

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

CRIMINAL APPEAL NO.199 OF 2018

1. Gayabu s/o Pandurang Gudde,
Age : 50 years, Occ. Agri.,
R/o Lavhral, Tq. Loha,
Dist. Nanded.
2. Baban @ Anantrao s/o Motiraj Gudde,
Age: 40 years, Occ. Agri.,
R/o Lavhral, Tq. Loha, Dist. Nanded
At present R/o Nirgudi Road, Lohgaon,
Pune.

**...APPELLANTS
(Original accused)**

VERSUS

1. The State of Maharashtra
Through Sub Police Inspector,
Police Station, Malakoli,
Tq. Loha, Dist. Nanded.
2. Rukhminibai w/o Ashok Sable,
Age: 50 years, Occ. Household,
R/o Lavhral, Tq. Loha, Dist. Nanded.

...RESPONDENTS

WITH

CRIMINAL APPEAL NO.200 OF 2018

1. Manjusha w/o Manojkumar Khandare,
Age : 31 years, Occ. Household,
R/o Lavhral, Tq. Loha, Dist. Nanded.
2. Manoj @ Pintya s/o Dushant Kandare,
Age: 40 years, Occ. Agri.,
R/o Lavhral, Tq. Loha, Dist. Nanded

**...APPELLANTS
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VERSUS

1. The State of Maharashtra
Through Sub Police Inspector,
Police Station, Malakoli,
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2. Rukhminibai w/o Ashok Sable,
Age: 50 years, Occ. Household,
R/o Lavhral, Tq. Loha, Dist. Nanded.

...RESPONDENTS

Mr.S.C. Swami, Advocate h/f Mr. V.D. Gunale, Advocate
for the appellants
Mr.V.S. Badakh, APP for respondent No.1/State
Mr.P.P. Khandagale, Advocate for respondent No.2.

CORAM : S.M.GAVHANE, J.
RESERVED ON : 02/04/2019
PRONOUNCED ON : 25/04/2019

J U D G M E N T :-

. Heard. Both the appeals are admitted. They
are taken up for final hearing with the consent of
the learned counsel for the parties and the learned
APP.

2. Since both the appeals are arising out of
the same Crime No.15/2018 registered with Malakoli
Police Station, Nanded they are being disposed of by

this common judgment.

3. The Criminal Appeal No.199/2018 has been filed by the appellants Gayabu s/o Pandurang Gudde and Baban @ Anantrao s/o Motiraj Gudde challenging the order dated 17/02/2018 passed by the Additional Sessions Judge, Kandhar in Misc. Criminal Application No.26/2018 rejecting their said application for anticipatory bail under Section 438 of the Code of Criminal Procedure in Crime No.15/2018 and the Criminal Appeal No.200/2018 has been filed by Manjusha w/o Manojkumar Khandare and Manoj @ Pintya s/o Dushant Kandare challenging the order dated 17/02/2018 in Misc. Criminal Application No.27/2018 rejecting their said application for anticipatory bail under Section 438 of the Code of Criminal Procedure in Crime No.15/2018. By orders dated 23/03/2018 interim protection that, "till the returnable date, no coercive action be taken against the appellants", was granted and it was continued from time to time.

4. Facts relevant to decide these appeals, in short, are that, the respondent No.2-Rukhminibai w/o Ashok Sable/complainant who belongs to 'Mahar' caste i.e. Scheduled Caste had filed complaint dated 08/02/2018 in Police Station Malakoli alleging that on 05/02/2018 at about 06.00 to 07.00 p.m. the appellant Manoj @ Pintya s/o Dushant Kandhare (accused No.1) abused her on her caste and threatened to kill her, and at that time his wife Kusumbai Manoj @ Pintya Kandhare (accused No.5) had also abused her, by taking her under the tractor on the ground of tying the cattle in her site and while her relatives were coming to save her they were wrongfully confined by the appellant Baban @ Anantrao s/o Motiraj Gudde (accused No.2), Gayabu s/o Pandurang Gudde (accused No.3) and Malhari Maroti Hingane (accused No.4) and all these accused Nos.2 to 4 gave fist and kick blows to her nephew Rahul and pulled hairs of her daughter and assaulted her and as such crime No.15/2018 under Sections 324,323,337,341,143,147,149 and 506 of the Indian Penal Code (for short "IPC) and under Sections

3(1)(r) and 3(1)(s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the "Atrocities Act") was registered against all the accused. Hereinafter the appellants are referred to by their accused number.

5. Thereafter accused No.2- Baban Gudde and accused No.3-Gayabu Gudde had filed Misc.Criminal Application No.26/2018 in the Court of Additional Sessions Judge, Kandhar under Section 438 of the Code of Criminal Procedure for anticipatory bail and said application was rejected vide order dated 17/02/2018 observing that bar under Section 18 of the Atrocities Act is applicable in the present matter. Aggrieved by the said order accused Nos.2 and 3/the appellants have filed Criminal Appeal No.199/2018. Similarly, accused No.1 Manoj and his wife Manjusha Kandhare had filed Misc. Criminal Application No.27/2018 in the Court of Additional Sessions Judge, Kandhar under Section 438 of the Code of Criminal Procedure for anticipatory bail and said application was rejected

vide order dated 17/02/2018 observing that the application is not tenable in view of the bar under Section 18 of the Atrocities Act. Aggrieved by the said order accused No.1 and his wife have filed Criminal Appeal No. 200/2018.

6. Mr.Swami, learned counsel for all the appellants submitted that in the FIR no role is attributed to the appellants/accused Nos.2 and 3, in Criminal Appeal No.199/2018 and the allegations made in the FIR against these accused and wife of accused No.1 are not sufficient to attract offences under Section 3(1)(r) and 3(1)(s) of the Atrocities Act. The accused No.1 had filed FIR No.21/2018 against Balaji cousin of the respondent No.2/complainant. So also, there are civil disputes between accused No.1 and Sopan Sabale. Suit was decreed in favour of accused No.1 Manoj. Accused Nos.2 and 3 are wrongly involved in the crime. No offence alleged against the accused is attracted and therefore all the accused/appellants are entitled to anticipatory

bail. While passing the impugned orders both dated 17/02/2018 the learned Additional Sessions Judge did not consider the aspect that the bar contemplated under Section 18A of the Atrocities Act is not attracted. Therefore, according to the learned counsel for the appellants the learned Additional Sessions Judge ought to have granted anticipatory bail to all the appellants/accused Nos.1,2,3 and 5 wife of accused No.1-Manoj. Thus, the impugned orders are not sustainable and they are liable to be set aside by allowing the appeal. Applications of the respective accused are to be allowed and they are required to be granted anticipatory bail as prayed.

7. Mr.Badakh, learned APP for the respondent No.1/State supported the impugned orders contending that the bar contemplated under Section 18A of the Atrocities Act is attracted in the present case and therefore the learned Additional Sessions Judge has rightly rejected both the applications by the impugned orders. He therefore claimed to dismiss both

the appeals.

8. Mr. Khandagale, learned counsel for the respondent No.2/complainant submitted that offences are serious. Respondent No.2 was abused on her caste by the accused. Serious head injury was caused to respondent No.2. As such, offence under Section 324 of the IPC which is serious is attracted. He therefore prayed to dismiss both the appeals contending that there is no ground to interfere with the impugned orders.

9. I have carefully considered the submissions made by the learned counsel for the appellants, learned APP for the respondent/State and learned counsel for respondent No.2/complainant in both the appeals. With their assistance I have perused documents and the impugned orders. There is no dispute that respondent No.2 and all the appellants/accused are from the same village. There is a civil dispute between accused No.1 and

respondent No.2 on account of site of tying the cattle which is behind the house of Vyankatrao Kadam and Mahadu Kadam.

10. To see whether anticipatory bail application is maintainable after provision under Section 18A of the Atrocities Act after the amendment in the Act, it would be useful to refer observations in paragraphs No. 20 and 21 of the judgment dated 03/04/2019 of the Division Bench of this Court in Criminal Appeal No. 194 of 2019. Said paragraph Nos.20 and 21 are as under:-

"20) In the landmark case reported as AIR 2007 SC 1450 [D.K. Ganesh Babu Vs. P.T. Manokaran & Ors.], the Apex Court has discussed the provision of section 438 and it is laid down that in exceptional circumstances anticipatory bail can be granted. In section 438 of Cr.P.C., the factors which are required to be taken into consideration by the Court are given and the provision is as follows :-

"438. Direction for grant of bail to person apprehending arrest .- (1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of

such arrest, he shall be released on bail, and that Court may, after taking into consideration, *inter alia*, the following factors:- (i) the nature and gravity or seriousness of the accusation as apprehended by the applicant;

(ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court previously undergone imprisonment for a term in respect of any cognizable offence;

(iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested, and

(iv) the possibility of the applicant, if granted anticipatory bail, fleeing from justice,"

either reject the application forth with or issue an interim order for the grant of anticipatory bail:"

With effect from 21.4.2018 sub-section (4) was added to section 438 and it runs as under :-

"(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA of section 376DB of the Indian Penal Code."

In the case reported as (1980) 2 SCC 565 [Shri. Gurbaksh Singh Sibbia and Ors. Vs. State of Punjab], the Constitutional Bench of Apex Court has made following observations at para No. 31 :-

"31. In regard to anticipatory bail, if the proposed accusation

appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the

court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in *The State v. Captain Jagjit Singh*, which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail."

Thus, the provision of section 438 of Cr.P.C. and the law developed on it shows that it is a discretionary relief, it can be granted in exceptional circumstances and the Court is expected to keep in mind the interest of the society also. If there are provisions due to which the relief of anticipatory bail cannot be granted to a person against whom there is allegation of commission of a particular offence, it becomes the duty of the Court to ascertain as to whether there is material to make out prima facie case of commission of that offence by the person who has come to the Court for relief of anticipatory bail. If the Court forms opinion that there is such

material, then it can be said that the bar given by section 18 or section 18-A comes into play. If the material is not sufficient to make out prima facie case of commission of the offence punishable under the Act against the applicant, the Court is expected to consider the matter as provided under section 438 of Cr.P.C. Section 438 already quoted shows that the provision is made to see that the liberty of the subject is not put in jeopardy on frivolous grounds at the instance of unscrupulous or irresponsible persons or officers who may some times be in charge of prosecution. [Reliance placed on the case reported as AIR 1977 SC 366 (Balchand Jain Vs. State of Madhya Pradesh) and also on AIR 2007 SC 1450 [D.K. Ganesh Babu Vs. P.T. Manokaran & Ors.]).

21) In view of the discussion made above, this Court holds that even after the amendment made in the year 2018 by which the provision of section 18-A came to be added, there is the power to Sessions Court and High Court to consider anticipatory bail application even if the crime is registered for offences punishable under the Act. At the time of consideration of such application, the Court will have to consider as to whether there is accusation of having committed the offence under the Act and as to whether there is material to make out prima facie case for commission of such offence. This Court wants to add that even the police officer is expected to give thought at the time of registration of the crime under section 154 of Cr.P.C. that whether the allegations constitute the offence under the Act. Only because the first informant belongs to scheduled tribe or scheduled caste, the crime cannot be registered for offence punishable under the

Act and offence can be registered under the Act only if there are ingredients of the offences punishable under the Act in the accusation."

11. Similarly, it is useful to refer decision of Full Bench of Rajasthan High Court in the case of Virendra Singh Vs. State of Rajasthan, 2000 Cri.L.J. 2899 to see under what circumstances application under Section 438 of the Code of Criminal Procedure can be entertained in case of offence under the Atrocities Act, and in the said case in paragraph 18 it was observed thus:-

"18.If a person is even alleged of accusation of committing an offence under the S.C. S.T. Act of 1989 the intention of Section 18 is clearly to debar him from seeking the remedy of anticipatory bail and it is only in the circumstances where there is absolutely no material to infer as to why Sec. 3 has been applied to implicate a person for an offence under the Act of 1989 the courts would be justified in a very limited sphere to examine whether the application can be rejected on the ground of its maintainability. What is intended to be emphasized is that while dealing with an application for anticipatory bail, the courts would be justified in merely examining as to whether there is at all an accusation against a person for registering a case

under Section 3 of the Act of 1989 and once the ingredients of the offence are available in the FIR or the complaint, the courts would not be justified in entering into a further inquiry by summoning the case diary or any other material as to whether the allegations are true or false or whether there is any preponderance of probability of commission of such an offence. Such an exercise in our view is intended to put to a complete bar against entertainment of application of anticipatory bail which is unambiguously laid down under Section 18 of the Act of 1989, which is apparent from the perusal of the section itself and thus the court at the most would be required to evaluate the FIR itself with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of the ingredients constituting the alleged offence. In our opinion, the court will not be justified in embarking upon an inquiry as to the reliability or genuineness or otherwise of the allegations 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 Section 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 scrutinising the preponderance of the probability of commission of the offence by the accused, but if from the FIR itself the ingredients of offence 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 enquiry into the matter so as to determine whether the allegations levelled 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 levelled against the accused are even prima facie correct or incorrect."

12. Thus, it is clear from observations of the Division Bench of this Court in Criminal Appeal No. 194 of 2019 that if the Court forms opinion that there is such material, then bar under Section 18A comes in to play, if the material is not sufficient to make out prima facie case of commission of offence punishable under the Act against the applicant, the Court is expected to consider the matter as provided under section 438 of Cr.P.C. Similarly in view of Full Bench decision of Rajasthan High Court in the case of Virendra Singh (Supra) 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 Section 3 of the Act of 1989, the bar of Section 18 would instantly operate against the person who has been made an accused of the offence under the Act of 1989.

13. The ingredients of offences under Sections 3(1)(r) and 3(1)(s) of the Atrocities Act alleged against the appellants/accused Nos.1,2,3 and 5 are to be considered and said provisions are as under:

"3. Punishments for offences of atrocities.- (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-

(a)

(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;

(t)

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine."

14. On perusal of the FIR (Exh.'A') dated 08/02/2018 it is seen that said FIR was lodged by respondent No.2/complainant against in all five accused. Amongst them appellants in Criminal Appeal No.199/2018 are the accused Nos.2 and 3 and the appellants in Criminal Appeal No.200/2018 are the accused No.1-Manoj Kandhare and his wife accused No.

5, but name of his wife is mentioned as Kusumbai and not Manjusha Kandhare appellant No.1 in Criminal Appeal No.200/2018. FIR further shows that the caste of respondent No.2 is 'Mahar' (Nav-Buddha) and all the accused are belonging to 'Dhangar' community. It is alleged that on 05/02/2015 in the evening at 06-07 p.m. while respondent No.2 was tying the cattle in her site accused No.1 said her why she was tying the cattle and that said site is belonging to him and abused her on her caste i.e. Maharge, Dhadge and said her that he would kill her under the tractor and while accused No.1 was abusing her, his wife Kusumbai also came abusing her and accused No.1 hurled stone towards the respondent No.2, which hit her head. As a result she fell down. Therefore, her daughter Uma, her brother-in-law's wife of Shashikalabai Sopan Sabale, her nephew Rahul Sopan Sabale rushed towards her shouting to save her and at that time accused Nos.2,3 and 4 restrained her nephew Rahul and gave fist and kick blows to him and pulled hairs of her daughter. At that time Ashok Sabale husband of the

respondent No.2 came and requested the accused and thereupon they went away.

15. From the above allegations in the FIR it is clear that no role is attributed to accused Nos.2 and 3 the appellants in Criminal Appeal No.199/2018 as regards the offences under Sections 3(1)(r) and 3(1)(s) of the Atrocities Act and what is alleged against them is only that they gave fist and kick blows to Rahul nephew of respondent No.2/complainant and pulled hairs of her daughter which at the most would attract offence under Section 323 of the IPC which is bailable.

16. From the allegations in the FIR it is clear that respondent No.2/complainant belongs to Scheduled Caste since her caste is 'Mahar' (Nav-Buddha) and the accused are not members of Scheduled Caste or Scheduled Tribe since they belong to 'Dhangar' community. As far as allegations against accused No.1 are concerned it is only alleged that accused No.1

abused respondent No.1 on her caste and threatened to kill her under the tractor and he hurled stone towards respondent No.2 which hit her head and as a result she sustained head injury and at that time wife of accused No.1 abused respondent No.2 but aforesaid allegation is not sufficient to infer that accused No.1 and his wife have intentionally insulted or intimidated or abused the respondent No.2 in a place within the public view because it does not appear from the FIR that daughter-Uma of respondent No.2, Shashikalabai Sabale wife of brother-in-law of respondent No.2 and Rahul Sabale nephew of respondent No.2 had witnessed aforesaid incident. Therefore, bar contemplated under Section 18A of the Atrocities Act to entertain anticipatory bail application under Section 438 of the Code of Criminal Procedure is not attracted in the present case and therefore finding of the trial Court that bar under Section 18A of the Atrocities Act is attracted in the present case is not correct.

17. However, on the basis of above referred allegations in the FIR it can be said that accused No.1 had threatened to kill respondent No.2/ complainant attracting offence under Section 506 of the IPC which is bailable. There is copy of injury certificate of respondent No.2 on record which shows that out of two injuries she suffered the first is simple injury on parital region and second injury suffered by her is abrasion over the right leg. Thus, at the most offence under Section 323 of the IPC which is bailable would be attracted against the accused No.1 and there is hardly a scope to attract offences under Sections 324 and 337 of the IPC against said accused.

18. For all the reasons discussed above, I hold that when the offences under Sections 3(1)(r) and 3(1)(s) of the Atrocities Act are not attracted against all the appellants/accused and when offences attracted against accused Nos.1 to 3 are bailable as observed earlier and as the custodial interrogation

of the accused No.1 is not appearing necessary I hold that, the appellants have made out a case for anticipatory bail. Therefore, the learned Additional Sessions Judge should have granted anticipatory bail to all the appellants by allowing their respective applications. As such, impugned orders passed by the learned Additional Sessions Judge rejecting the respective applications of the respective appellants/accused are not sustainable and they are liable to be set aside by allowing the appeals and the applications of the appellants/accused are required to be allowed. In the result following order is passed.

ORDER

(i) Both the Criminal Appeal Nos.199/2018 and 200/2018 are allowed.

(ii) Impugned orders dated 17/02/2018 passed by the Additional Sessions Judge in Misc. Criminal Bail Application Nos.26/2018 and 27/2018 are set aside.

(iii) Said Misc. Criminal Bail Application No. 26/2018 and 27/2018 are allowed. In the event of arrest of the appellants i.e. accused No.3 Gayabu s/o Pandurang Gudde, accused No.2 Baban @ Anantrao s/o Motiraj Gudde, accused No.5 Manjusha w/o Manojkumar Khandare and accused No.1 Manoj @ Pintya s/o Dushant Kandare in connection with Crime No.15/2018 registered in Malakoli Police Station, Nanded, they be released on bail, each on furnishing P.R. bond of Rs.15,000/- (Rupees Fifteen Thousand) with solvent surety of the like amount on conditions that;

(a) They shall make themselves available to the Investigating Officer for the purpose of investigation as and when necessary;

(b) They shall not tamper the evidence of prosecution in any manner and by brining pressure on the respondent No.2/complainant or any witness;

(c) They shall attend Malakoli Police Station, Nanded on fourth Saturday of each month between 11.00 a.m. to 12.00 p.m. till the conclusion of the investigation.

[S.M.GAVHANE, J.]