

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

CRIMINAL APPEAL NO.855 OF 2018

1. Qazi Mohamed Arifuddin S/o
Qazi Mohamed Munneruddin,
Age 55 years, Occ.Agri
(Deleted as per order dated 29/01/2019)
2. Qazi Mohammed Azizuddin Farooqui S/o
Qazi Mohamed Munnerruddin Farooqui,
Age 45 years, Occ.Agri.,
Both R/o. Roshankhan Mohall,a
Parbhani, Tq. & Dist. Parbhani ... Appellants

VERSUS

1. The State of Maharashtra
Through Nanalpeth Police Station
Parbhani, Dist. Parbhani.
2. Akshay Ganesh Jogdand
Minor u/g Ganeshh Jogdand
Age 16 years, Occu : Education,
R/o Behind Civil Hospital, Bhajangalli,
Parbhani. ... Respondents

Mr. Sachin S. Deshmukh, Advocate for the appellants
Mr. P.N. Kutti, APP for the respondent/State.

CORAM : S.M.GAVHANE, J.
DATED : 10.04.2019

ORAL JUDGMENT :-

- . Respondent No.2 is absent, though served.
2. Admit, heard finally at the admission stage,
with the consent of the parties.

3. The appellants/accused Nos.1 and 2 have challenged order dated 25/10/2018 in Criminal Misc. Application No.566 of 2018 passed by the Additional Sessions Judge, Parbhani, thereby, rejecting their application for anticipatory bail under Section 438 of the Code of Criminal Procedure.

4. Facts relevant to decide this appeal, in short, are that, the Crime No.394 of 2018 has been registered against the appellants in Nanalpeth Police Station, Parbhani for the offences punishable under Section 3(1)(r)(s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 [hereinafter referred to as the "SC and ST (Prevention of Atrocities)" Act] and under Sections 324, 323 and 504 read with Section 34 of the Indian Penal Code (for short "IPC") on the complaint of one Akshay Ganesh Jogdand.

5. During pendency of this appeal the appellant No.1 Qazi Mohamed Arifuddin was arrested and he came to be released on regular bail by the concerned Court and therefore his name came to be deleted as per leave granted by this Court and as such now this application

is only to the extent of request or relief of appellant No.2.

6. Mr.Deshmukh, learned counsel for the appellant submitted that on 06/10/2018 brother of the appellant No.2 had filed complaint against the present respondent No.2/complainant in respect of incident dated 05/10/2018 which took place at 12.15 p.m. and to give counter blast to the said FIR registered on the complaint of brother of appellant No.2 the respondent No.2 has filed the complaint dated 05/10/2018 in respect of so called incident dated 05/10/2018. It is submitted that allegations made in the FIR lodged by respondent No.2 are only against appellant No.1 whose name is deleted. Only allegation against appellant No.2 is that he allegedly assaulted respondent No.2 on his back and face, by sticks and fist blows. Said accusation made against appellant No.2 is not at all sufficient to attract offence under Sections 3(1)(r) and 3(1)(s) of the SC and ST Prevention of Atrocities Act. Learned counsel for the appellant has submitted that even the learned Additional Sessions Judge in his order under challenge stated that what words exactly were uttered by

appellant No.2 have not come on record. Thus according to the learned counsel when the aforesaid offences under SC and ST Prevention of Atrocities Act are not prima-facie attracted on the basis of FIR, bar contemplated under Section 18A of the SC and ST (Prevention of Atrocities) Act is not attracted and hence application seeking anticipatory bail can be entertained and appellant No.2 is entitled to anticipatory bail. Mr. Deshmukh, learned counsel further submitted that in the very first order dated 05/12/2018 this Court observed that there are no allegations against appellant No.2 and prima facie there is no evidence to attract provisions of Section 3(1)(r) and 3(1)(s) of the SC and ST Prevention of Atrocities Act. Thus, it is submitted that interim protection granted to the appellant No.2 by this Court as per order dated 05/12/2018 be made absolute, by setting aside the order under challenge to the extent of appellant No.2 by allowing the appeal.

7. Mr.Kutti, learned APP, on the other hand, by inviting my attention to the supplementary statement of respondent No.2 and other two witnesses submitted that even the appellant No.2 intentionally insulted or

intimidated respondent No.2 who is a member of Scheduled Caste with intent to humiliate him within a public view and abused him on his caste in a place within public view and therefore offences under Sections 3(1)(r) and 3(1)(s) are prima facie attracted against appellant No.2 and therefore he is not entitled to anticipatory bail. As such according to learned APP the learned Additional Sessions Judge has rightly declined to extend benefit of anticipatory bail to the appellants by rejecting their application by the impugned order. Accordingly he learned APP claimed to dismiss the appeal.

8. To see whether anticipatory bail application is maintainable after provision under Section 18A after the amendment in the Act, it would be useful to refer observation 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."

9. Similarly considering the submissions made by the learned APP based on the supplementary statement of respondent No.2 and statements of two witnesses besides the FIR to see which material can be considered by the Court while considering the aspect whether bar contemplated under Section 18A of the SC and ST (Prevention of Atrocities) Act attracts or which

material can be considered while entertaining an application under section 438 of the Code of the Criminal Procedure when the offence is registered under the provisions of the SC and ST (Prevention of Atrocities) Act, 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 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."

10. I have carefully considered the submissions made by the learned counsel for the appellant and the learned APP. With their assistance I have perused the copies of documents and impugned order produced on record with the appeal. On perusal of the FIR dated 05/10/2018 lodged by respondent No.2/complainant Akshay Ganesh Jogdand, it is seen that incident took place on 05/10/2018 at 12.30 p.m. and it is alleged that appellant No.1 whose name is now deleted, abused respondent No.2 and others on their caste. Only allegation made against appellant No.2 is that he assaulted on left thigh, left wrist, on back and face of respondent No.2 with stick and further respondent No.2

and Nilesh were given kick and fist blows and no allegation is made against appellant No.2 in the FIR that he either intentionally insulted or abused the complainant with intend to intimidate him in a place within public view. Therefore, when prima facie offences under Sections 3(1)(r) and 3(1)(s) of the SC and ST (Prevention of Atrocities) Act are not attracted, application under Section 438 of the Code of the Criminal Procedure can be entertained and bar contemplated under Section 18A of the SC and ST (Prevention of Atrocities) Act is not applicable.

11. In view of the 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 Sec. 18 would instantly operate against the person who has been made an accused of the offence under the Act of

1989. Thus, material beyond the FIR is not required to be considered while considering applicability of the bar contemplated under Section 18A of the SC and ST (Prevention of Atrocities) Act. Even perusal of statements of one witness and supplementary statement of complainant do not show that respondent No.2-complainant and said witness were abused on caste and there is no reference to their caste. Similarly, statement of one witness which refers to the caste of respondent No.2-complainant, but the same is not prima facie sufficient to say that said act has taken place at a place within public view so as to prima facie attract offences under Sections 3(1)(r) and 3(1)(s) of the SC and ST (Prevention of Atrocities) Act.

12. For the forgoing reasons, I find that prima facie offences under Sections 3(1)(r) and 3(1)(s) of the SC and ST (Prevention of Atrocities) Act are not attracted against appellants No.2. The investigation appears to be almost completed. No custodial interrogation of the appellant No.2 is appearing necessary. Offences under Sections 324, 323 and 504 of the IPC are bailable. The order impugned shows that the

learned Additional Sessions Judge was of the view that what words exactly were uttered by appellant No.2 have not come on record. Therefore, in my view, in fact, the learned Additional Sessions Judge ought to have extended benefit of anticipatory bail to appellant No.2. Therefore, the order impugned in the present appeal, passed in criminal application, to the extent of appellant No.2 is not sustainable and the same is liable to be quashed and set aside and the said application needs to be partly allowed by allowing this appeal. Therefore, following order is passed.

ORDER

- (i) Appeal is allowed.

- (ii) Impugned order dated 25/10/2018 in Criminal Misc. Application No.566 of 2018 is quashed and set aside to the extent of appellant No.2 Qazi Mohammed Azizuddin Farooqui s/o Qazi Mohamed Munnerruddin Farooqui.

- (iii) Said Criminal Misc. Application No.566/2018 is partly allowed to the extent of appellant No.2.

(iv) The order of interim anticipatory bail in terms of prayer clause (C) passed by this Court on 05/12/2018 is made absolute with conditions that,

(a) The appellant No.2 will cooperate in the investigation and will make himself available as and when he may be called by the Investigating Officer for investigation purposes and;

(b) He shall not make any inducement/threat or promise to the complainant or to any person acquainted with the facts of the case so as to descend him from disclosing such fact to Court or Police Officer.

[S.M.GAVHANE, J.]