

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

CRIMINAL APPEAL NO.859 OF 2018

Milind Dnyandeorao Sawant,
Age 42 years, Occu. Business,
R/o. Vidyanagar, Selu,
Dist. Parbhani.

...Appellant

VERSUS

1) The State of Maharashtra,
Through Police Station Pathri,
Dist. Parbhani.

2) Laxman Kacharuba Kamble,
Age 43 years, Occu. Labour,
R/o. Samrat Nagar, Pathri,
Tq. Pathri Dist. Parbhani.

...Respondents
(R.No.2 Orig.
complainant)

WITH

CRIMINAL APPEAL NO.861 OF 2018

Govind Surajlal Jaiswal,
Age 29 years, Occu. Business,
R/o. Shivajinagar, Parbhani,
Dist. Parbhani.

...Appellant

VERSUS

1) The State of Maharashtra,
Through Police Station Pathri,
Dist. Parbhani.

2) Laxman Kacharuba Kamble,
Age 43 years, Occu. Labour,
R/o. Samrat Nagar, Pathri,
Tq. Pathri Dist. Parbhani.

...Respondents
(R.No.2 Orig.
complainant)

...

Mr.S.J. Salunke, Advocate for the Appellants.
Mr.P.N. Kutti, A.P.P. for the respondents-State.

CORAM : S.M.GAVHANE, J.
RESERVED ON : 28.03.2019
PRONOUNCED ON : 25.04.2019

J U D G M E N T :-

. Since both these appeals are arising out of the same order dated 22.11.2018, passed by the Adhoc Addl.Sessions Judge, Parbhani in Misc. Application No.656 of 2018, thereby rejecting the said application of the appellants - accused for anticipatory bail under Section 438 of the Code of Criminal Procedure in connection with Crime No.256 of 2018 registered against them in Pathri Police Station, Dist.Parbhani, they are being disposed of by this common judgment.

2. Facts giving rise to these appeals, in short are that, the FIR bearing Crime No.256 of 2018 has been registered against appellant Milind Dnyandeorao Sawant in Criminal Appeal No.859 of 2018 (hereinafter referred to as "accused No.1") and appellant Govind Surajlal Jiaswal in Criminal Appeal No.861 of 2018 (hereinafter referred to as "accused No.2") and two

others in Pathri Police Station, Dist. Parbhani for the offences punishable under Sections 3(1) (R) (s), 3(1) (2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "the Atrocities Act") and under Sections 324, 327, 323, 504 and 427 read with Section 34 of the Indian Penal Code (hereinafter referred to as "IPC") on the complaint of respondent No.2—Laxman Kachruba Kamble dated 26.10.2018, alleging that on 25.10.2018 at about 10.30 p.m., accused No.1 owner of Harshavardhan Beer Bar assaulted Parmeshwar Kamble at the said Bar and intentionally insulted and abused him on his caste. Moreover, accused No.1 assaulted Parmeshwar Kamble by iron rod on his head, accused Nos.1 and 2 gave fist and kick blows to respondent No.2 and accused No.1 snatched Rs.50,000/- from respondent No.2.

3. The accused Nos.1 and 2 filed Criminal Misc.Application No.656 of 2018 in the Court of Sessions Judge, Parbhani under Section 438 of the Code of Criminal Procedure for anticipatory bail. Said application was rejected by the Adhoc

Addl. Sessions Judge, Parbhani by the impugned order dated 22.11.2018. Aggrieved by the said order, Criminal Appeal No.859 of 2018 has been filed by accused No.1 and Criminal Appeal No.861 of 2018 has been filed by accused No.2 under Section 14-A(2) of the Atrocities Act. By order dated 5th December, 2018, interim protection that the police shall not take coercive action against both appellants was granted and it was continued from time to time.

4. Mr. Salunke, learned Advocate for the appellants submitted that accused No.1 belongs to Mahar Caste and his caste certificate is produced at Exhibit "D". Therefore, when accused No.1 is a member of a Scheduled Caste, the offences under the Atrocities Act are not attracted against the appellant-accused No.1.

5. Mr. Salunke, learned Advocate further submitted that respondent No.2 is habituated to lodge false reports and as such, he has filed FIR Exhibit "E" against in all 11 accused, alleging the offences under the Atrocities Act and under the IPC. Thus,

according to learned Advocate, the report against appellants-accused lodged by respondent No.2 is false.

6. It is further submitted by Mr.Salunke, learned Advocate that in the FIR against accused Nos.1 and 2, no role is attributed to accused No.2 as regards the offence under the Atrocities Act. Therefore, no offence under the Atrocities Act is *prima facie* attracted against accused Nos.1 and 2. Therefore, bar contemplated under Section 18A of the Atrocities Act to entertain the application for anticipatory bail under Section 438 of Code of Criminal Procedure is not attracted. As such, the observations in the impugned order that accused No.2 does not belong to SC or ST category and in view of bar contained in Section 18 of the Atrocities Act, a relief under Section 438 of Code of Criminal Procedure cannot be extended in favour of accused No.2 are not proper. It is submitted that as per FIR, the occupation of respondent No.2-complainant is labour and therefore, the allegation against accused No.1 in the FIR that accused No.1 took out

Rs.50,000/- from the pocket of respondent No.2 are not *prima facie* acceptable and therefore, the observations of the trial Court for recovery of iron rod used by accused No.1 in assaulting Parmeshwar Kamble on his head and aforesaid amount, custodial interrogation of accused No.1 is necessary, are not correct.

7. Mr.Salunke, learned Advocate for accused Nos.1 and 2 submitted that on the same day i.e. on 26.10.2018 at about 02.57 a.m. i.e. prior to FIR Exhibit "A" dated 26.10.2018 lodged at 13.19 hours, accused No.2 lodged FIR No.255 of 2018 in the same Police Station, i.e. Pathri, Dist.Parbhani against respondent No.2-complainant and three others namely, Sachin Kamble, Pramod Kamble and Nitin Chiklange. Thus, the FIR lodged by accused No.2 is prior in time than the FIR against present respondent No.2 and just to give counter-blast to the FIR lodged by accused No.2, the present respondent No.2 has filed the FIR against appellants-accused Nos.1 and 2 and therefore, there is no substance in the allegations made in the FIR against accused Nos.1 and 2. It is submitted that

during pendency of these appeals, interim relief is granted in favour of accused Nos.1 and 2. They have not misused the liberty granted by this Court. They have assisted the Investigating Officer. Almost all the investigation is completed and now mere formality of submitting the charge-sheet is remained. The offence is of October, 2018. In all the above circumstances, according to the learned Advocate for the appellants, it is a fit case to extend benefit of anticipatory bail to both the accused. But the learned Adhoc Addl. Sessions Judge has wrongly rejected the application of accused Nos.1 and 2 by the impugned order. Therefore, the said order is liable to be set aside and the application of accused Nos.1 and 2 is to be allowed by allowing the appeals.

8. Mr.Salunke, learned Advocate for the appellants to support his aforementioned submissions has relied upon the following decisions of this Court and the Hon'ble Supreme Court :

- i) Kiran S/o Madhukar Ingle V/s. The State of Maharashtra and Anr., Criminal Appeal No.787 of 2018 decided on 26.02.2019.*
- ii) Vishwanath Kisan Jadhav V/s. The State*

of Maharashtra, Criminal Application No.2734 of 2012 decided on 09.07.2012.

iii) Smt. Nilima Raghunath Malode Vs. The State of Maharashtra and Ors., 2015 ALL MR (Cri) 4613

iv) Dr.Subhash Kashinath Mahajan Vs. The State of Maharashtra & Anr., 2018 ALL MR (Cri) 1773 (SC).

9. Mr.Kutti, learned APP on the other hand submitted that accused Nos.1 and 2 are influential persons. There are eye-witnesses to the incident. Custodial interrogation of accused Nos.1 and 2 is necessary. Due to fear of the accused Nos.1 and 2, independent witnesses are not coming forward. Further, it is submitted that evidence is yet to be collected. Lastly, it is submitted that both the appeals be dismissed and interim protection granted to the accused Nos.1 and 2 may not be continued. None present for respondent No.2/complainant though served with the notice.

10. I have carefully considered the submissions made by the learned advocate for the accused Nos.1 and 2 and the learned APP and with their assistance I have perused the documents and impugned order.

11. To see whether anticipatory bail application is maintainable under Section 18A of the Atrocities Act after the amendment in the Act, it would be useful to refer observations in paragraph Nos.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."

12. 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.
(Emphasis supplied). 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."

13. Thus, it is clear from the 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 Atrocities 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 as an accused of the offence under the Act of 1989.

14. The ingredients of offences under Sections 3(1)(r) and 3(1)(s) of the Atrocities Act alleged against the appellants 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."

15. On perusal of the FIR (Exh.A), it is seen that respondent No.2-complainant lodged the said FIR on 26.10.2018 at 13.19 hours against accused Nos.1 and 2 and two other unknown persons in respect of the incident which took place on 25.10.2018 at about 10.30 p.m. In this FIR, respondent No.2 has not stated that he is a member of SC or ST category. So also, he has not stated that accused Nos.1 and 2 are not the members of SC or ST category. There is no dispute that accused No.1 Milind Sawant belongs to Mahar Caste and as such, he is a member of Schedule Caste. Therefore, the offences under Section 3(1) (r) and 3 (1) (s) of the Atrocities Act are not attracted against accused No.1.

16. On perusal of the FIR, it is apparent that no role is attributed to accused No.2 Govind Jaiswal as regards the aforesaid offences under the Atrocities Act and whatever allegations are made in respect of abusing the complainant on his caste are made against accused No.1 Milind Sawant. Therefore,

the offences under the aforesaid sections of the Atrocities Act are also not *prima facie* attracted against accused No.2. In such circumstances, when the offences under the Atrocities Act are not applicable or attracted against accused Nos.1 and 2, 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 applicable to the present case and as such the application for anticipatory bail can be entertained. Therefore, the observations of the learned Adhoc Addl.Sessions Judge, Parbhani in the impugned order that as accused No.2 does not belong to SC or ST category in view of bar contained in Section 18 of the Atrocities Act, the relief under Section 438 of the Code of Criminal Procedure cannot be extended in his favour are incorrect and not sustainable.

17. On perusal of the FIR (Exh.A), further it is seen that both accused Nos.1 and 2, along with two other persons went to respondent No.2/complainant, while he was sitting at the Hotel of tea of Vishwanath Kamble and they had taken respondent No.2

towards the Petrol Pump. There the witnesses Nitin Chafekar, Parmeshwar Kamble and Ganesh Ghode had come to rescue respondent No.2. At that time, accused No.1 assaulted to Parmeshwar Kamble on his head with iron rod and as a result, he sustained bleeding injury. Accused Nos.1 and 2 gave fist and kick blows to the respondent No.2 and accused No.2 hit brick to the head of the respondent No.2. At that time, glass of the Petrol Pump was broken and towards the damages of said glass, accused No.1 had taken out Rs.50,000/- from the pocket of respondent No.2. It is seen from the copy of injury certificate of respondent No.2 that, he sustained four abrasions i.e. simple injuries and it is seen from the copy of injury certificate of Parmeshwar Kamble that, he sustained three CLWs and blunt trauma i.e. simple injuries by hard and blunt object. Thus, there is *prima facie* involvement of accused No.1 in assaulting Parmeshwar Kamble with iron rod and involvement of both accused Nos.1 and 2 in assaulting respondent No.2 with fist and kick blows and further involvement of accused No.2 in hitting a brick to the head of respondent

No.2-complainant and as a result causing aforementioned injuries to Parmeshwar Kamble and respondent No.2, thereby attracting the offence under Section 324 of the IPC. Similarly, there is *prima facie* involvement of accused No.1 in taking out Rs.50,000/- from the pocket of respondent No.2.

18. Considering the above said allegations and material, there is substance in the submissions of learned APP that some evidence is yet to be collected. In such circumstances, I find that even custodial interrogation of both the appellants-accused Nos.1 and 2 is necessary for recovery of the objects/ articles used by them in assaulting respondent No.2 and witness Parmeshwar Kamble and the amount taken out from respondent No.2. It appears that the FIR was registered against respondent No.2 and three others prior in time on the complaint of accused No.2 Govind Jaiswal as per Exh.B, but the same is not sufficient at this stage to state that the allegations made against accused Nos.1 and 2 are false as argued by their learned Advocate. As the offence under Section 324 of the IPC which is

non-bailable is *prima facie* attracted against both accused Nos.1 and 2 and their custodial interrogation is necessary, they are not entitled to anticipatory bail.

19. In this view of the matter, the decisions of this Court and of the Hon'ble Supreme Court referred earlier relied upon by learned Advocate for the appellants-accused Nos.1 and 2 cannot be suitably made applicable to the present case to state that accused Nos.1 and 2 are entitled to anticipatory bail. As such, I find that learned Adhoc Addl.Sessions Judge, Parbhani has rightly observed that the custodial interrogation of accused No.1 is necessary and hence, accused No.1 is not entitled to anticipatory bail. As regards the role of accused No.2 in committing the offence under Section 324 of the IPC, the learned Judge has not properly considered the allegations against said accused in the FIR and simply observed that the bar contained in Section 18 of the Atrocities Act is attracted and therefore, the relief under Section 438 of the Code

of Criminal Procedure cannot be extended in favour of said accused and such observation is incorrect.

20. For all the aforesaid reasons, there is no justifiable ground to interfere with impugned order of rejecting the anticipatory bail application of the appellants-accused Nos.1 and 2. Thus, both the appeals *san* merit and they are liable to be dismissed. Accordingly, they are dismissed.

21. Needless to state that interim protection which was granted to the appellants comes to an end with the dismissal of the appeals.

[S.M.GAVHANE, J.]

sarowar