

CRM-M-113-2020 (O&M)

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.**

**CRM-M-113-2020 (O&M).
Decided on: January 27, 2020.**

Harpreetinder Singh

.. Petitioner

VERSUS

State of Punjab

.. Respondent

*** * ***

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

*** * ***

**PRESENT Mr.Manvinder Singh Sidhu, Advocate,
for the petitioner.**

**Mr.M.S.Nagra, AAG, Punjab, with
Mr.Rajesh Chibber, DSP, Barnala.**

JASGURPREET SINGH PURI, J.

The present petition has been filed under Section 438 of the Code of Criminal Procedure (for short 'the Cr.P.C.')

praying for issuance of directions to the arresting officer/SHO, Police Station, Barnala, to release the petitioner on bail in the event of his arrest in case FIR No.221 dated 24.12.2019, under Section 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, registered at Police Station Barnala.

The grievance of the petitioner is that vide AnnexureP5, the above stated FIR has been lodged against him at the instance of one

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Jatinder Singh, who was a social study teacher in the same school along with the petitioner and that the petitioner has been targeted in a mala fide manner.

Before issuing notice in the present petition, the learned Assistant Advocate General, Punjab, was asked to assist the Court with regard to the maintainability of the present petition which has been filed under Section 438 of the Code of Criminal Procedure, in view of specific bar created under Section 18-A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, (for short ‘the SC & ST Act’), and particularly in view of the judgment of Hon’ble the Supreme Court in **Union of India Vs. State of Maharashtra and others, 2019 (4) RCR (Crl.) 828.**

Learned counsel for the petitioner had raised an argument that when the FIR does not, prima facie, disclose commission of or make out an offence under the SC & ST Act, then the petition under Section 438 Cr.P.C. would be maintainable despite the bar created under Section 18-A of the SC & ST Act and therefore, on 16.1.2020, notice of motion was issued to the State so that the matter can be heard in its entirety, both on maintainability as well as on the merits of the case.

Before advertng to the facts of the present case, the law with regard to the maintainability of the petition under Section 438 Cr.P.C. needs to be discussed.

Section 18 of the SC & ST Act, is reproduced as under:-

“18. Section 438 of the code not to apply to

persons committing an offence under the Act.

Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.”

Hon’ble the Supreme Court in **Dr.Subhash Kashinath Mahajan Vs. State of Maharashtra and another, 2018 (2) RCR (Crl.) 552,** while dealing with the provisions of Section 18 of the SC & ST Act, held as under:-

“Accordingly, we have no hesitation in holding that exclusion of provision for anticipatory bail will not apply when no prima facie case is made out or the case is patently false or mala fide. This may have to be determined by the Court concerned in facts and circumstances of each case in exercise of its judicial discretion. In doing so, we are reiterating a well established principle of law that protection of innocent against abuse of law is part of inherent jurisdiction of the Court being part of access to justice and protection of liberty against any oppressive action such as mala fide arrest. In doing so, we are not diluting the efficacy of Section 18 in deserving cases where Court finds a case to be prima facie genuine warranting custodial interrogation and pre-trial arrest and detention.

Thereafter, Hon’ble the Supreme Court gave the conclusion as follows:-

“Our conclusions are as follows:

i) Proceedings in the present case are clear abuse of process of court and are quashed.

ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. We approve the view taken and approach of the Gujarat High Court in Pankaj D Suthar (supra) and Dr. N.T. Desai (supra) and clarify the judgments of this Court in Balothia (supra) and Manju Devi (supra);

(iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.

iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.

(v) Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt.

The above directions are prospective.

In the aforesaid judgment, a Review Petition (Criminal)

No.275 of 2018 in Criminal Appeal No.416 of 2018, was filed and vide

judgment dated 01.10.2019, Hon'ble the Supreme Court reviewed the aforesaid judgment to the extent as was stated in the judgment itself.

Learned counsel for the petitioner has relied upon para 54 and 57 of the said judgment in Review Petition which is reproduced as under:-

*“54. The guidelines in (iii) and (iv) appear to have been issued in view of the provisions contained in Section 18 of the Act of 1989; whereas adequate safeguards have been provided by a purposive interpretation by this Court in the case of **State of M.P. v. R.K. Balothia, (1995) 3 SCC 221**. The consistent view of this Court that if prima facie case has not been made out attracting the provisions of SC/ST Act of 1989, in that case, the bar created under section 18 on the grant of anticipatory bail is not attracted. Thus, misuse of the provisions of the Act is intended to be taken care of by the decision above. In Kartar Singh (supra), a Constitution Bench of this Court has laid down that taking away the said right of anticipatory bail would not amount to a violation of Article 21 of the Constitution of India. Thus, prima facie it appears that in the case of misuse of provisions, adequate safeguards are provided in the decision mentioned above.*

*67. We do not doubt that directions encroach upon the field reserved for the legislature and against the concept of protective discrimination in favour of down-trodden classes under **Article 15(4)** of the Constitution and also impermissible within the parameters laid down by this Court for exercise of powers under **Article 142** of*

Constitution of India. Resultantly, we are of the considered opinion that direction Nos.(iii) and (iv) issued by this Court deserve to be and are hereby recalled and consequently we hold that direction No. (v), also vanishes. The review petition is allowed to the extent mentioned above.”

The SC & ST Act was amended vide notification No.27 dated 17.08.2018, in which Section 18-A was inserted. Section 18-A of the SC & ST Act, is reproduced as under:-

"18A. (1) For the purposes of this Act,—

(a) preliminary enquiry shall not be required for registration of a First Information Report against any person; or

(b) the investigating officer shall not require approval for the arrest, if necessary, of any person,

against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.

(2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court."

A bare perusal of above Section 18-A of the SC & ST Act, would show that it has been specifically provided that the provisions of Section 438 Cr.P.C., would not apply to a case under this Act notwithstanding any judgment or order or direction of any Court.

Learned counsel for the petitioner has further relied upon a judgment of the Hon'ble Madhya Pradesh High Court in **Vinod Gurjar and another Vs. The State of M.P. and another, bearing CRA No.1937 of 2019, decided on 01.03.2019**, to contend that the provisions of Section 438 Cr.P.C. would be applicable and despite insertion of Section 18-A of the Amendment Act, the Court still has power to invoke Section 438 of the Code, for the grant of anticipatory bail. Paras 16 and 17 of the judgment are reproduced as under:-

“16.Since the Section 18A of the Amendment Act, 2018 is repetition of Section 18 of the Atrocities Act couched in different language, therefore, earlier discussion of the Hon'ble Apex Court and different High Courts in different cases can be borrowed for discussion value. Coordinate Bench of this Court vide order dated 27-08-2018 in Cr.A.No.5233/2018 (Principal Seat at Jabalpur) and vide order dated 24-09-2018 in Cr.A.No.6880/2018 (Gwalior Bench) have allowed the appeal filed by the accused seeking anticipatory bail.

17.In the instant set of facts, no likelihood of the appellant/accused to terrorise the victim exists, nor the appellant can hinder the investigation process. Therefore, considering the overall fact situation of the instant case as well as application of the Code in the procedure adopted for investigation along with the provisions of the Atrocities Act, instant case appears to be a case for grant of anticipatory bail.”

The learned counsel for the petitioner has further relied

upon a judgment of Madurai Bench of the Hon'ble Madras High Court in *Dr.S Ariharan and another Vs. The Inspector of Police and another bearing No.CRL. OP(MD) No.7224 of 2019, decided on 26.11.2019* and para 12 of the said judgment is reproduced as under:-

“12. Section 438 of Cr.PC is not the sole repository of the power to grant anticipatory bail. The High Courts are endowed with inherent powers to make such orders as to secure the ends of justice. I hope I am not indulging in quibbling or hair-splitting when I say that neither Section 18 nor Section 18 A engraft a bar against grant of anticipatory bail. They are to the effect that the provision of Section 438 of the Code shall not apply to a case under the Atrocities Act. Even if Section 438 of Cr.PC is not available, Section 482 of Cr.PC can very much be invoked. Hence, I hold that this Court is very much possessed of the power to grant anticipatory bail even in cases arising under the Schedules Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The petitions can be filed under Article 226 of the Constitution of India or under Section 482 of Cr.PC.

On the other hand, learned State counsel has relied upon judgment of the Hon'ble Gujarat High Court, to contend that after the enactment of Section 18-A of the Act, the petition under Section 438 Cr.P.C. is not maintainable. He has relied upon para 10.4 of the aforesaid judgment and relevant portion is reproduced as under:-

10.4 According to Shri Bhatt, learned advocate for the appellants, unless and until the accused has committed

an offence under the IPC where minimum punishment provided is 10 years or more against a person of Scheduled Caste or Scheduled Tribe, no provisions of Section 3(2)(v) of the Act can be invoked. According to him, since accused no.1 had caused injuries to the deceased for restoration of property i.e. his lent money, in view of the fact that the deceased died of vasovagal shock, offence at the best would attract the provisions of Section 330 or Section 331 of the IPC. At the same time, according to Shri Bhatt, learned advocate for the appellants, since there is no intention or knowledge to kill attributed to accused no.1, considering the weapon used and the injuries found on the body of the deceased, it may be an offence of homicide but not culpable homicide. Making good his submission he submitted that the intention of accused no.1 may be of only causing injuries to the deceased with a view to restore the properties belonging to the accused. At the same time, since the injuries caused is not on vital part of the body and there is no opinion to the effect that any specific injury is sufficient to cause death, offence would not fall within the definition of Section 299 i.e. culpable homicide. The said submission appears to be misconceived. Looking at the Post Mortem note, the probable cause of death, pending report from FSL as also histopathology lab, is shown to be death due to vasovagal shock due to severe injuries. Though injuries found on the body of the deceased individually may not be sufficient to cause death but considering even the provisional cause of death, injuries collectively has caused the death, may be because of vasovagal shock. In short, the death is because of the injuries found on the

body of the deceased, and therefore, injuries has a direct nexus with the death, and therefore, prima facie it cannot be concluded at this stage, that too, pending investigation deciding anticipatory bail, that whether an offence under Section 330 or Section 331 of the IPC is made out or offence under Section 302 of the IPC is made out. Prima facie, if offence falls under Section 302, when it prescribes life imprisonment, the provisions of Section 3(2)(v) of the Act gets attracted, and therefore, arguments advanced by the learned advocate for the appellants even relying on various decisions of the Hon'ble Supreme Court on that score is not acceptable. Further more, this is not the stage where while deciding anticipatory bail application every minute details in that respect is to be gone into. Suffice it to say prima facie an offence is made out, and therefore, provisions of Section 3(2)(v) of the Act is rightly invoked. Since only because the appellants - accused are not part of assault but they have abetted the assault, as coming out from the record, merely they are ready and willing to cooperate with the investigation, no anticipatory bail can be granted to them, when the offence alleged is under Section 302 of the IPC and provisions of the Act are invoked, the Court is precluded from invoking the provisions of Section 438 of the Code, more particularly, in view of bar under Section 18 and 18A of the Act. Merely because description of the appellants are not given by any witnesses and their readiness to participate in TI Parade will not lead to a conclusion that they are entitled to have an order of anticipatory bail when Section 18 and Section 18A of the Act specifically bars invoking Section 438 of the Code to a case involving the arrest of any

person on an accusation of having committed an offence under the Act. Hence, this Court does not find any merit in this Appeal, and therefore, it fails. The Appeal stands dismissed.

I have heard the learned counsel for the parties. Hon'ble the Supreme Court in **Dr.Subhash Kashinath Mahajan** (supra) observed that exclusion of provisions of anticipatory bail will not apply when no prima facie case is made out or the case is patently false or mala fide. Hon'ble the Supreme Court has further observed that this will have to be determined by the Court concerned in the facts and circumstances of each case in the exercise of its judicial discretion. It was further clarified that the Court was not diluting the efficacy of Section 18 in deserving cases where Court finds a case to be prima facie genuine warranting custodial interrogation and pre-trial arrest and detention. Thereafter, Hon'ble the Supreme Court issued directions in the concluding part of the judgment.

A perusal of the directions would show that in (ii) it has been concluded by Hon'ble the Supreme Court that there is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act, in case no prima facie case is made out or where on judicial scrutiny, the complaint is found to be prima facie mala fide. Thereafter, in the review petition, the directions contained in para (iii) and (iv) were recalled. In the meantime the provisions of the SC & ST Act were amended by way of notification dated 17.8.2018 wherein Section 18-A was inserted providing for non-obstante clause to the effect that Section 438 of the Code shall not apply to case

under the Act, notwithstanding any judgment or order or direction of any Court.

It is settled law that a legislation or a provision in the legislation is presumed to be constitutionally valid unless it is struck down by the competent court.

It has been stated by the learned counsel for the parties that although the vires of Section 18-A have been challenged before Hon'ble the Supreme Court but the matter is still sub judice and that there is no stay pertaining to operation 18-A of the SC & ST Act. In other words, Section 18-A of the SC & ST, Act as inserted vide Notification dated 17.8.2018, is in operation and therefore, presumed to be constitutionally valid.

The contention raised by the learned counsel for the petitioner that in view of the judgment of Hon'ble the Supreme Court, there can be no bar under Section 18 of the SC & ST Act, and even after insertion of Section 18-A, still there would be no bar for entertaining the petition under Section 438 Cr.P.C. for grant of pre-arrest bail, is required to be tested in the present case on two issues, firstly Section 18-A is presumed to be constitutionally valid and secondly Hon'ble the Supreme Court in **Dr.Subhash Kashinath Mahajan** (supra), had observed that the exclusion of provisions of anticipatory bail will not apply when no prima facie case is made out or case is patently false or mala fide. Therefore, it will be necessary to advert to the facts of the present case so as to ascertain as to whether in the present set of circumstances, prima facie case is made out on

the face of it or not and also as to whether on the face of it, it is patently false or mala fide or not.

In the present case, the FIR was registered against the petitioner namely Harpreetinder Singh on 24.12.2019, at the instance of “**whole Gram Panchayat**” vide Annexure P5 and the translated version of the contents of the FIR, as attached by the petitioner in the present petition, is reproduced as under:-

*“To
The SHO,
Police Station,
Sadar, Barnala,*

*Subject Complaint against Harpreetinder Singh
“SST (Teachers) by Gram Panchayat for denoting to
caste of the Sarpanch and a SS Teacher.*

Sir,

It is requested that we all are the members of Gram Panchayat and Gram Sabha. That Harpreetinder Singh SS Teacher has uttered words denoting caste to the whole panchayat and Jatinder Singh, SS Teacher. Recording of the same is with us. In the recording, he is uttering the word “Chure” to the whole panchayat. He said to the Sarpanch that Chura has no match while sitting on leveler (Suhaga) whereas he has become Sarpanch and at the same he is insulting Jatinder Singh SS Teacher by denoting the word “Chura”, and he is saying the Chief Minister is nothing. That he spoiled the atmosphere of the school regarding which we have

made complaint to the District Education Officer. In this regard, complaints made to DC and SSP on 16.12.19 and 19.12.19, are also enclosed. Action may be taken against the accused under the SC/T Act (POA). Sd/- Jatinder Singh Sarpanch, Gram Panchayat Naiwala, Sd/- Bikkar Singh, Panch, Ward No.3, Gram Panchayat Naiwala, Sd/- Rajinder Singh Ex-Panch, Sd/- Paramjit Singh, Ward No.1, Gram Panchayat Naiwala, Sd/- Bant Singh Ward No.8, Panch Gram Panchayat Naiwala, Sd/- Bahadar. Singh”

A perusal of the above stated FIR would show that the entire Gram Panchayat has complained to the police that the petitioner has uttered the word “Churra” to the whole Panchayat and that they have recordings of the same with them. Further, the allegation is that the petitioner said to the Sarpanch that “Churra” has no match while sitting on *Suhaga* whereas he has become Sarpanch and at the same he is denoting the word “Churra”. The allegations which have been made in the FIR, are directly attributable to the petitioner and the learned State counsel, on instructions from Mr.Rajeh Chibber, DSP Barnala, has stated that the matter is under investigation and has not been completed as yet and that custodial interrogation is required especially for taking the voice samples of the petitioner, and therefore, according to the learned State counsel, prima facie offence is made out under Section 3 of the SC & ST Act. The test laid down by Hon’ble the Supreme Court in **Dr.Subhash Kashinath Mahajan** (supra), was that Section 438 of the Code may apply when no prima facie case is made out or the case is patently false or mala fide. However, in the present

case, it cannot be said that no prima facie case is made out or that the case is patently false or mala fide. This aspect can be established either when the investigation is complete or during the course of trial but not at this stage, when investigation is yet to be completed and voice samples are to be taken. Apart from this, there are direct allegations against the petitioner in the FIR itself which may attract the provisions of the SC & ST Act. Therefore, the petitioner is not entitled for pre-arrest bail, in the facts and circumstances of the present case.

In view of aforesaid discussion, it can be safely held that in the present set of circumstances, it is not a case where it can be held that no prima facie case is made out or that the allegations are patently false or mala fide and therefore, bar created under Section 18 and 18-A of the SC & ST Act, would apply in the present case and accordingly, the present petition for grant of anticipatory bail is dismissed.

However, anything observed hereinabove shall not be treated as an expression of opinion on merits of the case and is meant for the purpose of deciding the present petition only.

January 27, 2020.
raj arora

(JASGURPREET SINGH PURI)
JUDGE

Whether speaking / reasoned	Yes / No
Whether reportable	Yes / No