

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 844 of 2020**

- Umendra Sahu S/o Shri Shiv Kumar Sahu, Aged About 18 Years R/o Village - Nirjam, Thana - City Kotwali Mungeli, Tahsil And District - Mungeli Chhattisgarh

---- Appellant**Versus**

1. State Of Chhattisgarh, Through The District Magistrate Mungeli, District - Mungeli Chhattisgarh
2. Vijay Kumar Bhaskar S/o Shri Bablu Bhaskar Aged About 41 Years R/o Village Doukidah, Thana - AJAK Mungeli, Tahsil And District - Mungeli Chhattisgarh

---- Respondents

For Appellant	:	Shri Sunil Sahu, Advocate
For State	:	Smt. Fouzia Mirza, Addl. A.G. and Shri Shubham Verma, Panel Lawyer

Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****04/02/2021**

This appeal arises out of order dated 13/10/2020 by which, learned Sessions Judge, Mungeli has rejected application for grant of anticipatory bail filed by the appellant.

2. The appellant is apprehending his arrest in connection with Crime No.541/2020 registered at Police Station – City Kotwali, District – Mungeli (CG) for alleged commission of offences under Section 363, 366, 376, 450 of IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Section 3 (2) (v) of the Scheduled Castes and Scheduled Tribes (Prevention of

Atrocities) Act, 1989 (for short 'the Act of 1989').

3. Prosecution case is that the appellant and co-accused abducted minor and it is alleged that later on, the minor was taken to another place and there, the co-accused committed rape on the prosecutrix whereas the present appellant was guarding against any possibility of arrival of third person at the place where the co-accused was committing rape on the prosecutrix. Offence under Section 363, 366, 376, 450/34 of IPC as also offence under Section 4 of the POCSO Act against the appellant and the co-accused. After arrest, the present appellant applied for grant of regular bail under Section 439 of IPC and jurisdictional Court, (Special Judge, POCSO Act, Mungeli), vide order dated 28/09/2020, granted regular bail to the present appellant, taking into consideration that according to the story of the prosecution, while the co-accused was committing rape, the appellant was standing near the place of incident.

Later on, during investigation, the investigating agency collected evidence with regard to prosecutrix belonging to Scheduled Caste and therefore, added, under the same crime number, offence under Section 3 (2) (v) of the Act of 1989. Having come to know that now, offence under Section 3 (2) (v) of the Act of 1989 have been added after grant of bail, the appellant apprehended his arrest on account of addition of new offence and applied for grant of anticipatory bail before the Court below which was eventually rejected giving rise to the present appeal.

4. Learned counsel for the appellant argued that in the present case, the allegation of commission of offence of rape is against co-accused and not against the present appellant and that was one of the main operative reason to grant regular bail also. It is next contended that mere addition of offence under Section 3 (2) (v) of the Act of 1989 will not bar grant of anticipatory bail despite

statutory bar under Section 18 of the Act of 1989 under all circumstances, but in appropriate cases, where it can be established to be an exceptional case of the nature as held by the Supreme Court in the case of **Prathvi Raj Chauhan v. Union of India and ors., (2020) 4 SCC 727**, benefit of anticipatory bail could be granted notwithstanding statutory bar under Section 18 of the Act of 1989.

Taking further his argument, he would argue that present is a case of exceptional nature because in the present case, neither in the FIR nor in the case diary statement or even in 164 CrPC statement, it has ever been stated by the prosecutrix that the offence of rape was committed on her since she was a member of scheduled caste. Therefore, even if the entire story of the prosecution, as reflected from the allegation of the prosecutrix, is taken on its face value, *prima facie* case under Section 3 (2) (v) of the Act of 1989 is not made out and therefore, in such a case, the appellant / accused is entitled to grant of anticipatory bail against accusation of Section 3 (2) (v) of the Act of 1989. He would submit that the other aspect making the case exceptional is that in respect of offence under Section 376 of IPC and other alleged offence, the appellant had already been granted regular bail taking into consideration his limited role and he was not the person who is alleged to have committed offence of rape. Therefore, the impugned order may be set aside and the appellant may be granted anticipatory bail. Learned counsel for the appellant relied upon order dated 14/01/2021 passed by the Co-ordinate Bench of this Court in Cr.A. No.845/2020 and other connected case as also order passed by the High Court of Delhi in **Danish Khan @ Saahil v. State (Govt. of NCT of Delhi)** passed in Bail Appl. No.3497/2020.

5. On the other hand, learned State counsel would argue that the plain reading of provisions contained in Section 3 (2) (v) of the Act of 1989 attract offence therein committed by the appellant because according to the prosecutrix,

the appellant and co-accused had been teasing the prosecutrix off and on and later on, she was abducted and raped by the co-accused in which the present appellant was also involved. It is submitted that the appellant is resident of the same village and this shows *prima facie* that the appellant was knowing that the prosecutrix was belonging to scheduled caste. Therefore, *prima facie* case would be made out.

6. I have heard learned counsel for the parties.

7. The first issue arising for consideration is whether the anticipatory bail application would be maintainable in view of bar under Section 18 of the Act of 1989.

This legal issue is no longer *res integra* in view of the authoritative pronouncement of the Supreme Court in the case of **Prathvi Raj Chauhan** (supra) wherein the Supreme Court had an occasion to consider the maintainability of application under Section 438 of CrPC in the matter of **allegation** of offence under the Act of 1989.

“11. Concerning the applicability of provisions of Section 438 CrPC, it shall not apply to the cases under the 1989 Act. However, if the complaint does not make out a *prima facie* case for applicability of the provisions of the 1989 Act, the bar created by Sections 18 and 18-A (i) shall not apply. We have clarified this aspect while deciding the review petitions.

.....

33. I would only add a caveat with the observation and emphasize that while considering any application seeking pre-arrest bail, the High Court has to balance the two interests: i.e. that the power is not so used as to convert the jurisdiction into that under Section 438 of the Criminal

Procedure Code, but that it is used sparingly and such orders made in very exceptional cases where no *prima facie* offence is made out as shown in the FIR, and further also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law. I consider such stringent terms, otherwise contrary to the philosophy of bail, absolutely essential, because a liberal use of the power to grant pre-arrest bail would defeat the intention of Parliament.”

8. Therefore, even though there may be allegations of offence under the Act of 1989, if a case is met out to be exceptional in nature, in exceptional cases, benefit of grant of anticipatory bail could be extended and in such cases and bar under Section 18 of the Act of 1989 may not operate.

9. In the present case, the allegation of the prosecutrix is that she was kidnapped by the appellant and co-accused and the other co-accused committed rape on her. Considering that present appellant was not one who had committed rape, he was granted regular bail but, later on, offence under Section 3 (2) (v) of the Act of 1989 has been added, as during investigation, the prosecution collected material evidence with regard to prosecutrix belonging to Scheduled Caste.

10. The provisions contained in Section 3 (2) (v) of the Act of 1989 came up for consideration and interpretation of the Supreme Court in the case of **Khuman Singh v. State of Madhya Pradesh, AIR 2019 SC 4030**. In that case, the assault was given to the deceased. While altering conviction under Section 302 of IPC to that under Section 304-II of IPC, conviction under Section 3 (2) (v) of the Act of 1989 was set aside on following considerations -

“11. The next question falling for consideration is whether the conviction under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act can be sustained? Deceased belongs to “Khangar” Caste and in a wordy altercation, appellant-accused is said to have called the deceased by his caste name “Khangar” and attacked him with an axe. Calling of the deceased by his Caste name is admittedly in the field when there was a sudden quarrel regarding grazing of the buffaloes.

12. From the evidence and other materials on record, there is nothing to suggest that the offence was committed by the appellant only because the deceased belonged to a Scheduled Caste. Both the trial court and the High Court recorded the finding that the appellant-accused scolded the deceased Veer Singh that he belongs to “Khangar” Caste and how he could drive away the cattle of the person belonging to “Thakur” Caste and therefore, the appellant-accused has committed the offence under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. Section 3 of the said Act deals with the punishments for offences of atrocities committed under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Section 3(2)(v) of the Act reads as under:-

“Section 3 – Punishments for offences of atrocities –

(1)

(2) Whoever, not being a member of a Scheduled Caste or a Schedule Tribe,

.....

(v) commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine”.

The object of Section 3(2)(v) of the Act is to provide for enhanced punishment with regard to the offences under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property knowing that the victim is a member of a Scheduled Caste or a Scheduled Tribe.

13. In *Dinesh alias Buddha v. State of Rajasthan* (2006) 3 SCC 771, the Supreme Court held as under:-

“15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine.

As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to “Khangar”-Scheduled Caste is not disputed. There is no evidence to show that the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable.”

11. In the aforesaid decision, the other judgment relied upon by the Supreme Court was rendered in **Dinesh @ Budhha** (supra) wherein, facts were that the prosecutrix was subjected to rape and for the reason that the prosecutrix was belonging to Scheduled Caste, offence under Section 3 (2) (v) of the Act of 1989 was also added. However, the Supreme Court found that *sine qua non* for

application of Section 3 (2) (v) of the Act of 1989, offence must have been added on the ground that such person is a member of scheduled castes and scheduled tribes. On facts, it was found in that case, that no evidence was led to establish that requirement and though it was not a case of the prosecution that the rape was committed on the victim since she was a member of scheduled caste. In that background, the Supreme Court held that in the absence of evidence to that effect, Section 3 (2) (v) of the Act of 1989 would have no application.

12. If the aforesaid settled legal position is applied to the allegation which have been leveled by the prosecutrix as they stand, there is nothing in the FIR, case diary statement or Section 164 CrPC statement that the prosecutrix was subjected to rape by the co-accused because she belonged to scheduled caste. If that be so, as apparent from the records of the case diary, in the considered opinion of this Court, this would be a case of exceptional nature and therefore, in view of decision of the Supreme Court in the case of **Prathvi Raj Chauhan** (supra), the bail application under Section 18 of the Act of 1989 is maintainable and looking to the aforesaid material, the appellant needs to be protected against arrest on account of subsequent addition of offence under Section 3 (2) (v) of the Act of 1989 coupled with another exceptional feature that the allegation of offence of rape is against the co-accused and the appellant was otherwise granted regular bail by the Trial Court prior to addition of offence under Section 3 (2) (v) of the Act of 1989.

13. In view of above consideration, the impugned order rejecting bail application cannot be sustained and is therefore, set aside. The application for anticipatory bail is, accordingly, allowed.

14. It is directed that in the event of arrest of the appellant on accusation of

offence under Section 3 (2) (v) of the Act of 1989, the appellant shall be released on bail on his furnishing a personal bond in the sum of Rs.20,000/- with two local sureties for the like sum to the satisfaction of the arresting officer and he shall abide by all the following terms and conditions:-

- (i) that the appellant shall make himself available for interrogation by a Police Officer as and when required;
- (ii) that he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer.
- (iii) that the appellant shall not act, in any manner, which will be prejudicial to fair and expeditious trial; and
- (iv) that the appellant shall appear before the Trial Court on each and every date given to him by the said Court till disposal of the trial.

Certified copy as per rules.

Sd/-
(Manindra Mohan Shrivastava)
Judge