against him. Therefore, the Courts are not permitted to enter into roving enquiry in regard to sustainability of accusation nurtured on behalf of complainant. Moreover, further scrutiny by summoning the case diary or other material to test veracity of the allegations made in the FIR also not permissible under the law.

9. In the instant appeal, the prosecution applied the provisions of section 3(2)(va), 3(1)(a) of the Act of 1989 against the present appellant, which reads as under :

“3. Punishments for offences of atrocities :-

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe :-

(i) xxxxxxxx to

(v) xxxxxxxx

(va) commits any offence specified in the Schedule, against a person or property, knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with such punishment as specified under the Indian Penal Code(45 of 1860) for such offence and shall also be liable to fine.”

3. Punishments for offences of atrocities :-

(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe :-

(a) puts any inedible or obnoxious substance into the mouth of a member of a Scheduled Caste or a

Scheduled Tribe or forces such member to drink or eat such inedible or obnoxious substance.”

10. After perusal of FIR lodged against the present appellant, *prima facie*, it reveals that the ingredients of aforesaid penal provisions do not match with factual score of the present case. It is to be noted that as per Section 3 of the Act of 1989 it must be *prima facie* shown that accused is not a member of Scheduled Caste or Scheduled Tribes and alleged humiliation by way of intentional insult or intimidation was committed in a place within public view. Moreover, the knowledge of the accused that person against whom the offence is committed is a member of Scheduled Caste or Scheduled Tribe is also essential ingredient of the offence under the Act of 1989. The opening sentence of section 3(1) and 3(2) of the Act of 1989 itself shows “whoever not being a member of Scheduled Caste or Scheduled Tribe”. It means that there must be *prima facie* affirmation or say in the FIR/ complaint that the accused is not the member of Scheduled Caste or Scheduled Tribe. In the present complaint, absolutely there is no averment to the effect that appellant-applicant is belonging to higher caste or atleast that he is not a member of Scheduled Caste. This being main and basic ingredient of Section 3(2)(va) and Section 3(1)(a) of the Act of 1989 and the absence of the same will have an serious impact as to the allegations to constitute offence under Act of 1989.

11. In the matter-in-hand, averments in regard to appellant that he is not the member of SC or ST community or he is belonging from higher caste, is totally absent in the alleged FIR. Therefore, statutory bar under Section 18 of the Act, 1989, is not applicable to the facts and circumstances of the present case.

12. Taking into consideration all aspects of the matter and in spite of bar under Section 18 of the Act, 1989, for invocation of power under Section 438 of the Cr.P.C., it is still open to the Court to find out looking to the FIR of the case itself as to whether *prima facie* case is made out by the complainant against the appellant. The circumstances on record are not sufficient to arrive at the conclusion that there are material *prima facie* on record to draw adverse inference against the appellants. Therefore, there is no impediment to entertain the application of appellant for the relief of his pre-arrest bail under Section 438 of the Cr.P.C.

13. In regard to the offence under Section 365 read with Section 34 of the IPC, it is to be noted that IO has apprehended in all eight co-accused in this case. The most of the part of investigation has already been completed. IO availed the custodial interrogation of the prime accused of the crime. There are no allegations against the appellant in regard to his participation or overt-act in the commission of crime of

kidnapping except allegation that he is the owner of vehicle used in the crime. These circumstances do not permit to curtail the valuable liberty of appellant for the sake of investigation. It has been alleged that, vehicle is yet to be seized in this crime, and therefore, custodial interrogation of the appellant-accused is necessary. I do not find any substance in this contention propounded on behalf of prosecution. Appellant has shown inclination to co-operate with the IO during the course of investigation. There is also inordinate delay in lodging the FIR. Hence, there is no impediment to allow the application.

14. In sequel, the appeal stands allowed. The impugned order dated 31-12-2018 passed by learned Additional Sessions Judge, Parbhani, in Criminal Misc. (Bail) Application No. 775 of 2018 filed by the appellant is hereby quashed and set-aside. The application of the appellant-applicant filed under Section 438 of the Cr.P.C. for his pre-arrest bail before the learned trial Court is hereby allowed. The appellant- Udhav Gyanoba Budhwant be released on bail in the event of his arrest in connection with Crime No. I-417 of 2018 registered at Jintur Police Station for the offence punishable under section 365 read with Section 34 of the IPC and under section 3(2)(va) and 3(1)(a) of the Act of 1989, on furnishing PR bond of Rs.15,000/- (Rupees Fifteen Thousand) with one solvent surety of like amount. It is stipulated that appellant-applicant shall not indulge, directly or indirectly, in

any kind of activities of tampering with the evidence of prosecution witness. The appellant/applicant shall attend the Jintur Police Station, on every Sunday in between 11.00 a.m. to 3.00 p.m. till filing of the charge-sheet and shall co-operate with the Investigating Officer for the sake of investigation into the crime. Inform the concerned Investigating Officer accordingly.

15. The present Criminal Appeal stands disposed of in above terms. No order as to costs.

Sd/-

[K. K. SONAWANE]
JUDGE

MTK.
