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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 19 OF 2021

Mr. ABCAppellant

V/s.

The State of Maharashtra and anotherRespondents

**WITH
INTERIM APPLICATION NO. 141 OF 2021
IN
CRIMINAL APPEAL NO. 19 OF 2021**

Ms. XYZApplicant

IN THE MATTER BETWEEN

Mr. ABCAppellant

V/s.

The State of Maharashtra and anotherRespondents

Mr. Karan Bhosale i/b Mr. Raju D. Suryawanshi for Appellant
Mr. P. S. Gautam for Respondent no. 2/Original complainant
Smt. A. S. Pai, APP for the State

**CORAM : S. S. SHINDE &
MANISH PITALE, JJ.**

RESERVED ON: 11/03/2021.

PRONOUNCED ON: 08/04/2021.

JUDGMENT: (PER: MANISH PITALE, J.)

1] At the outset it is required to be noted that since the allegations against the Appellant are in respect of the alleged sexual assault and Respondent no. 2 is the victim, their identities need to be concealed, and they are referred to as “ABC” and “XYZ”. The Registry is directed to maintain the record accordingly.

2] The Appellant herein claims that friendship between him and Respondent No.2 (original informant), which developed into attraction and relationship, but which could not transform into marriage, has resulted in registration of FIR at the behest of Respondent No. 2 against him. By the present Appeal the Appellant has challenged order dated 19/12/2020 passed by Court of Additional Sessions Judge, Kalyan, whereby an application for grant of pre-arrest bail filed by Appellant under Section 438 of Code of Criminal Procedure, 1973 (Exhibit 1) stood rejected. It is brought to the notice of this court that an application filed for grant of pre-arrest bail by the co-accused persons i.e. family members of the Appellant, was allowed by a separate order by the very same court on 19/12/2020 itself.

According to the Appellant, the said Court failed to appreciate the contentions raised on behalf of the Appellant, thereby rendering the impugned order erroneous and liable to be set aside.

3] The Respondent No. 2 approached Shivaji Nagar Police Station, district: Thane on 02/12/2020, with a grievance against the Appellant and his family members. On the basis of allegations made by Respondent no. 2, FIR dated 02/12/2020, stood registered against the said accused persons for offences punishable under Sections 376, 420 and 506 r/w 34 of the Indian Penal Code and Sections 3(1)(w)(i), 3 (1)(w)(ii), 3(2)(va), 3(2)(V), 3(2)(VII) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'Atrocities Act').

4] The Respondent No. 2 alleged that being a final year student of engineering and President of Nationalist Youth Congress of Ambernath city, involved in social work, she used to regularly visit police stations. According to Respondent No. 2, on one such visit to police station, Ambernath, she met the Appellant who, being a

constable was posted at the said police station. She further alleged that the Appellant asked for her mobile number, but she refused to give him the same. Yet, after about two days, the Appellant called from his mobile phone and asked the Respondent No. 2 as to whether she would like to be friends with him. According to Respondent No. 2, she refused the said offer, but when she went to the police station in connection with permission for a *Morcha*, the Appellant met her and convinced her to develop friendship. On 07/05/2020, the Appellant allegedly called Respondent No. 2 and expressed his love for her and stated that he was ready to marry her. According to Respondent No. 2, she asked the Appellant to speak to her parents and then take further steps in the matter. According to Respondent No. 2, with passage of time, she developed faith in the Appellant and they started to meet each other.

5] According to the Respondent No.2, on 2/06/2020, they met at a temple, where two friends of the Appellant were also present. In their presence, the Appellant allegedly expressed his love for Respondent No. 2 and convinced her sister that he genuinely intended to marry

her. On the said day, the Appellant allegedly married Respondent No. 2 by exchanging garlands and also promised that they would undertake actual ceremonies of marriage in the near future. Thereafter, Respondent No. 2 has alleged that on 30/06/2020, the Appellant visited her house when her parents were not at home. He allegedly desired to establish physical relations on the ground that they were already married. When Respondent No. 2 resisted, the Appellant allegedly forcibly had physical relation with Respondent No. 2. Thereafter he quarreled with her in the morning and broke her mobile phone, but thereafter, apologized profusely.

6] According to statements made by Respondent No. 2 in her aforesaid complaint, when she further insisted on a proper marriage between the parties, the Appellant stated that her father belonged to *Mahar* caste, although her mother was Maratha and that Respondent No. 2 should get an amount of Rs. 50 lacs from her parents if she wanted that marriage should be solemnized between them. Respondent No. 2 has further alleged that on 24/11/2020, the Appellant and other accused persons i.e. his family members came in front of her house and made abusive statements against her by

referring to her caste. It is on the basis of such allegations that the complaint was lodged, leading to registration of FIR for the said offences.

7] As noted above, while application for grant of pre-arrest bail filed by other accused persons i.e. family members of the Appellant was allowed, on the same day, by the impugned order, the jurisdictional Court rejected the application filed by the Appellant. The said Court did record the fact that the Appellant and Respondent No. 2 had developed friendship and they were also in love with each other, but on the basis of allegations regarding sexual exploitation and harassment due to caste of Respondent No. 2, it found that a *prima facie* case was made out against the Appellant. On this basis, the said Court held that bar against grant of anticipatory bail under Section 18 of the Atrocities Act operated and thereby rejected the application.

8] Mr. Karan Bhosale, learned counsel appearing for the Appellant submitted that the Court below committed an error in rejecting the application of the Appellant, for the reason that there was material on record to indicate that a *prima facie* case was not made out

against the appellant for offences under the Indian Penal Code and the Atrocities Act. It was submitted that Respondent No. 2 is a well educated person, pursuing final year engineering course and she is President of youth wing of a political party i.e. Nationalist Youth Congress of Ambernath city, thereby showing that she is sufficiently capable of taking care of her own self. It was submitted that even according to Respondent No. 2, she was at the forefront of highlighting grievances of the youth by regularly approaching police stations and in that context, delay in approaching the police station with her allegations was a crucial factor, which the court below has failed to appreciate. It was submitted that there was obvious delay on the part of Respondent No. 2 in approaching the police with her grievances.

9] It was further submitted that there were two complaints submitted by Respondent No. 2, on 20/11/2020, before the Assistant Commissioner of Police and on 27/11/2020, before the Home Minister in respect of her grievances. It was further submitted that, on 27.11.2020, mother of Respondent No. 2 had also submitted a complaint before Assistant Commissioner of Police. It was vehemently

submitted that neither in the two aforesaid complaints submitted by Respondent No. 2 nor the complaint submitted by her mother, was there any reference to forcible physical relations on 30/06/2020 or the incident dated 24/11/2020 involving Appellant and his family members. On this basis, it was submitted that complaint leading to registration of FIR dated 02/12/2020 was nothing but an attempt to falsely implicate the Appellant and his family members in the said offences.

10] It was further submitted that the Appellant and Respondent No. 2 had both voluntarily entered into friendship, leading to interaction with each other. It was only when the same did not fructify into marriage that the Respondent No. 2 had lodged the aforesaid complaint. It was also highlighted that in the complaints addressed to the Assistant Commissioner of Police and the Home Minister, the Respondent No. 2 herself stated that marriage of the Appellant was fixed with someone else on 21/01/2021, thereby showing that complaint making false allegations was triggered because relationship between Appellant and Respondent No. 2 did not transform into marriage. The allegations pertaining to rape and offences under the

Atrocities Act were falsely and maliciously levelled against the Appellant. As regards bar under Section 18 of the Atrocities Act, learned counsel appearing for the Appellant submitted that when no *prima facie* case was made out for the said offences, the aforesaid bar will not operate. The learned counsel relied upon the Judgment of the Hon'ble Supreme Court in the matter of **Sonu @ Subhash Kumar Vs. State of Uttar Pradesh & Another**¹ in support of the aforesaid contentions.

11] On the other hand, Mr. P. S. Gautam, learned counsel appearing for Respondent No. 2 submitted that bar under section 18 of the Atrocities Act clearly operated in the facts and circumstances of the present case. It was submitted that the bar is absolute and that even though exception in rarest of the rare case was recognized by the Hon'ble Supreme Court, the present case did not fall within such exception. It was submitted that on this short ground, the present Appeal deserved to be dismissed. It was further submitted that the court below had correctly appreciated the material on record and that the impugned order did not deserve any interference. It was further submitted that offences under the Atrocities Act registered

¹ [Criminal Appeal No. 233 of 2021]

against the Appellant were clearly made out from the contents of the complaint leading to registration of FIR and therefore, the order rejecting pre-arrest bail did not deserve interference. It was further submitted that the Appellant had given false promise of marriage to Respondent No. 2 and he had sexually exploited her, thereby showing that offences under sections 376 and 420 of the Indian Penal Code were also made out against the Appellant. On this basis, it was submitted that Appeal deserved to be dismissed.

12] Mrs. Pai, learned APP appearing on behalf of the State opposed the appeal and supported the impugned order rejecting pre-arrest bail. The learned APP placed copies of investigation papers before this court.

13] We have heard counsel appearing for the rival parties and perused the material on record. Before considering the case of the Appellant for grant of pre-arrest bail, it needs to be appreciated that when the question of grant of pre-arrest bail is to be considered in the context of offences registered under the Atrocities Act, scope for grant of such relief is reduced considerably. Section 18 of the Atrocities Act clearly states that section 438 of Code of Criminal

Procedure, 1973 (Cr.P.C.), pertaining to grant of pre-arrest bail would not apply to the persons committing an offence under the said act. A person accused of offences under the Atrocities Act cannot claim such relief.

14] Yet, the Hon'ble Supreme Court has considered the scope and ambit of sections 18 & 18A of the Atrocities Act in the case of **Prathvi Raj Chauhan Vs. Union of India and Ors**². It has been held therein that the aforesaid provisions are clear about non-availability of section 438 of Cr.P.C. when offences under the Atrocities Act are registered. The Hon'ble Supreme Court has recognized that in exceptional cases where the complaint does not make out a *prima facie* case for applicability of the provisions of the Atrocities Act, the bar created by Sections 18 and 18A of the said Act shall not apply.

15] Thus, it becomes clear that while considering the question of grant of pre-arrest bail to the accused under the Atrocities Act, there is scope for the court to consider as to whether a *prima facie* case for applicability of the Atrocities Act is made out or not. It is pertinent to note that in the present case itself, the very same court granted pre-arrest bail to the other accused persons i.e. family members of the

² [(2020) 4 SCC 727]

Appellant.

16] In the present case, the Respondent No. 2 has indeed made statements in the complaint alleging forcible physical relationship by the Appellant on 30/06/2020 and there is also reference to an incident dated 24/11/2020 involving Appellant and his family members wherein they threatened and allegedly intimidated Respondent No. 2 by referring to her caste. There are also allegations regarding demand of certain sum of money as pre-condition for marriage. But, it is significant that the complaint leading to registration of FIR was lodged on 02/12/2020, while the allegations pertaining to forcible physical relationship pertained to 30/06/2020, which was more than five months ago. The complaint itself refers to the manner in which friendship developed between Respondent No. 2 and Appellant and their interaction with each other. Since the allegation regarding forcible physical relationship pertained to 30/06/2020, it would have been natural for the said incident being mentioned in the two complaints dated 20/11/2020 and 27/11/2020 submitted by Respondent No. 2 before the Assistant Commissioner of Police and the Home Minister respectively. It is crucial that

Respondent No. 2 has not denied the said complaints submitted by her. It is also relevant that mother of the Respondent No. 2 also did not refer to any such incident of 30/06/2020 in her complaint dated 27/11/2020 addressed to the Assistant Commissioner of Police.

17] This becomes even more significant when it is appreciated in the context that the Respondent No. 2 is an educated person, in the final year of engineering course at the time when the complaint was lodged and more importantly that she was the President of the Nationalist Youth Congress. In that capacity, even as per her own statements, she was highlighting the grievances of students and others by regularly approaching police stations and other authorities. In that context, it becomes significant that Respondent No. 2 lodged her complaint as late as on 02/12/2020, while she had allegedly suffered forcible physical relationship at the hands of the Appellant as far back as on 30/06/2020. Even the alleged incident dated 24/11/2020 does not find mention in her complaints or the complaint lodged by her mother prior to registration of FIR dated 02/12/2020. In fact, the allegations pertaining to said incident dated 24/11/2020 appear to be general in nature and this is the very

ground on which other co-accused persons were granted pre-arrest bail.

18] This is apart from the fact that by way of additional affidavit, the Appellant has placed on record copy of complaint leading to registration of non-cognizable offence at the behest of Appellant on 24/11/2020, at around the time when Respondent No. 2 claims that Appellant and other accused persons had reached her house and harassed her in the name of her caste. It is significant that the said non-cognizable offence was registered at the behest of the Appellant at police station, Murbad, which is admittedly at a considerable distance from the house of Respondent No. 2. The said material can be considered to examine whether a *prima facie* case is made out on the basis of statements made by Respondent No. 2, which led to registration of FIR.

19] In this backdrop, it would be necessary to appreciate the material on record to examine as to whether during the relationship between Appellant and Respondent No. 2, Appellant sought to exploit Respondent No. 2 due to her caste or that he sought to dominate her in any manner. Respondent No. 2 has placed on record copies of

Whats App chats between her and the Appellant. In the investigation papers also, copies of such Whats App chats have been included which have not been disputed by the Respondent no. 2. We have perused the same and examined the nature of interaction between the Appellant and Respondent No. 2. A perusal of the same *prima facie* shows that friendship between the Appellant and Respondent No. 2 developed into attraction and love for each other. In the chats, the Appellant as well as Respondent No. 2, both have expressed their love for each other. It appears that the Respondent No. 2 desired that Appellant should be clear about their relationship going to the next level of marriage. The Appellant also expressed a similar desire. The chats also show that Respondent No. 2 was apprehensive that family members of the parties may not be positively disposed towards such marriage and she wanted assurance in that regard. The Appellant appears to have given such assurances and there is no reference to caste of Respondent No. 2 in these interactions between the parties. We have referred to the said material, not to sift through or examine any kind of evidence in detail, but to appreciate as to whether allegations levelled by Respondent No. 2 *prima facie* indicate that Appellant started the friendship and entered into relationship with

Respondent No. 2 from the very beginning to dominate her due to her caste or to exploit her physically and emotionally.

20] On a perusal of said material, *prima facie* it appears that such a finding at this stage cannot be reached that the whole purpose of the Appellant to develop friendship and going further with Respondent No. 2 was with a view to exploit her, particularly because of her caste. At this stage, *prima facie*, it appears that friendship between Appellant and Respondent No. 2, which developed into attraction and love between them could not be fructify into marriage. It is when such a situation arose, the Respondent No. 2 sought to air her grievances.

21] It is crucial that in the complaints submitted by her on the letter heads of Nationalist Youth Congress to the Assistant Commissioner of Police and the Home Minister, she did not refer to the incident of forcible physical relationship on 30/06/2020 and the alleged incident on 24/11/2020. It can be understood that incident of 24/11/2020 was not mentioned in her complaint addressed to Assistant Commissioner of Police dated 20/11/2020, but in her complaint submitted before the Home Minister on 27/11/2020,

Respondent No. 2 has admittedly not referred to such an incident of 24/11/2020. These complaints do refer to alleged exchange of garlands and marriage in temple and the allegation that the Appellant and his family members were demanding Rs. 50 lacs, but the crucial incidents dated 30/06/2020 and 24/11/2020 are not mentioned at all. Similarly, in the complaint lodged by the mother of Respondent No. 2, such incidents are not mentioned.

22] A perusal of the impugned order passed by the Court below would show that these aspects were not referred to in the impugned order. It appears that since the impugned order was passed on 19/12/2020 and it was not even a month after the FIR dated 02/12/2020 was registered, the Court below did not feel it appropriate to grant pre-arrest bail to the Appellant as the investigation was at initial stage.

23] We have perused the copies of the investigation papers which show that it has progressed further. While granting interim protection to the Appellant, we had directed him to appear before the investigating officer and pursuant thereto, the Appellant did appear before investigating officer on 27/01/2021 and thereafter everyday till

3/02/2021. It is a matter of record that the Appellant submitted a pen drive containing Whats App chat messages copied from his mobile phone before the investigating officer. In the affidavit filed before this court, the Appellant stated that he was always ready and willing to submit his mobile phone and to undergo medical examination. It is stated in the affidavit that the investigating officer had informed the Appellant that his mobile phone was not required at that juncture. As per the directions given by this court, the Appellant appeared on dates of hearing before this court till it was reserved for Judgment. It is an admitted position that the Appellant is a police constable and that his being arrested would certainly have an adverse effect on his service.

24] As regards the Judgment of the Hon'ble Supreme Court **Sonu @ Subhash Kumar** [*cited supra*] relied upon by learned counsel appearing for the Appellant, it pertains to a case where the accused sought quashing of charge-sheet when he was said to have committed an offence under section 376 of the Indian Penal Code by allegedly sexually exploiting the complainant on a false promise of marriage. In the present case, we are not concerned with the question of quashing

of FIR and therefore, to that extent, the said Judgment may not be of assistance. But, the principle laid down in the said Judgment pertaining to "misconception of fact" that vitiates "consent" of a woman can be of assistance to gauge as to whether a *prima facie* case is made out against the Appellant in the context of offence under section 376 of the Indian Penal Code. It has been held in the said Judgment that a distinction has to be made between a promise to marry which is false at its inception and the intention of the maker at the time of making the promise itself was not to abide by it, as compared to promise which could not be fulfilled.

25] The nature of material presently on record in the instant case indicates *prima facie* that the intention of marriage between the parties could not be fulfilled and in any case the Respondent No. 2 did not allege forcible physical relationship, at the outset when she started raising grievances against the Appellant. It is also crucial that in the two complaints which she lodged on the letterheads of Nationalist Youth Congress as its President, before the ACP and the Home Minister, she referred to the fact that the Appellant intended to get married to someone else on 21.01.2021, thereby showing that she

started raising her grievances after she became aware that the Appellant intended to marry someone else. It is also relevant that medical examination report of Respondent no. 2 does not indicate anything significant. This is obviously because the alleged incident of forcible physical relation happened on 30/06/2020, while medical examination was conducted after 2/12/2020, when the F.I.R. was registered at the behest of Respondent no. 2. Therefore, it can be said that Court below erred in rejecting the pre-arrest bail to the Appellant.

26] As regards offences under the Atrocities Act, provisions of Section 3(w)(i), 3(w)(ii), 3(2)(v), 3(2)(va) and 3(2) (vii), have been invoked. Sections 3 (w)(i) and 3(w)(ii) of the Atrocities Act pertain to use of words, acts or gestures of a sexual nature and intentionally touching a woman belonging to a Scheduled Caste or Scheduled Tribe in a sexual manner without her consent. In the present case, we have found hereinabove that alleged incident of forcible physical relationship on 30/06/2020, was not divulged by Respondent no. 2 in her complaints addressed to the Assistant Commissioner of Police and Home Minister in November 2020. It was for the first time in her

complaint dated 02/12/2020, leading to registration of F.I.R. that such incident was stated. The Whatsapp messages exchanged between the Appellant and Respondent no. 2 do not mention any such words, gestures or acts of sexual nature and they do not refer to any touch of sexual nature without the consent of Respondent no. 2. In fact, as noted above, the Appellant as well as Respondent no. 2 expressed love for each other. Thus, the said offences under the Atrocities Act, *prima facie*, do not appear to be made out.

27] Section 3(2)(v) of the Atrocities Act states that if a person commits an offence under the IPC punishable with imprisonment for a term of ten years or more against a person belonging to Scheduled Caste or Scheduled Tribe, he shall be punishable with imprisonment for life. In the present case, offence under Section 376 of IPC has been registered against the Appellant, which is punishable with imprisonment for at least ten years and upto imprisonment for life. But, as noted above, *prima facie* the allegation under Section 376 of IPC appears to be made by Respondent no. 2 upon being aggrieved by the fact that relationship with the Appellant did not fructify into marriage. As a consequence, *prima facie* case under Section 3(2) (v)

of the Atrocities Act does not appear to be made out.

28] Similarly, offence under Section 3(2)(va) of the Atrocities Act, does not appear to be *prima facie* made out because it pertains to offence specified in the Schedule committed against a person belonging to Scheduled Caste or Scheduled Tribe. In the present case offences under Sections 376 and 506 of IPC, mentioned in the Schedule to the Atrocities Act, have been registered against the Appellant. But, for the reasons stated hereinabove, indicating that *prima facie* the relationship between the Appellant and Respondent no. 2 appears to be consensual, the said offence under Section 3(2) (va) also *prima facie* does not appear to be made out.

29] Section 3(2)(VII) of the Atrocities Act, provides that when a public servant commits any offence under the said Section, he shall be punishable with imprisonment for a period not less than one year. In the instant case, there can be no dispute about the fact that the Appellant is a public servant. But, since we have found hereinabove that *prima facie* offences under Section 3 of the Atrocities Act, do not appear to be made out, the offence under Section 3(2)(VII) thereof, *prima facie* does not appear to apply to the Appellant.

30] Hence, we are of the opinion that when allegations levelled in the complaint dated 02/12/2020 are seen in the context of the relationship that developed between the Appellant and Respondent no. 2, which could not fructify into marriage, it cannot be said that a *prima facie* case is made out for offences under the Atrocities Act, to deny pre-arrest bail to the Appellant.

31] In view of above, we are of the opinion that present Appeal deserves to be allowed and the Appellant deserves to be granted pre-arrest bail, although conditionally.

32] Accordingly, in the event Appellant is arrested in connection with F.I.R. No. 274/2020 registered with Shivaji Nagar, Police Station, Ambarnath, he shall be released on the following conditions:

(a) He shall furnish P.R. bond in the sum of Rs. 50,000/- and surety in the like amount.

(b) Appellant shall not enter the jurisdiction of Shivaji Nagar Police Station, Ambarnath, District: Thane till the filing of the charge-sheet.

(c) Appellant shall not in any manner contact Respondent no. 2.

(d) Appellant shall not himself or through any person

threaten or pressurize Respondent no. 2.

(e) He shall not in any manner tamper with evidence.

(f) Appellant shall co-operate with investigation and he shall make himself available before the Investigating Officer as and when required.

(g) He shall submit his mobile phone before the Investigating Officer, if not already submitted.

33] The Appeal is allowed in the above terms. Needless to say the observations made hereinabove are only for the purpose of deciding the present Appeal and they shall not affect further proceedings in pursuance of the said FIR.

34] In view of disposal of Appeal, Intervention Application also stands disposed of.

[MANISH PITALE, J.]

[S. S. SHINDE, J.]