

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

CRIMINAL APPEAL NO. 159 OF 2019

Smt. Dharmishtha W/o Vinodkumar Bafna,
Age: 43 years, Occu. Household,
R/o : Vaibhav Nagar, Nalwa Road,
Nandurbar

...APPELLANT

VERSUS

1. The State of Maharashtra,
Through : Police Inspector(Sub-City),
Nandurbar.
2. Devidas S/o Khandu Nerkar,
Age: 47 years, Occu: Business,
R/o: Plot No.1, Rupam Nagar,
Nandurbar.

...RESPONDENTS

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Ms. Pradanya S. Talekar, Advocate for appellant
Mr. D.R. Kale, APP for respondents No. 1
Mr. N.L. Chaudhari, Advocate for respondent No. 2

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CORAM : K.K. SONAWANE, J.

**RESERVED ON : 12th MARCH, 2019.
PRONOUNCED ON : 18th MARCH, 2019.**

JUDGMENT :-

1. Heard. **Admit.** The present appeal is taken up for final hearing on merit with the consent of both sides.
2. This appeal is directed against the impugned order dated 07-02-2019 passed by learned Sessions Judge, Nandurbar, in Criminal Bail Application No. 41 of 2019 rebuffing the relief of pre-arrest bail of the appellant under section 438 of the Code of Criminal Procedure (for short "Cr.P.C.") in Crime No. 22 of 2019

registered at Upnagar Police Station, Nandurbar under sections 406, 420 and 506 read with section 34 of the Indian Penal Code (IPC) and under Sections 3(1)(f)(r)(s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "Act of 1989" for the sake or brevity). The appellant preferred the present appeal under section 14-A (2) of the Act of 1989 to redress her grievances.

3. The prosecution case in short compass is that, the first informant Devidas Khandu Nerkar on 29-01-2019 approached to the Upnagar Police Station, Nandurbar and filed report against present appellant and her husband, namely, Vinodkumar Kewalchand Bafna, for the allegations of cheating, criminal breach of trust, intimidation and casteist abuses to humiliate him on his caste within public view. According to prosecution, there were money transactions in between the first informant Devidas Nerkar and Vinodkumar Bafna, husband of the present appellant. In the year 2015, first informant executed the document of sale-deed of his land survey No. 37-3-B located within the vicinity of Nandurbar town in favour of appellant for security of the money transaction occurred in between them. It was agreed that after refund of entire hand loan of Rs.20,00,000/- with interest, the agricultural land will be restored in possession of first informant with title by cancellation of sale-deed executed in the name of appellant. But, Vinodkumar Bafna, husband of the appellant

meanwhile alienated land in favour of one Mr. Narendra Jain by accepting huge consideration amount. The first informant attempted to refund the hand loan amount with interest to the husband of the appellant. But, he refused to accept the same. Moreover, the appellant and her husband found reluctant to get the document of sale-deed cancelled on accepting entire hand loan amount from the first informant. Therefore, first informant filed civil litigation for cancellation of the document of sale and for restoration of possession. Taking umbrage of the litigation, appellant and her husband on 20-01-2019 visited to the office of the first informant and abused him filthily on his caste by uttering word “महार” “धेडले”. It has also alleged that appellant while reprimanding her husband for money transaction with person like first informant uttered the word “महारटोके” by referring caste of first informant. The appellant and her husband threatened the first informant for dire consequences. Eventually, first informant approached to Upnagar Police Station, Nandurbar and lodged the report.

4. Pursuant to the FIR, Police of Upnagar Police Station, Nandurbar registered the Crime No. 22 of 2019 under Sections 406, 420 and 506 read with section 34 of the IPC and under Sections 3(1)(f)(r)(s) of the Act of 1989 and set the penal law in motion. Investigating Officer (IO) recorded statements of witnesses acquainted with the facts of the case. IO arrested

Vinodkumar Bafna, husband of the appellant for the sake of investigation. The appellant apprehending her arrested at the hands of Police, rushed to the Court of learned Sessions Judge, Nandurbar and preferred the Criminal Bail Application No. 41 of 2019 for relief of anticipatory bail under Section 438 of the Cr.P.C. However, learned Sessions Judge found reluctant to grant relief of pre-arrest bail in favour of appellant and rejected the application. The impugned order of rejecting application of the appellant filed under section 438 of the Cr.P.C. by the learned Sessions Judge, Nandurbar is challenged in this appeal.

5. The learned counsel for the appellant strenuously urged that the appellant has been falsely embroiled in this case on account of civil litigation in between them pending before the Civil Court at Nandurbar. The learned counsel drawn attention of this Court towards the document of sale instances, consent deed, bank statements, photograph of alleged construction as well as documents of civil litigation etc., filed on record. According to learned counsel, husband of the appellant purchased the agricultural land from first informant for consideration by executing document of sale. The allegations nurtured in the FIR all are false, fabricated with purported motive to implicate the appellant and her husband in this case. The husband of appellant after his arrest in this crime was enlarged on bail by learned Sessions Judge, Nandurbar. The recitals of the FIR are not

sufficient to attract the provisions of Act of 1989 in this case. Moreover, in view of civil litigation, allegations about cheating, criminal breach and intimidation against the appellant are not sustainable in law. The learned counsel further added that as ingredients of the offence under the Act of 1989 are not attracted against the appellant, there is no impediment to entertain the present application for pre-arrest bail as envisaged under section 438 of the Cr.P.C.

6. Learned APP for respondent No. 1 and learned counsel for respondent No. 2 raised objection and submit that the section 18-A of the Act of 1989 put embargo on the Court for exercising powers under section 438 of the Cr.P.C. The appellant abused the complainant on his caste within public view. The circumstances reflect from the FIR are sufficient to make out the offence under sections 3(1)(f)(r)(s) of the Act of 1989. Therefore, application for anticipatory bail of the appellant being not maintainable deserves to be rejected. The learned APP produced on record the relevant documents of investigation of the crime for perusal.

7. 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.

8. In the instant appeal, the prosecution applied the provisions of section 3(1)(f) (r)(s) of the Act of 1989 against the present appellant, which reads as under :

“3. Punishments for offences of atrocities :-

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

(a) xxxxxxxx to

(e) xxxxxxxx

(f) Wrongfully occupies or cultivates any land, owned by or in the possession of or allotted to, or notified by any competent authority to be allotted to, a member of a Scheduled Caste or a Scheduled Tribe or gets such land transferred.

(g) xxxxxxxx to

(q) xxxxxxxx

(r) *Intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view ;*

(s) *abuses any member of a Scheduled Caste or a Scheduled Tribe by caste name in any place within public view;*

Explanation : For the purposes of this clause, the expression "object" means and includes statue, photograph and portrait."

9. After perusal of the 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. The basic ingredients of section 3(1)(r)(s) are that there must be "intentional insults" or "intimidation" with "intent" to humiliate a member of Scheduled Castes and Scheduled Tribes in any place within "public view". It is abundantly clear that *mensrea* is the decisive factor in the offence under Act of 1989. There must be "intentional insults" or "intimidation" with "intent" to humiliate member of Scheduled Caste and Scheduled Tribes in any place within "public view". In the case of ***Shantabai Vs. State of Maharashtra*** reported in ***1982 Cr.L.J. 872***, it has been held that merely calling a person by his caste name though may amount to insult or abuse to him, it cannot be said to be with intent to humiliate such person.

10. In the instant case, it has been alleged on behalf of first informant in his FIR that on 20-01-2019 at about 1.00 p.m. the appellant and her husband Vinodkumar Bafna arrived in his office

located in the Indira Gandhi Complex, Nandurbar. They started rebuking first informant on account of money transaction and civil litigation pending in between them in the Court. It has been alleged that husband of the appellant gave threats of dire consequence to the first informant and while altercation he abused him on his caste. The first informant further alleged that during course of altercation the appellant reprimanded her husband for the reason of his money transaction with the persons like first informant. During the course of conversation with husband she uttered the word "महारटोके" by referring caste of first informant. The superficial scrutiny of the entire episode occurred, it reveals that *prima facie* there was no intentional insult or intent to humiliate the first informant on his caste within a public view. If word "महारटोके" is taken out from the FIR for moment then other utterances that, "‘‘मै तुमको पहीलेही बोल रही थी, ऐसे लोगोंके साथ व्यवहार मत करो’’", perceived from the FIR though indicate reference of the caste of first informant, but does not pointer to the inference that there was any intent or *mensrea* to humiliate the complainant/first informant on his caste within public view. The allegations in the FIR about conversation in between the spouses by taking name of caste of first informant would be out of anger or wrath against first informant following money transaction. Moreover, there was no direct dialogue between the appellant and first informant while uttering the

words in the name of caste of first informant. Therefore, it cannot be considered *prima facie* to constitute offence under the Act of 1989.

11. In regard to the offence under section 3(1)(f) of the Act of 1989 there should be wrongful occupation of the land of member of a Scheduled Caste or a Scheduled Tribes or gets such land transferred. In view of civil litigation subjudice before the Civil Court as well as document of sale produced on record, it is unsafe to draw any adverse inference at this stage against the appellant. It cannot be, *prima facie*, considered that the recitals of FIR make out any offence under Section 3(f) of the Act of 1989. It is preposterous to appreciate the possession of the appellant on disputed land as wrongful occupation as envisaged under Section 3(1)(f) of the Act of 1989.

12. In view of aforesaid discussion, I am of the opinion that in spite of bar under section 18 of the Act of 1989, for invocation of powers under section 438 of the Cr.P.C., it is still open to this Court to find out by looking to the FIR of the case itself as to whether *prima facie* case is made out by the complainant/first informant against appellant. The circumstances on record adumbrates that the incriminating factor to show the intentional insult or intimidation with intent to humiliate the complainant within public view on the part of appellant or wrongful occupation

or alienation of the land of first informant-member of Scheduled Caste and Scheduled Tribe are lacking in this case. There is no impediment to arrive at the conclusion that there are no material *prima facie* on record for inference that appellant has committed offence under section 3(1)(f)(r)(s) of the Act 1989. As such, there is no statutory bar for this Court to consider the application of the appellant filed under section 438 of the Cr.P.C.

13. Now, turning to the merit of the application under section 438 of the Cr.P.C. is concerned, it cannot be ignored that the appellant is a female member and wife of co-accused Vinodkumar Bafna. The very nature of the offence and gravity of the allegations do not persuade to curtail valuable liberty of the appellant for the sake of investigation. The prime accused in this case i.e. husband of the present appellant has already been arrested by the IO and subsequently released on bail by the learned trial Court. In such circumstances, there is no propriety to turn-down the relief of pre-arrest bail prayed on behalf of appellant. Therefore, appeal deserves to be allowed.

14. In sequel, the appeal stands allowed. The impugned order dated 07-02-2019 passed by learned Sessions Judge, Nandurbar, in Criminal Bail Application No. 41 of 2019 rebuffing the relief of pre-arrest bail of the appellant under section 438 of the Code of Criminal Procedure is hereby quashed and set-aside. The

application of the appellant-applicant filed under Section 438 of the Cr.P.C. for her pre-arrest bail before the learned trial Court is stands allowed. The appellant - Smt. Dharmishtha W/o Vinodkumar Bafna, be released on bail in the event of her arrest in connection with Crime No. 22 of 2019 registered at Upnagar Police Station, Nandurbar under Sections 406, 420 and 506 read with section 34 of the Indian Penal Code and under Sections 3(1)(f)(r)(s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 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 Upanagar Police Station, Nandurbar 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.

[K. K. SONAWANE]
JUDGE