

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

CRIMINAL APPEAL NO. 731 OF 2018

Eknath Chindha Patil,
Age: 50 years, Occupation Agri.,
R/o : Village Borkhede Pirache,
Tal. Chalisgaon, District : Jalgaon
At Present R/o. Balaji Nagar,
Chalisgaon, District Jalgaon.

...APPELLANT

VERSUS

1. The State of Maharashtra,
Through Sub Divisional Police Officer,
Chalisgaon Divison, Chalisgaon,
District Jalgaon.
2. Sau. Sushilabai Anna Kamble,
Aged 42 years, Occupation Household,
R/o Village Borkhede Pirache,
Tal. Chalisgaon, District Jalgaon.

...RESPONDENTS

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Mr. D.B. Thoke, Advocate for appellant
Mr. P.G. Borade, APP for respondent No. 1
Mr. Harshal P. Randhir, Advocate for respondent No. 2

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CORAM : K.K. SONAWANE, J.

RESERVED ON : 04th MARCH, 2019.

PRONOUNCED ON : 18th MARCH, 2019.

JUDGMENT :-

Heard. **Admit.** The present appeal is taken up for
final hearing on merit with the consent of both sides.

2. This appeal is preferred by the appellant-accused agitating the validity and propriety of the impugned order passed by the learned Additional Sessions Judge, Jalgaon, on the application below (Exhibit-3) filed in Special (Atrocity) Case No. 12 of 2018 under Section 437 read with Section 439 of the Code of Criminal Procedure, 1973, to enlarge the appellant-accused on bail pending trial. The appellant taking recourse of 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 or brevity) filed the present appeal to redress his grievances.

3. The genesis of the appeal culled out in brief is that, on 06-11-2017, the first informant – Smt. Sushilabai w/o. Anna Kamble, Sarpanch of village Borkheda Budruk, Taluka Chalisgaon, approached to the Police of Mehunbare Police Station and lodged the report that at about 1.00 p.m. after finishing the office work of monthly meeting of Grampanchayat, she proceeded towards her house. When she came at the square in the village, the appellant accosted her and started reprimanding her for what reason she has accepted his resignation in post-haste manner. He further caste allegations for not sanction of his bills nor he received any share from the work commenced in the locality of Dalit Community. The complainant made endeavour to give understanding to the appellant, but he became furious and

in a fit of rage, manhandled the complainant and also hurld abuses on her caste. The appellant gave threat to the complainant. After hearing commotion, the villagers and family members of the complainant thronged at the spot and extricated the complainant from the clutches of appellant-accused. Thereafter, she filed the report to the Police of Mehunbare Police Station.

4. Pursuant to the FIR, Police of Mehunbare Police Station registered Crime bearing No. 105 of 2017, under Section 354-A of the Indian Penal Code (IPC) and Section 3(1)(r)(s) and (w)(i) of the Act of 1989 and set the penal law in motion. Investigation Officer (IO) recorded the statement of witnesses acquainted with facts of the case. He seized the relevant documents, memory card about recording of incident, etc. during the investigation. He collected documents of medical certificates, etc. The IO also issued letter to the appellant under Section 41-A(1) of the Cr.P.C. and made enquiry about the incident with him. After completion of investigation, IO preferred charge-sheet against appellant-accused bearing Special Case (Atro) No. 12 of 2018.

5. It is to be noted that while submitting charge-sheet i.e. report under Section 173 of the Cr.P.C., IO issued another notice to the appellant, for communication to secure his presence before

the Sessions Court for further process. Accordingly, the appellant appeared before the Sessions Court concerned and filed the application under Section 437 and 439 of the Cr.P.C. to admit him on bail. Unfortunately, the learned Sessions Judge did not favour the appellant and rejected his application for bail, on the ground of its maintainability prior to any order of remand of appellant to magisterial custody. According to learned Sessions Judge, the appellant was not arrested in this crime by the police, neither he was taken in custody by the court at any point of time, nor the appellant get himself surrender before the concerned Court. Therefore, no question would arise to entertain the application for grant of bail of the appellant. Eventually, the learned Sessions Judge passed the impugned order, which is reproduced as below :-

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:: ORDER ::

"[1] The application vide Exh. 3 for regular bail which filed by accused is hereby rejected on the ground of its maintainability.

[2] The application vide Exh. 9 which filed by learned Astt. Counsel of informant is hereby allowed.

[3] Accused is directed to file application before this Court for surrendering him and for taking him in MCR.

[4] Issue notice to Investigation officer for filing his explanation why during investigation he has not arrested accused though against accused having prima facie evidence and his active involvement disclose in the alleged crime."

Dt. 04-10-2018

Sd/-
(Addl. Sessions Judge)
Jalgaon. ”

Obviously, the appellant put in question the validity, legality and propriety of the aforesaid impugned order in this appeal by invoking remedy under section 14-A(2) of the Act of 1989.

6. The learned counsel for the appellant raised the two fold objections to the impugned order passed by the learned trial Court. The first objection is in regard to the directions of issuance of show cause notice to the IO for explanation of non-arrest of appellant in this crime. According to learned counsel, the concerned IO issued the notice under section 41-A of the Cr.P.C. and directed the appellant to appear before him with all relevant documents. Pursuant to notice, the appellant complied with the directions issued by the IO and therefore no question arises for arrest of the appellant in this crime.

7. Admittedly, the new provisions of Section 41-A to 41-D are incorporated by the Code of Criminal Procedure (Amendment) Act, 2018 with effect from 01-11-2010. The relevant section of 41-A of the Cr.P.C. would be read as under :-

"41-A. Notice of appearance before Police Officer:- (1) [The police officer shall] in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has

been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officers is of the opinion that he ought to be arrested.

[(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer, may, subject to such orders as may have been passed by a competent Court in this behalf , arrest him for the offence mentioned in the notice.]

8. The aforesaid provision of Section 41-A provides that where a case falls under sub-section (1)(b) of Section 41, the Police Officer shall, instead of arresting the person concerned issue notice to him for his appearance before the concerned Police Officer. The newly introduced provision of Section 41-A of the Cr.P.C. manifestly makes it clear that in view of the provisions of Section 41(1)(b) of the Cr.P.C. in all cases the arrest of such an

accused is not necessary. The Police Officer concerned is required to issue notice directing the accused to appear before him at a specified time and place. However, if at any time the accused fails to comply with the terms of notice or the Police Officer is of the opinion that the arrest is necessary, he may arrest the accused after recording the reasons for the same. Albeit, powers of the Police Officer to arrest will be subject to any order that may have been passed by the competent Court. The Honourable Apex Court reiterated the aforesaid exposition of law in the case of ***Arnesh Kumar Versus State of Bihar, reported in 2014 SC 2756***. It is to be borne in mind that the factum of registration of FIR under Section 154 of the Cr.P.C. and arrest of an accused under Section 41 of the Cr.P.C. are entirely two different things. It would be fallacious to say that just because the FIR is registered, the immediate arrest of the accused person is essential for the IO.

9. In the matter-in-hand, the appellant-accused is arraigned for the offence punishable under Section 3(1)(r)(s) and (w)(1) of the Act, 1989 as well as Section 354-A of the IPC. The punishment of imprisonment prescribed for these offences are upto five years and with fine. Therefore, when the allegations against the appellant are of the offence punishable with imprisonment upto five years, the arrest of appellant was not necessary at the initial stage and his attendance could be secured

by issuing notice to him as provided under Section 41-A of the Cr.P.C. The Section 41 of the Cr.P.C. gives discretion to the Police Officer who may without an order from the Magistrate or even without warrant arrest any such person in the situation enumerated in Section 41(1)(b) of the Cr.P.C.. Therefore, since the power to arrest is discretionary, a Police Officer is not always bound to arrest an accused even if the allegations against accused is of having committed a cognizable offence. It is only for the IO to opt for arrest or not to arrest the appellant for the sake of investigation. The Court has no role to play in the matter of arrest of accused in the crime of cognizable offence. In the aftermath, the inference can be drawn that the clause (4) of the operative part of the impugned order for calling explanation from the IO is erroneous and not amenable within jurisdiction of learned trial Court.

10. The another objection propounded on behalf of appellant pertains to findings of learned Sessions Judge regarding maintainability of application for bail filed on behalf of appellant. The learned counsel Shri Thoke assailed that the learned Sessions Judge did not consider the circumstances on record in its proper perspective. The finding of the learned trial Court is totally based on misconception of factual aspect and provisions of law. He submits that, once the appellant appeared before the Court and filed the application for bail, these circumstances itself

sufficient to appreciate that he had surrendered before the Court. He relied upon the ratio laid down in the cases of **Sundeep Kumar Bafna Vs. State of Maharashtra** reported in **2014 AIR (SC) 1745** as well as **Isan Vasant Deshmukh @ Prasad Vasant Kulkarni Vs. State of Maharashtra** reported in **2011 (2) Mh.L.J. 361**.

11. Learned APP for respondent No. 1 and learned counsel for respondent No. 2 raised objections to the contentions propounded on behalf of appellant and supported the impugned order of learned trial Court.

12. The intense scrutiny of the factual score as well as impugned finding of the learned Sessions Judge in the present matter reflects that, the view taken by the learned Additional Sessions Judge, pertains to maintainability of the application for bail filed by the appellant appears erroneous, perverse and not in proper perspective of the circumstances on record. It is absurd and illogical to appreciate that the person, who is not arrested by the Police nor remanded to magisterial custody is not entitled to apply for bail under section 439 of the Cr.P.C. Undisputedly, the provision of section 439 of Cr.P.C. contemplates special power of High Court and Court of Sessions to grant bail to a person accused of an offence and who is in custody.

13. There are catena of judicial precedents, wherein it has been

laid down that an application for bail would not lie unless the applicant concerned is in "custody". Now, the question would arise as to what is the meaning of expression "person in custody"? It is to be seen that the expression "custody" has not been defined anywhere in the Code, though it has been used in various provisions of the Code including Section 439 of Cr.P.C. Their Lordship of Apex Court in the case of **Niranjan Singh Vs. Prabhakar Kharote** reported in **1980(2) SCC, 559** dealt with the issue as to when is the person assumed to be in custody of Court, within the meaning of section 439 of Cr.P.C. and observed in paragraph No. 7 as under:

"7. When is a person in custody, within the meaning of Section 439, Cr.P.C ? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the Court having been remanded by the judicial order, or having offered himself to the Court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the Court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439. This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek

niceties sometimes hard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubiotics are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose. "

14. In the case of ***Sunitadevi Vs. State of Bihar (2005(2) Mah.L.J. 534)***, the Hon'ble Apex Court reiterated the view expressed by Their Lordship in the aforesaid *Niranjan Singh's* case and held in paragraph No. 15 as under :

"15. Since the expression "custody" though used in various provisions of the Code, including section 439, has not been defined in the Code, it has to be understood in the setting in which it is used and the provisions contained in Section 437 which relate to jurisdiction of the Magistrate to release an accused on bail under certain circumstances which can be characterized as "in custody" in a generic sense. The expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which the Magistrate can entertain in a bail petition of an accused. Section 437 envisages, inter alia, that the Magistrate may release an accused on bail, if

such accused appears before the Magistrate. There cannot be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the Court of the Magistrate."

These aforesaid observations were also considered by the Hon'ble Apex Court in the case of *Sundeeep Kumar Bafna Vs. State of Maharashtra (Supra)* as relied upon by the appellant in this case.

15. Having considered the legal guidelines delineated by the Hon'ble Apex Court, it can safely be concluded that when a person appeared personally before the learned Magistrate or the Sessions Judge as the case may be and filed application for his bail, it means he subjects himself to the jurisdiction of the concerned Magistrate/Sessions Judge, and he can be regarded as a person in custody of the Court for the purpose of grant of bail.

16. The Co-ordinate Bench of this Court (Coram: D.J. Karnik, J.) in the case of ***Ritesh Prem Gayal Vs. Senior Inspector Police*** reported in ***2008 Cri.L.J. 2118*** on referring the decision of same Bench in the case of ***Dr. Sanjivani R. Kale Vs. State of Maharashtra*** (Criminal Application No. 3 of 2008 decided on 14th January 2008, Coram: D.G. Karnik, J.) adopted the similar view and reiterated that,

"When a person accused of an offence

personally present in Court and makes an application for bail, he subjects himself to the jurisdiction and command of the Court and he can be regarded as a "person in custody" of the Court and would be entitled to apply for bail."

17. In the instant case the appellant is arraigned for the offence punishable under section 354-A of the Indian Penal Code (IPC) and Section 3(1)(r)(s) and (w)(i) of the Act of 1989. The offence alleged against the appellant is exclusively triable by the Special Court notified under section 14 of the Act of 1989. The IO also filed the report under section 173(2) of the Cr.P.C. before the Special Court, Jalgaon. Pursuant to notice received from IO, the appellant appeared before the concerned Special Court /Sessions Court and filed an application for his bail. When the appellant personally remain present before the court concern and filed an application for bail, it means that appellant subjects himself to the jurisdiction and command of the concerned Special Court, Jalgaon. Therefore, appellant can be regarded as a person in custody of the Court. The physical appearance of the appellant to make an application for his bail before the concerned Sessions Judge would itself sufficient for inference that the appellant would come in the custody of the Court within meaning of section 439 of the Cr.P.C. Therefore, he is entitled to apply for bail as observed by Hon'ble Apex Court in **Niranjan Singh'** s case as

referred supra.

18. As regards to merits of the application for bail, I find that it would be unjust and improper to curtail valuable liberty of the appellant/accused in this case. Admittedly, the accused is charge-sheeted for the offence punishable under Section 354-A of the Indian Penal Code (IPC) and Section 3(1)(r)(s) and (w)(i) of the Act of 1989. The IO did not prefer to arrest the appellant for the sake of investigation in this crime. The relevant documents of the police papers reflects that appellant was not apprehended at any point of time during the course of investigation. The IO also completed entire investigation and filed charge-sheet before the concerned trial Court under section 173(2) of Cr.P.C. Therefore, there is no propriety to lodge the appellant behind bar pending the trial. It is the rule of law that there should not be pre-conviction incarceration by way of punishment. There is no impediment to exercise discretion in favour of appellant for releasing him on bail pending the trial. It would unjust and improper to put restrictions on the personal liberty of the appellant guaranteed under Article 21 of the Constitution of India for the sake of trial in this case. Therefore, the application moved by the applicant before learned Special Judge for bail required to be allowed. In such backdrop, I am of the considered opinion that the appeal filed on behalf of appellant deserves to be granted.

19. In sequel, the appeal stands allowed. The impugned order dated 04-10-2018 passed by the learned Additional Sessions Judge, Jalgaon, below applications (Exhibit-3 and 9) in Special (Attro) Case No. 12 of 2018 is hereby quashed and set-aside. The application of the appellant-applicant filed under Sections 437 and 439 of the Cr.P.C. for bail stands allowed. The appellant-Eknath Chindha Patil be released on bail in connection with Crime No. 105 of 2017 registered at Mehunbare Police Station, Jalgaon under Section 354-A of the Indian Penal Code and Section 3(1)(r)(s) and (w)(i) 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.

20. Intervention application filed on behalf of respondent No.2-first informant does not survive and same is disposed of.

21. Accordingly, the present Criminal Appeal stands disposed of in above terms. No order as to costs.

[K. K. SONAWANE]
JUDGE

MTK.
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