

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 998 / 2021

Kailas Shankarlal Soni,
Age : 31 years, Occ.: Business,
Residing at 305, B-Wing, Near Jhojwala
Petrol Pump, Ambika Nagar,
Kalyan (W), Dist. Thane.

.. Appellant

Versus

1. The State of Maharashtra
(Through Kolsewadi Police Station)
2. Pawan Pandurang Kamble,
Age : 32 years, Occ.: Business,
Residing at Nakul Building,
Room No.4, Krishna Complex,
Chinchpada, Kalyan (East),
District Thane.

.. Respondents

Mr. R.D. Suryawanshi, Advocate for the Appellant.

Mr. Susmit Phatale, Advocate for the Respondent
no.2.

Mr. A.R. Patil, APP for State.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : 09th DECEMBER, 2021.
PRONOUNCED ON : 20th DECEMBER, 2021.

ORDER. : -

1. Apprehending the arrest in Crime No. 364/2021 registered at Kolsewadi Police Station for the offences punishable under Section 3(1)(r) and (s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter called, Act of 1989), Appellant is seeking pre-arrest bail.

2. Complainant's case in brief, is that he was working as a Supervisor on a construction site at Kalyan of M/s Balaji Developers, of which the Appellant and Mr. Navin Jaiswani were the partners. The building constructed by M/s Balaji Developers consist of shops and flats. One shop was purchased by Mr. Vijay Singh Thakur. He was complaining water

seepage in the shop. However, neither Navin Jaiswani, nor Appellant, bothered to attend the complaint. In March, 2021 Vijay Singh Thakur requested the Appellant to rent out another unsold, shop to him. Though the shop was rented out to Vijay Singh Thakur, he did not pay the rent, ever since the nation wide lockdown. On 30th June, 2021 in heated verbal contention between Appellant and Complainant, over and in respect of water seepage and arrears of rent, Complainant allegedly, stood for Vijay Thakur. Upset with this, Appellant allegedly insulted and humiliated the Complainant by hurling caste based abuses. Though this incident had occurred on 30th June, 2021, a written complaint was filed on 7th July, 2021. Copies of which, were also forwarded to Minister and High Rank Police Officers.

3. Taking note of the written complaint, on 10th July, 2021, the crime in question came to be

registered against the Appellant under Section 3(1) (r) and (s) of the Act of 1989.

4. The learned Additional Sessions Judge, declined pre-arrest protection to the Appellant and therefore he has preferred this appeal under Section 14-A (i) of the Act of 1989.

5. Heard. Mr. Suryawanshi, learned Counsel for the Appellant and Mr. Patil, Prosecutor for the State and Mr. Phatale, learned Counsel for the Complainant. Investigating Officer is present with papers. Perused the investigation papers.

6. Mr. Suryawanshi, learned Counsel for the Appellant advanced following submissions;

(i) Appellant has been falsely implicated in this case, at the behest of one Rinku Hemandas Jaiswani, a relative of his partner, Mr. Navin Jaiswani and it is evident, from FIR filed by

Rinku Jaiswani against the Appellant.

- (ii) that construction, Kalyan site was completed two years before and since then the Complainant was not working with him.
- (iii) that last salary paid to the Complainant was in October, 2018; in support of this submission, Mr. Suryawanshi would rely on the Bank's statement.
- (iv) although, the alleged incident had occurred on 30th June, 2021, the written complaint was filed on 7th July, 2021, after due deliberation.
- (v) in FIR there was improvement in so far as the Complainants' caste is concerned.
- (vi) abuses allegedly hurled were not caste based.
- (vii) Complaint does disclose offence under the Act, as victim was not abused or allegedly intimidated only for the reason that he belongs to Schedule Caste.

. Therefore, it was submitted that the facts, surrounding the incident, implies that the false case has been projected against the Appellant and in fact such incident had not taken place. Mr. Suryawanshi submitted that the allegations being false on the face of it, same would do not constitute offence under the Act of 1989, and therefore bar under Section 18 of the Act of 1989 would not apply.

7. Mr. Patil, learned Additional Prosecutor and Mr. Phatale, learned Counsel for the Complainant have taken preliminary objection as to the maintainability of the Anticipatory Bail Application on the basis that Section 18 and Section 18-A of the Act of 1989, bars application of Section 438 Cr.P.C. to any case involving an accusations that the person has committed an offence under that Act. Mr. Patil submitted the Hon'ble Supreme Court in the case of **Manju Devi Vs. Onkarjit Singh Ahluwlliya** (2017) 13

SCC 439, has held that while considering the applicability of Section 18 of the Act 1989, a plea that a complaint was false and malicious cannot be looked into. Mr. Patil learned APP submitted, whether a prima-facie case is made out or not has to be assessed, only on the basis of allegation in the complaint or in the FIR, without its further scrutiny. The reliance was placed upon the decision of the Hon'ble Supreme Court in **Prathviraj Chauhan Vs. Union of India** (2020) 4 SCC 727; wherein it has been held that the bar, on the applicability of Section 438 Cr.P.C. shall not apply to the cases under the said Act only if "the complaint does not make out a prima-facie case," for applicability of the provisions of the 1989 Act. Mr. Patil learned APP argued that in Prathviraj Chauhan (supra), the Apex Court has held, the jurisdiction under 438 Cr.P.C. in such cases is to be used sparingly and in very exceptional cases where no prima facie offence is made out as shown in the FIR and further

a liberal use of power to grant pre-arrest bail would defeat the intention of Parliament.

8. Reverting to the facts of the case, Mr. Patil learned Prosecutor and Mr. Phatale, learned Counsel for the Complainant, submitted that the FIR prima-facie makes out a case for applicability of the provision of 1989 Act and therefore, the bar under Section 18 and 18A(2) squarely applies. On this premise, they sought rejection of the application.

9. In the case of **Dr. Subhash Kashinath Mahajan Vs. State of Maharashtra and Anr.** AIR 2018 SCC 1498; the Hon'ble Supreme Court, drew the conclusions in Paragraph No. 83, which were as follows.

83. (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 (AIR 1995 SC 1583) (supra) and Manju Devi (AIR 2017 SC 1583) (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.

10. By Act of 27 of 2018, Section 18A has been inserted with effect from 28th August, 2018, to nullify the judgment of the Hon'ble Supreme Court in Dr. Subhash Kashinath Mahajan (supra). The main reason to insert Section 18A was to undo the conclusion no. (iii) to (v) in Paragraph No. 83 of

the judgment, as it, evident from the statement of objects and reasons of Act of 27 of 2018. Same read as under;

STATEMENT OF OBJECTS AND REASONS

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (said Act) was enacted with a view to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes and to provide for Special Courts and exclusive Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences. The said Act was amended in 2015 with an objective to deliver greater justice to members of the Scheduled Castes and the Scheduled Tribes.

2. In a recent judgment, the Supreme Court has held that a preliminary enquiry shall be conducted by a Deputy Superintendent of Police to find out whether allegations make out a case under the said Act before registering a First Information Report relating to commission of an offence and the approval of an appropriate authority shall be obtained before arrest of any person in connection with such offence.

3. However, the provisions of the Code of Criminal Procedure, 1973 provide that every information relating to commission of an offence, if given, shall be recorded and where the investigating officer has reason to suspect the commission of an offence, he can arrest a person and there is no requirement of conducting a preliminary enquiry before recording of any such information or obtaining of an approval from any authority before arresting any person. Moreover, such preliminary enquiry and approval would only delay the filing of a charge sheet.

4. The principles of criminal jurisprudence and section 41 of the Code of Criminal Procedure, 1973 as interpreted in several judgments, implies that once the investigating officer has reasons to suspect that an offence has been committed, he can arrest an accused. This decision to arrest or not to arrest cannot be taken away from the investigating officer.

5. In view of the above, it is expedient in the public interest that the provisions of the Code of Criminal Procedure, 1973 be made applicable in respect of registration of First Information Report relating to commission of an offence or arrest of any person without any preliminary enquiry or approval of any authority, as the case may be.

6. The Bill seeks to achieve the above objects.

. Thus, it could be seen from Paragraph Nos. 2, 3, 4 and 5 of the Objects and Reasons that Section 18A has been inserted to nullify conclusions (iii), (iv) and (v) of Paragraph No. 83 of the judgment in Dr. Subhash Kashinath Mahajan (supra), which relates to necessity of preliminary enquiry before registration of offence under the Act of 1989.

11. Be that as it may, the Union of India filed a Criminal Review Petition No. 228/2018 seeking review of judgment in the case of Dr. Subhash Kashinath

Mahajan (supra). The review petition was allowed, by which directions/conclusions Nos. (iii) to (v) have been recalled vide judgment dated 1st October, 2019 much after Section 18A came into force.

12. In that way, although in review judgment and statement of objects and reasons, conclusions/directions in (iii) to (v) of Paragraph No. 83 of the judgment in Dr. Subhash Kashinath Mahajan (supra) have been recalled, yet, conclusion no. (ii) remained intact. It reads as under;

(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 (AIR 1995 SC 1583) (supra) and Manju Devi (AIR 2017 SC 1583) (supra).

13. Later, in the case of Prathviraj Chauhan (supra), Petitioners had questioned the validity provisions inserted by way of carving out Section

18A of the Act of 1989. His Lordship Justice Mr. Arun Mishra in his judgment, observed in Paragraph No.8, 9, 10 and 11, as under;

8. Concerning the provisions contained in Section 18A, suffice it to observe that with respect to preliminary inquiry for registration of FIR we have already recalled the general directions (iii) and (iv) issued in Dr. Subhash Kashinath's case (supra). A preliminary inquiry is permissible only in the circumstances as per the law laid down by a Constitution Bench of this Court in Lalita Kumari v. Government of U.P., (2014) 2 SCC 1, shall hold good as explained in the order passed by this Court in the review petitions on 1.10.2019 and the amended provisions of section 18A have to be interpreted accordingly.

9. The Section 18A(i) was inserted owing to the decision of this Court in Dr. Subhash Kashinath (supra), which made it necessary to obtain the approval of the appointing authority concerning a public servant and the SSP in the case of arrest of accused persons. This Court has also recalled that direction on Review Petition (Crl.) No.228 of 2018 decided on 1.10.2019. Thus, the provisions which have been made in section 18A are rendered of academic use as they were enacted to take care of mandate issued in Dr. Subhash Kashinath (supra) which no more prevails. The provisions were already in section 18 of the Act with respect to anticipatory bail.

10. Concerning the applicability of provisions of section 438 Cr.P.C. it shall not apply to the cases under Act of 1989. However, if the complaint does not make out a prima facie case for applicability of

the provisions of the Act 1989, the bar created by section 18 and 18A(2) shall not apply. We have clarified this aspect while deciding the review petitions.

11. The court can, in exceptional cases, exercise power under section 482 Cr.P.C. for quashing the cases to prevent misuse of provisions on settled parameters, as already observed while deciding the review petitions. The legal position is clear, and no argument to the contrary has been raised.

. Justice S. Ravindra Bhatt, supplementing the judgment of Justice Arun Mishra, has observed in Paragraph No. 19 and 20 as under;

19. As far as the provision of Section 18A and anticipatory bail is concerned, the judgment of Mishra, J, has stated that in cases where no prima facie materials exist warranting arrest in a complaint, the court has the inherent power to direct a pre-arrest bail.

20. 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.

14. Thus, upon reading judgment in Dr. Subhash Kashinath Mahajan (supra) in review petition; statement of objects and reasons and judgment in Prathviraj Chauhan (supra); it may be stated that;

- (i) provision of Section 438 Cr.P.C. shall not apply to the cases under the Act of 1989;
- (ii) however, if the complaint does not make out a prima facie case for applicability of provision of the Act of 1989, the bar created by Section 18 and 18A(2) shall not apply;
- (iii) in exceptional cases, Court can exercise power under Section 482 of Cr.P.C. for quashing the cases to prevent misuse of provisions on settled parameters;
- (iv) while considering any application, seeking pre-arrest bail, the High Court has to balance to interests, that;

(a) one, that power is used sparingly and such orders are made in exceptional cases, where no prima-facie offence is made out as shown in FIR.

(b) secondly, if orders are not passed in these classes of case, necessarily result would be miscarriage of justice or abuse of process of law.

(c) thirdly, if no prima facie case is made out or on judicial scrutiny, the complaint is found to be prima facie mala fide, there is no bar against the grant of anticipatory bail in cases under the Atrocities Act;

15. Thus, having held that the petition for anticipatory bail is maintainable for pre-arrest bail, let me now assess the facts on hand. The investigation papers shown that the Complainant was not on the payroll of M/s. Balaji Developers of which the Appellant was partner. This fact is not disputed even by the partner of the Appellant. Additionally the Bank's statement also shows that last salary paid to the Appellant by M/s. Balaji

Developers was two years before the incident. These circumstances, militates Complainant's case. Moreover, although the alleged incident had occurred on 30th June, 2021, written complaint was filed on 7th July, 2021. Apparently, there is no acceptable reason for such delay. Equally it is strange to note that copy of the complaint was also addressed to Ministers and Politicians. Moreover, a crime registered against the Appellant at the instance of his partners' relative in respect of M/s Balaji Developers, cannot be overlooked. That even otherwise, victim was not allegedly intimidated, abused or insulted only for the reason, that he belongs to Scheduled caste, but the reason being Complainant stood for Vijay Thakur and not for the Appellant.

16. In the consideration of the facts of the case and for the reasons stated, in my view, the accusations against the Appellant as shown in the

FIR, have not disclosed the offence under the Act of 1989 and therefore, in the event of his arrest in Crime No.364/2021 registered with Kolsewadi Police Station, he shall be released on bail on executing P.R. Bond for the sum of Rs. 25000/- with one or more sureties in the like amount.

17. The Appellant shall report to the Investigating Officer as and when called and cooperate in the investigation. He shall not temper or influence the prosecution witnesses at any time till the trial is concluded.

18. Appeal is allowed and disposed of.

(SANDEEP K. SHINDE, J.)

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