

3. Heard learned Advocate Mr. H. V. Tungar for the appellant, learned APP Mr. S. P. Sonpawale for respondent Nos.1 and 2 – State and learned Advocate Mr. R. M. Gaikwad for the respondent No.3 – State.

4. It has been vehemently submitted on behalf of the appellant that the FIR was filed by respondent No.3 against eight persons. The learned Special Judge had allowed the application of original accused Nos.1, 3 to 8, however, had rejected the application to the extent of present appellant only. Hence, this appeal.

5. The respondent No.3 states that he is a member of Scheduled Caste and gives FIR on 28.01.2022 at about 19.47 hours with Hingoli Rural Police Station vide Crime No.22 of 2022 in respect of incident dated 26.01.2022, which is alleged to have been taken place at 12.00 hours. The said FIR came to be lodged for the offences punishable under Sections 143, 147, 148, 149, 323, 324, 447, 506 of Indian Penal Code and under Sections 3(1)(r), 3(1)(s) and 3(2)(va) of the Atrocities Act. The learned Special Judge failed to consider the fact that two days prior to the alleged incident, co-accused Jagan Mahadu Nandankar has lodged FIR vide Crime No.17 of 2022 with the same Police Station on 24.01.2022 for the offence punishable under Sections 448, 323, 504, 506 read with Section 34 of Indian Penal Code against the informant

and his family members. Further, a complaint application was filed with the Police Officers as well as the Collector, Hingoli, Dist. Hingoli on 12.01.2022 itself, in which it was specifically mentioned that the informant and others are giving threat that the appellant and his family members would be implicated in the offence under the Atrocities Act. Therefore, the impugned FIR is nothing but a concocted version in retaliation to the FIR filed on 24.01.2022 against the informant and others. The informant has not given any reason for the delay caused in lodging FIR. The FIR recites that the appellant and his family members had encroached upon the land belonging to the informant admeasuring to the extent of 16 ft. x 16 ft., but the said plot bearing No.247 stands in the name of father of the appellant. The Grampanchayat has issued Gaothan certificate and it is filed on record. The appellant and his family members could not have encroached upon their own land. The allegations are totally false. The learned Special Judge has wrongly held that the application filed by the appellant is barred under Section 18 of the Atrocities Act and offence under the Atrocities Act has been made out against the appellant. The learned Advocate for the appellant, therefore, prayed for allowing the appeal.

6. Per contra, the learned APP as well as learned Advocate for respondent No.3 strongly opposed the application and submitted that

the learned Special Judge had rightly rejected the application filed by the present appellant/original accused No.2. Facts were correctly considered and the appellant is the person, who had abused the informant in the name of caste. He had assaulted the informant with stick causing him injury to the right hand, right leg, thigh, left knee and right side of the forehead. The appellant has the knowledge about the caste of the informant and, therefore, when the ingredients are attracted, the application under Section 438 of the Code of Criminal Procedure is not maintainable.

7. At the outset, it is to be noted that as per the FIR, all the accused persons had gone together to the place which according to the informant belongs to him, whereas the appellant says that it belongs to his father. At this stage, we cannot enter into disputed facts. As regards the maintainability of the application under Section 438 of the Code of Criminal Procedure is concerned, the law has been crystallized by the Hon'ble Apex Court in *Prathvi Raj Chauhan Vs. Union of India and others, [(2020) 4 SCC 727]*. Therefore, it is now required to be seen as to whether offence against the present appellant has been made out under the Atrocities Act or not. FIR discloses that he was informed by his uncle at about 12.00 p.m. that the appellant and other persons are committing encroachment on his land and, therefore, he went to

Khandala i.e. his village. He says that in fact he was in the police station itself when he was called at about 11.30 a.m. on 26.01.2022. When he went to the field, he found all the accused persons i.e. eight in numbers committing encroachment by erecting tin shed. He objected, but according to him, the appellant had used abuses in the name of caste as “महा-या धरड्या” and then stated why the persons from lower caste need land touching road and then appellant started assaulting the informant by sticks causing him injuries. As regards the other accused persons are concerned, it is stated that thereafter those persons had assaulted him. He was then taken to Government Hospital, Hingoli and he was discharged on 28.01.2022. There appears to be delay of two days in lodging the report, however, such delay can be explained at later point of time also, but that cannot give any advantage to the accused at this stage. At the cost of repetition, it can be said that after perusal of the entire contents of the FIR, the allegation says that the appellant is the person who had abused the informant in the name of caste and then assaulted him by means of stick. Therefore, offence under the Atrocities Act has been made out against the appellant – original accused No.2. Merely because the FIR has been lodged earlier and certain communication was made expressing the apprehension that the informant and others would be framed in a false complaint cannot be

appreciated at this stage, because it requires proof to come to a conclusion that the act of the complainant of filing FIR is *mala fide* in nature. The documents those are produced on record are not sufficient to make such kind of inference because opportunity to explain should be given to the respondent also. The learned Trial Judge was correct in holding that application under Section 438 of the Code of Criminal Procedure is not maintainable, as *prima facie* offence under the Atrocities Act has been made out against the appellant – original accused No.2. There is no merit in the present appeal. It deserves to be dismissed. Accordingly, it is dismissed.

[SMT. VIBHA KANKANWADI, J.]

scm