

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.889 OF 2022

Harubai Abaji Fand

.. Appellant

Versus

1. The State of Maharashtra
Through Parner Police Station,
Dist. Ahmednagar.

2. Pappu Kantilal Vairal

.. Respondents

...
WITH

CRIMINAL APPEAL NO.890 OF 2022

1. Bhaskar Ambaji Fand
2. Dattatraya Ambaji Fand
3. Shubham Bhaskar Fand

.. Appellants

Versus

1. The State of Maharashtra
Through Parner Police Station,
Dist. Ahmednagar

2. Pappu Kantilal Vairal

.. Respondents

...

Mr. S. R. Wakale, Advocate for appellants in both the appeals.

Ms. V. S. Choudhary, APP for respondent No.1 - State in both the appeals.

Mr. S. S. Made, Advocate for respondent No.2 in both the appeals.

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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : JANUARY 17, 2023.

ORDER :- [Per Smt. Vibha Kankanwadi, J.]

. **Admit.**

2. Both the appeals have been filed under Section 14-A(2) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the "Atrocities Act") to challenge the rejection of applications under Sections 438 and 439 of the Code of Criminal Procedure respectively by learned Special Judge/Additional Sessions Judge, Court No.3, Ahmednagar on 22.11.2022.

3. Respondent No.2 is the original informant, who has lodged the FIR vide Crime No.922 of 2022 on 10.11.2022 with Parner Police Station, Dist. Ahmednagar for the offences punishable under Sections 324, 323, 325, 354, 436, 427, 504, 506, 509 of Indian Penal Code and under Sections 3(1)(r), 3(1)(s), 3(1)(w) of the Atrocities Act.

4. Heard learned Advocate Mr. S. R. Wakale for the appellants in both the appeals, learned APP Ms. V. S. Choudhary for respondent No.1 in both the appeals and learned Advocate Mr. S. S. Made for respondent No.2 in both the appeals.

5. Learned Advocate appearing for the appellants has taken us through the FIR and submitted that there was no question of bar under Section 18 of the Atrocities Act, as the Criminal Bail Application No.1875 of 2022 was under Section 439 of the Code of Criminal Procedure. There was nothing to be recovered at the

instance of the applicants. Merely because the offences under the provisions of Atrocities Act have been added, the applications have been rejected, otherwise only for Sections under Indian Penal Code, in the normal course, the Magistrate would have granted regular bail under Section 437 of the Code of Criminal Procedure. Taking such kind of technical approach amounts to injustice to the accused persons. Learned Special Judge failed to consider that there was delay in lodging the FIR, which has not been explained at all by the informant. Further, civil disputes are pending between the parties. Even the appellant had lodged the FIR against the informant and his family. It could have been seen that the informant is unnecessarily utilizing his caste as a weapon. The applications ought to have been allowed.

6. Per contra, the learned APP as well as learned Advocate representing respondent No.2 - informant have raised objection to the appeals and they have supported the reasons given by the learned Special Judge. It has been stated that the accused persons had abused the informant in the name of caste. The house was put to fire by the accused persons. Further, the informant, witnesses and the accused persons are from the same village and, therefore, the possibility of repetition of crime cannot be ruled out.

7. At the outset, the first impression after reading the impugned order by the learned Special Judge would show that he has not at all

considered the provisions under which he was dealing with the applications. The appellant in Criminal Appeal No.889 of 2022 i.e. Harubai Abaji Fand had filed Criminal Bail Application No.1886 of 2022 under Section 438 of the Code of Criminal Procedure. That means, it was the application for anticipatory bail, yet while writing the order, the learned Special Judge in the first paragraph has stated that "this is an application for regular bail under Section 439 of the Code of Criminal Procedure, 1973....". In spite of writing so, at the end, he has held that the application is barred under Section 18 of the Atrocities Act. On the same day, he has decided the Bail Application No.1875 of 2022, which is challenged in Criminal Appeal No.890 of 2022. The said application was filed for regular bail under Section 439 of the Code of Criminal Procedure. In fact, when both the applications were arising out of the same crime, then there was no hurdle for the concerned Judge to write a common order. Unnecessarily two separate orders have been passed and it appears that the mistake is due to copy paste, but still even while considering the regular bail in Bail Application No.1875 of 2022 filed by Bhaskar Abaji Fand and other accused persons, the observations would show that it has been rejected on the count of bar under Section 18 of the Atrocities Act. Therefore, this appears to be a case of lack of application of mind by the learned Special Judge.

8. We would like to deal with Criminal Appeal No.890 of 2022 first since it is challenging the order rejecting the regular bail. The bar

under Section 18 or 18-A of the Atrocities Act is for considering the applications under Section 438 of the Code of Criminal Procedure and not under Section 439 of the Code of Criminal Procedure. Nothing was required to be recovered from the appellants therein. With appropriate conditions to be imposed definitely the liberty of the applicants therein could have been restored. Pendency of civil litigation was one of the contention, but even if it was considered that the Regular Civil Suit No.895 of 2022 was instituted on 10.11.2022 itself, the other fact that there is cross complaint ought to have been considered. When substantial part of the investigation was over and nothing was required to be recovered from those applicants, the application ought to have been allowed. The reasons for the rejection of the regular bail to those applicants are absolutely not as per the set principles of law.

9. The prosecution submits that as per the Investigating Officer, the reports have been received in respect of the Medico Legal Certificates, which support the contention in the FIR. If we consider the Medico Legal Certificates, then it is to be noted that three accused persons had received simple injuries as per the District Hospital, Ahmednagar. Still, there is also one document showing that witness Vandana Kantilal Vairal was admitted from 13.11.2022 to 15.11.2022 with Kamalnayan Multispeciality Hospital. When the incident has taken place on 09.11.2022, her admission on 13.11.2022 cannot be considered at this stage as connecting to the incident.

Even the video shooting done etc. has been recovered and it has been sent to forensic lab. Therefore, further physical custody of those applicants was not required and, therefore, with proper conditions that application could have been allowed.

10. As regards the appellant in Criminal Appeal No.889 of 2022 is concerned, it is to be noted that even as per the FIR the alleged words amounting to insult in the name of caste are stated to have been uttered by original accused No.1 - Bhaskar Fand. As per the FIR the role attributed to the applicant is that she along with other accused persons had assaulted the informant and family members with stick. The appellant is aged 58 and it can be seen that the informant is aged 34 and the other injured are between the age group of 25-30, except Sanjay who is stated to be 52 years old. Section 3(1) (w) of the Atrocities Act so also Section 354 of Indian Penal Code cannot be attracted against the lady accused. Therefore, as regards the Atrocities Act is concerned, *prima facie* the offence is not made out against Harubai and as regards the offence under Indian Penal Code is concerned, her physical custody was not required. There was no question of bar under Section 18 of the Atrocities Act. It will have to be observed that time and again this Court is witnessing that the Special Judges under the Atrocities Act are not adhering to the ratio laid down in ***Prathvi Raj Chauhan Vs. Union of India and others, [(2020) 4 SCC 727]*** decided by the Hon'ble Apex Court as well as

the decisions of this Court. Denial of bail on fanciful ground or failure to exercise the discretion to release an accused on bail in deserving case amounts to injustice and, therefore, the impugned order in this case deserves to be set aside. The said application ought to have been allowed by the learned Special Judge. Hence, the following order :-

ORDER

I) Criminal Appeal No.889 of 2022 and Criminal Appeal No.890 of 2022 stand allowed.

II) The orders passed by learned Special Judge under the Atrocities Act/Additional Sessions Judge, Court No.3, Ahmednagar in Bail Application Nos.1886 of 2022 and 1875 of 2022 dated 22.11.2022 stand set aside. Those applications stand allowed.

III) In the event of arrest of appellant in Criminal Appeal No.889 of 2022 i.e. **Harubai Abaji Fand** in connection with Crime No.922 of 2022, registered with Parner Police Station, Dist. Ahmednagar for the offences punishable under Sections 324, 323, 325, 354, 436, 427, 504, 506, 509 of Indian Penal Code and under Sections 3(1)(r), 3(1)(s), 3(1)(w) of the Atrocities Act, she be released on P.R. Bond of Rs.30,000/- with two solvent sureties of Rs.15,000/- each.

IV) The appellants in Criminal Appeal No.890 of 2022 i.e.(i) **Bhaskar Ambaji Fand**, (ii) **Dattatraya Ambaji Fand** and (iii) **Shubham Bhaskar Fand**, who have been arrested in connection with Crime No.922 of 2022, registered with Parner Police Station, Dist. Ahmednagar for the offences punishable

under Sections 324, 323, 325, 354, 436, 427, 504, 506, 509 of Indian Penal Code and under Sections 3(1)(r), 3(1)(s), 3(1)(w) of the Atrocities Act, be released on P.R. Bond of Rs.30,000/- each with two solvent sureties of Rs.15,000/- each.

V) The appellants in Criminal Appeal No.890 of 2022 shall attend the concerned Police Station on every Monday between 10.00 a.m. to 2.00 p.m. till filing of charge-sheet.

VI) The appellants in both the appeals shall not tamper with the prosecution evidence.

VII) The appellants in both the appeals shall not indulge in any criminal activity.

VIII) Bail before the Trial Court.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm