

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.438 OF 2020

Shubham @ Dada Vitthal Borude,
Age-19 years, Occu:Private Service,
R/o-Chichondi Patil,
Taluka-Nagar, District-Ahmednagar.

...APPELLANT

VERSUS

1) The State of Maharashtra,
Through Police Station Officer,
Nagar Taluka Police Station,
District-Ahmednagar,

2) X. Y. Z.

...RESPONDENTS

...

Mr. Z.H. Farooqui Advocate h/f. Mr. N.V. Gaware Advocate
for Appellant.
Ms. V.S. Choudhari, A.P.P. for Respondent No.1.

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**CORAM: SMT. VIBHA KANKANWADI AND
Y.G. KHOBRADE, JJ.**

DATE : 28th FEBRUARY, 2023

ORDER :

1. Present Appeal has been filed under Section 14-A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (for short "the Atrocities Act") to challenge the order passed

by the learned Special Judge under the Atrocities Act, Ahmednagar, below Exhibit-7 in Special Case No.302 of 2019 on 29th May 2020, thereby the application filed under Section 439 of the Code of Criminal Procedure by the appellant, was rejected.

2. The appellant is the accused in Crime No.420 of 2019 registered with Nagar Taluka Police Station, Taluka and District-Ahmednagar for the offence punishable under Sections 376, 506 of the Indian Penal Code and Section 3(1)(r), 3(1)(s), 3(1)(w) of the Atrocities Act, which came to be registered on the basis of the First Information Report (for short "FIR") lodged by present respondent No.2.

3. Before we proceed further the fact emerging to take up the matter, though request on behalf of the appellant to withdraw the appeal was made in view of the order passed by the same learned Special Judge on 17th February 2021 below Exhibit-3 and Exhibit-16 in said Special Case, will have to be noted. The copy of the charge-sheet is made available and on the basis of the same, it can be said that the appellant came to be arrested on 19th September 2019. The charge-sheet has been filed somewhere around 11th December 2019. The informant is 19 years old married girl, whose marriage was performed on 14th

April 2019 and she lodged the FIR on 22nd August 2019. It is stated in the FIR that around 17th July 2019 the girl was taken by her mother in law to Government Hospital on suspicion and after the medical examination it was transpired that she was pregnant of 22 weeks. Her husband started asking about the paternity of the child in the womb and then she had disclosed that the present appellant had ravished her about 1½ to 2 months prior to the marriage and she had not disclosed the said fact due to the threats to kill given by the appellant. It also transpires that the informant is a member of the Scheduled Caste and the appellant is not such member. Under such circumstances the offence came to be registered under the relevant sections. Statement of the informant has also been taken under Section 164 of the Code of Criminal Procedure. In the meantime, it appears that the informant has delivered a child and the samples were given for DNA testing. After the appellant was arrested, he had filed an application for releasing him on bail and that application came to be rejected on 9th October 2019 and it was prior to the filing of the charge-sheet. After the charge-sheet was filed, his second bail application was still pending i.e. at Exhibit-3, which came to be filed on 4th December 2019. It appears that it was not decided immediately and then another

application was filed by the appellant from the jail which was at Exhibit-7 for releasing him on Covid bail. That was filed on 15th May 2020. It came to be rejected on 29th May 2020 by the same Judge. It is the said order dated 29th May 2020 which was under challenge in this Appeal.

4. Thereafter, it emerges from the facts those are now revealed that then on 19th January 2021 the appellant has filed application Exhibit-16 for bail under Section 439 of the Code of Criminal Procedure. At that time the earlier bail application Exhibit-3 was still pending and therefore, by a common order below Exhibit-3 and Exhibit-16, learned Special Judge allowed both the applications on 17th February 2021 by imposing certain conditions (the date has been wrongly mentioned as 17th February 2020 on the order). In view of this common order allowing Exhibits – 3 and 16, the appellant had made the said prayer in this Appeal which is now still pending, that he may be allowed to withdraw the Appeal. This Court took it by surprise as when the present Appeal is pending, how the appellant without mentioning the pendency of the Appeal before the higher Court, can approach the trial Court and the trial Court without considering the said fact of pendency of the Appeal, would grant the application and therefore, by a detailed order passed on 3rd

February 2023, necessary directions were given to produce certified copies of relevant documents. Accordingly, those have been submitted.

5. Heard learned Advocate Mr. Farooqui appearing for the appellant and learned APP appearing for the State. It will not be out of place to mention here that the notice of respondent No.2 is awaited and it has now been reported that the notice could not be served upon her as she was not traced out at the given address.

6. It has been submitted on behalf of the appellant that the appellant was challenging only the order that was passed below Exhibit-7 in the said Special case which was only restricting to the Covid bail. Though at earlier point of time when bail was sought in Criminal M.A. (Bail) No.1653 of 2019 decided on 9th October 2019, it was observed by the learned Special Judge that the appellant appears to be not ready to perform marriage with the girl and at that time result of DNA test was still awaited. When Exhibit-7 was rejected on 29th May 2020 by that time the result of DNA test was available and it indicated that the accused was the biological father of the child. It was then observed by the concerned Court while passing order on Exhibit-7 that the

earlier application of the accused was rejected on merit and the accused was arrested prior to the lock down. Then in view of guidelines as well as corrigendum issued by the High Power Committee, it was held that the case does not fall within the ambit of the directions and then the application was rejected. Under such circumstance, the present Appeal could not have been restricted only to challenge the bail application filed for the purpose of Covid bail. Even the prayer clauses do not show that it was restricted to the Covid period only or the grounds do not show that those observations in respect of the guidelines were not correct. Therefore, we do not accept that the present Appeal was restricted to the rejection of the bail for the Covid period only. It was under Section 439 of the Code of Criminal Procedure as plain as simple.

7. Application Exhibit-3 was filed prior to the rejection of Exhibit-7 and filing of the present Appeal, but Exhibit-16 was filed after the rejection of Exhibit-7 and filing of the present Appeal. Perusal of application Exhibit-16 would show that it is totally silent on the point that the appellant has approached higher Court and the Appeal is pending. When in fact it is a mandatory provision to mention in the application itself that the applicant / appellant has approached / not approached to the

higher Court, it appears that the concerned Judge had not insisted upon or the said fact was not brought to his notice. Important aspect to be noted is that the same Judge has now allowed Exhibit-3 and Exhibit-16. Exhibit-3 or Exhibit-16 are not under challenge before this Court and therefore, it will not be appropriate for us to make any kind of comment on the said order, but still we could find certain points on which proper attention has not been given. Be that as it may, the fact on which we want to harp upon is that Exhibit-16 is totally silent on the point of pendency of the present Appeal before this Court and the present Appeal is under Section 14-A(2) of the Atrocities Act to challenge the order of rejection of the bail application under Section 439 of the Code of Criminal Procedure. If this disclosure would have been made by the appellant, the propriety would have asked the concerned Judge to refrain himself from exercising his discretion power as well as jurisdiction in granting the bail. Therefore, we are of the opinion that the said order has been obtained by the appellant by playing fraud upon the Court, which cannot be allowed at all. Though, at the cost of repetition, we would say that application Exhibit-3 and 16 are not under the challenge before this Court, yet this Court has power to set aside the said order when it is now transpiring that the said order has

been obtained by fraud and such fraud cannot be allowed to be carried forward.

8. Learned Advocate for the appellant has prayed for the mercy on the ground that the boy i.e. appellant is 19 years old and now at the time of hearing of Exhibit-16 he had made statement before the concerned Court that he would accept the girl as well as the child taking into consideration the future life of the new born. No doubt the age of the accused is definitely required to be considered in bail applications, however, we are more concern with the fraud that is played and we could see from the record that when the matter was before the same Judge at the earlier point of time, the same appellant had taken the stand of total denial and therefore, it was also observed in the earlier order that if the appellant would have given nod to the marriage the life of the informant as well as the pregnancy she was carrying at that time would have been safe but it did not happen. Now, if only to get out from the jail if such proposal is given, then it may be another fraud on the girl. However, it appears from the order passed below Exhibit-3 and 16 that now the informant is not ready.

9. We do not want to carry it forward, but when this kind of

suppression is there and by suppressing the fact that the appellant had already approached this Court and the Appeal is still pending; without disclosing the same the order has been sought, we set aside the order below Exhibit-3 and 16 passed in Special Case No.302 of 2019 by the learned Special Judge under the Atrocities Act, Ahmednagar. We direct that the appellant should surrender before the learned Special Judge under the Atrocities Act, Ahmednagar, where the Special Case is still pending, on 6th March 2023. Thereupon the concerned Special Judge should take him in the custody. In case the appellant remains absent or fails to surrender himself before the concerned Judge; the concerned Judge should take coercive steps to get the custody of the appellant.

10. With the above directions, this Appeal stands disposed of.

[Y.G. KHOBRADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE