

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

CRIMINAL APPEAL NO. 229 OF 2022

Ramrao Kashinath Rathod ...Appellant

Versus

The State of Maharashtra, through P.I. CBD
Belapur Police Station, Navi Mumbai & anr. ...Respondents

SANTOSH
SUBHASH
KULKARNI

Digitally signed by
SANTOSH SUBHASH
KULKARNI
Date: 2022.04.27
19:30:53 +0530

Mr. Aniket Nikam, i/b Icham Amit Ratankumar, for the
Appellant.

Mr. A. R. Patil, APP for the State/Respondent no.1.

Ms. Savita Yadav, Appointed Advocate.

CORAM: N. J. JAMADAR, J.

DATED : 26th APRIL, 2022

JUDGMENT:-

1. This appeal under Section 14A of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ("the SC and ST Act") is directed against an order dated 24th February, 2022, in Criminal Appeal No.526 of 2022, whereby the learned Special Judge, Thane, was persuaded to reject the application of the applicant – accused for pre-arrest bail in connection with CR No.19 of 2002 registered with CBD Belapur Police Station, Thane, for the offences punishable under Sections 3(1)(r) and 3(1)(s) of the SC and ST Act.

2. Admit.

3. Heard finally.

4. The indictment against the appellant – accused is that the appellant had known the prosecutrix, who is a member of the scheduled caste, as the appellant had an occasion to interview the prosecutrix for the post of Tele-Caller with the Five Bridge Company, Belapur, Navi Mumbai. The prosecutrix was informed that she was not selected. However, the appellant tried to establish rapport with the prosecutrix and made advances towards her. The prosecutrix did not cave in to the advances of the appellant with ill motive.

5. In the month of January, 2022, the prosecutrix was offered appointment on the post of Tele-caller in Nearby Plut Company. The prosecutrix alleges that on 25th January, 2022, at about 11.30 am. while she was working as a receptionist, the appellant came to the office accompanied by four persons. She requested the appellant and his associates to enter their names in the visitors book. Without paying heed to her request, the appellant and his associates barged into the cabin of Chief Managing Director (CMD). There was exchange of words in high tone. After her employer, Devidas Rathod asked the appellant and his associates to leave the CMD's cabin, they came in the waiting area. At that time, the prosecutrix asked the appellant to make an entry in the visitors book. The appellant humiliated

the prosecutrix by uttering the words, “*Tuzi layaki kay ahe, tu chambhar kuthali, tula me jawal karnyacha praytna kela tar tula maj ala*”. The appellant humiliated the prosecutrix with reference to her caste, in the presence of the other office staff, Devidas Rathod, and the persons who accompanied the appellant. Hence, the prosecutrix lodged report.

6. Apprehending arrest, the appellant preferred an application for pre-arrest bail. By the impugned judgment and order, the learned Special Judge rejected the application. The learned Special Judge was of the view that there was *prima facie* material to support the allegation of commission of the offences punishable under the SC and ST Act, and thus the bar under Section 18 and 18-A of the SC and ST Act came into play and, therefore, the appellant did not deserve exercise of discretion under Section 438 of the Code of Criminal Procedure, 1973 (“the Code”).

7. Being aggrieved the appellant is in appeal.

8. I have heard Mr. Nikam, the learned Counsel for the appellant, Mr. Patil, the learned APP for the State and Ms. Yadav, the learned Advocate appointed from the Legal Aid Panel, to espouse the cause of the respondent no.2 - prosecutrix.

9. Mr. Nikam would urge that the offences punishable under Sections 3(1)(r) and 3(1)(s) of the SC and ST Act, are not *prima facie* made out. The learned Special Judge, according to Mr. Nikam, committed an error in arriving at a finding that in the facts of the case, the offences are *prima facie* made out and, therefore, the provisions of Section 438 of the Code had no application.

10. A three-pronged submission was canvassed by Mr. Nikam. First, the FIR does not disclose the caste of the appellant. Since Section 3 of the SC and ST Act begins with the expression, “Whoever, not being a member of Scheduled Caste or a Schedule Tribe’, it is incumbent on the prosecution to demonstrate that the appellant does not belong to Scheduled Caste or Scheduled Tribe. In the absence of such positive assertion in the First Information Report (“FIR”), the offences punishable under Section 3(1)(r) and 3(1)(s) cannot be said to have been *prima facie* made out. To lend support to this submission, Mr. Nikam placed reliance on an order passed by this Court in ***Criminal Appeal No.75 of 2020 (Santosh Damu Bhgat & Anr. vs. The State of Maharashtra & Anr.)***, dated 28th February, 2020.

11. In the case of ***Santosh Bhagat*** (supra) a learned Single Judge observed as under:

“5. At the outset, the first information report although indicates that the appellants had abused the first informant and her husband by saying “*tumhi Thakurde majale. Tumhala aata jasta zhale aahe*” yet there is no compliance of Section 3(1) of the S.C. and S.T. (Prevention of Atrocities) Act, which contemplates that the offender should not belong to a member of Scheduled Castes or a Scheduled Tribe. There is no such mention in the first information report. The learned Counsel for the appellant has drawn my attention to the order passed by this Court in Criminal Appeal No. 1752 of 2019 wherein in paragraph 7 it is observed that the record of the said case does not reveal whether the appellants belong to the community which is not either a Scheduled Caste or Scheduled Tribes.”

12. Relevant part of Paragraph 7 of the judgment in Criminal Appeal No.1752 of 2019 (*Mohan Pandurang Gajare vs. The State of Maharashtra & anr.*), which was relied upon by the learned Single Judge, reads as under:

“7. A perusal of record does not reveal as to whether the Appellant belong to community which cannot be termed to be Scheduled Caste or Scheduled Tribes.”

13. I have carefully perused the aforesaid orders. With respect, the aforesaid pronouncements do not lay down a correct proposition of law. Undoubtedly, a person who is a member of Scheduled Caste and Scheduled Tribe cannot be prosecuted for commission of atrocities on the other members of Scheduled Caste and Scheduled Tribe. The prosecution is enjoined to establish that the perpetrator of the alleged offence under Section 3 of the SC and ST Act is not a member of Scheduled Caste and Scheduled Tribe. However, this burden on

the prosecution does not necessarily support a proposition that the fact that the accused does not belong to Scheduled Caste and Scheduled Tribe must be mentioned in the first information report and failure to do so entails the consequence of drawing an inference that no *prima facie* offence is made out, or for that matter, quashing the prosecution. At multiple stages in the course of prosecution for the offence punishable under Section 3 of the SC and ST Act, the said question can be agitated, addressed and determined.

14. The controversy has been resolved by the judgment of the Supreme Court in the case of *Ashabai Machindra Adhagale vs. State of Maharashtra*¹. The observations in paragraphs 2, 14, 16 and 18 make the position abundantly clear. They read as under:

“2. An interesting question of law arises in this appeal. Background facts in a nutshell are as follows:

Appellant filed First Information Report (in short the ‘FIR’) under Section 154 of the Code of Criminal Procedure, 1973 (in short the ‘Code’) at Newasa Police Station, District Ahmednagar, alleging commission of offence punishable under Section 3(1)(xi) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short the ‘Act’). A petition under Section 482 of Code was filed by respondent No.3 (hereinafter referred to as the ‘accused’). The basic stand was that in the FIR the caste of accused was not mentioned and therefore the proceedings cannot be continued and deserved to be quashed. The High Court placing reliance on earlier decisions of the High Court allowed the petition.

.....

1 AIR 2009 SCC 1973.

14. It needs no reiteration that the FIR is not expected to be an encyclopedia. As rightly contended by learned counsel for the appellant whether the accused belongs to scheduled caste or scheduled tribe can be gone into when the matter is being investigated. It is to be noted that under Section 23(1) of the Act, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (in short the 'Rules') have been framed.

.....

16. After ascertaining the facts during the course of investigation it is open to the investigating officer to record that the accused either belongs to or does not belongs to scheduled caste or scheduled tribe. After final opinion is formed, it is open to the Court to either accept the same or take cognizance. Even if the charge sheet is filed at the time of consideration of the charge, it is open to the accused to bring to the notice of the Court that the materials do not show that the accused does not belong to scheduled caste or scheduled tribe. Even if charge is framed at the time of trial materials can be placed to show that the accused either belongs or does not belong to scheduled caste or scheduled tribe.

.....

18. Above being the position, the view taken by the Bombay High Court does not appear to be the correct view while that of the Orissa High Court is the correct view. Accordingly, we allow this appeal. Needless to say during investigation or at the time of framing of charge or at the time of trial it is open to respondent No.3 to show that he either belongs to scheduled caste or scheduled tribe so that applicability of Section 3(1)(xi) of the Act is ruled out."

(emphasis supplied)

15. Mr. Nikam nextly submitted that mere reference to the caste of the prosecutrix in the allegations attributed to the accused is not sufficient to bring the conduct of the accused within the dragnet of Section 3(1)(r) and 3(1)(s) of the SC and ST Act.

16. Reliance was sought to be placed on two judgments of this Court delivered by a learned Single Judge at Aurangabad in

Criminal Appeal No.866 of 2018 dated 6th March, 2019 (Shyam s/o Laxman Nawale and others vs. The State of Maharashtra and anr.) and Criminal Appeal No.1084 of 2019 dated 5th December, 2019 (Vasantrao S/o Madhavrao Vhadgir and others vs. The State of Maharashtra and anr.). The learned Single Judge, observed that use of the words, “*chambhar – chamatyaho*” during the course of altercation was not with intent to humiliate the complainant therein with reference to her caste in public view. If those words referring to the caste were eschewed from consideration, at best, the allegation would fall in the realm of ‘threat’ or ‘intimidation’ only.

17. It is imperative to note that, the question essentially turns on the intent of the accused to insult or humiliate the victim with reference to her caste or tribe. The use of the words, with reference to the caste of the victim, is required to be considered in the entire setting and context of the matter. It would be hazardous to lay down a broad proposition of law that mere reference to the caste or tribe of the victim, falls within the dragnet of the offences punishable under Section 3(1)(r) and 3(1)(s) of the Atrocities Act.

18. In this context, a profitable reference can be made to the judgment of the Supreme Court in the case of ***Swaran Singh***

and others vs. State through Standing Counsel and another², wherein the Supreme Court had an occasion to consider the general derogatory and humiliating fashion in which the word ‘*chamar*’ is used in addressing a member of the Scheduled Caste. The observations in paragraphs 23 to 25 are material and hence extracted below.

“23. This is the age of democracy and equality. No people or community should be today insulted or looked down upon, and nobody's feelings should be hurt. This is also the spirit of our Constitution and is part of its basic features. Hence, in our opinion, the so-called upper castes and OBCs should not use the word ‘Chamar’ when addressing a member of the Scheduled Caste, even if that person in fact belongs to the ‘Chamar’ caste, because use of such a word will hurt his feelings. In such a country like ours with so much diversity - so many religions, castes, ethnic and lingual groups, etc. - all communities and groups must be treated with respect, and no one should be looked down upon as an inferior. That is the only way we can keep our country united.

24. In our opinion, calling a member of the Scheduled Caste ‘Chamar’ with intent to insult or humiliate him in a place within public view is certainly an offence under section 3(1)(x) of the Act. Whether there was intent to insult or humiliate by using the word ‘Chamar’ will of course depend on the context in which it was used.

25. A perusal of the FIR clearly shows that, *prima facie*, an offence is made out against the appellants 2 and 3. As already stated above, at this stage we have not to see whether the allegations in the FIR are correct or not. We have only to see whether treating the FIR allegations as correct an offence is made out or not. In our opinion, treating the allegations in the FIR to be correct an offence under section 3(1)(x) of the Act is *prima facie* made out against appellants 2 and 3 because it *prima facie* seems that the intent of the appellants was to insult or humiliate the first informant, and this was done within the public view.”

(emphasis supplied)

2 (2008) 8 SCC 435.

19. Reverting to the facts of the case, it is pertinent to note that apart from the specific allegations in the FIR lodged by the prosecutrix, statements of three more witnesses were recorded under Section 164 of the Code. The statement of the prosecutrix has also been recorded under Section 164 of the Code. The witnesses have consistently stated that the appellant humiliated the prosecutrix by uttering words with reference to her caste. In this view of the matter, it would be difficult, at this stage, to draw an inference that the offences punishable under Section 3(1)(r) and 3(1)(s) of the SC and ST Act are not *prima facie* made out.

20. Mr. Nikam lastly attempted to wriggle out of the situation by asserting that the offences were not committed in public view. This submission is simply not borne out by the material on record. The prosecutrix was allegedly humiliated in the presence of her colleagues and employer as well as the associates of the appellant.

21. A useful reference can be made to the judgment of the Supreme Court in the case of *Vilas Pandurang Pawar and another vs. State of Maharashtra and others*³, wherein the approach to be adopted by the Courts while deciding

3 (2012) 8 SCC 795.

applicability of the bar under Section 18 of the SC and ST Act was delineated. Paragraphs 9 and 10 are instructive and hence extracted below:

“9. Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the SC/[ST Act](#) has been *prima facie* made out. In other words, if there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.

10. The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no Court shall entertain application for anticipatory bail, unless it *prima facie* finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence.”

22. In the aforesaid view of the matter, the learned Special Judge, in my considered view, committed no error in declining to exercise the jurisdiction under Section 438 of the Code.

23. The appeal thus fails.

24. Hence, the following order:

: O R D E R :

(i) The appeal stands dismissed.

11/12

Corrected as per order dated 27/4/2022.

- (ii) It is, however, clarified that the observations made hereinabove are confined to the determination of entitlement for pre-arrest bail and shall not be construed as an expression of opinion on the merits of the matter.

[N. J. JAMADAR, J.]