

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

CRIMINAL APPEAL NO.959 OF 2024

Waman Barku Mhatre
Age 54 years, Occ. Social Activist/
Business, Residing at Mhatre
House No.200, Barvi Dam Road,
New Vadavali, Badlapur West,
Badlapur, Kulgaon, Thane
421 503.

....Appellant

V/S

1 The State of Maharashtra
(At the instance of Badlapur
Police Station)

2 Mohini Dashrath Jadhav
Age 35 years, Occ. Reporter
Residing at Room No.205,
Om Radheshyam Society
Hendrepada, Kulgaon,
Badlapur West, Thane.

....Respondents

Mr. Viresh Purwant with Mr. Rushikesh Kale, Mr. Rajendra Bamane and Mr. A.K. Sheikh, *for the Appellant.*

Mr. Shilpa K. Gajare-Dhumal, APP *for Respondent No.1 / State.*

Mr. Samir Vaidya with Mr. Vinod Satpute, Ms. Sheetal Satpute, Ms. Tejali Jagdhone and Ms. Lubdha Bhoir *for Respondent No.2.*

Mr. Rajkumar B. Dongre, ACP Crime, Thane City present in Court.

CORAM : SANDEEP V. MARNE, J.
RESERVED ON : 03 OCTOBER 2024.
DECIDED ON : 07 OCTOBER 2024.

ORDER:

1) This is an Appeal filed under provisions of Section 14-A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities)

Act, 1989 (**SC & ST Act**) challenging Order dated 29 August 2024 passed by the learned Special Judge, Kalyan rejecting the application for grant of pre-arrest bail under provisions of Section 482 of Bharatiya Nagarik Suraksha Sanhita, 2024 (**BNSS**) in connection with Crime No.I-386 of 2024 registered with Badlapur Police Station under Sections 74 and 79 of Bharatiya Nyaya Sanhita, 2024 (**BNS**) and under Sections 3(1)(w)(ii) and 3(2)(va) of the SC & ST Act.

2) Prosecution case is that the Complainant belongs to Scheduled Caste and has been functioning as Journalist for over 10 years. That she is currently working as a Journalist for Daily Sakal Newspaper. On 20 August 2024, Complainant visited the spot near Adarsh School for covering the protests organized at Adarsh School in Badlapur (East). She continued reporting at the venue till 10.30 a.m. alongwith her colleague Tanmay Tambe. Since Complainant received information about *rail roko* protest being held at Badlapur Railway Station, she and Tanmay Tambe approached Badlapur Railway Station and were reporting the incident. At 11.30 a.m., Complainant went home for lunch and at 12.45 p.m. she was on her way to Adarsh School for reporting along with Tanmay Tambe on the motorcycle. At that time, Appellant, who is social worker, intercepted the duo and made following utterances to the Complainant "काय मोहिनी तुम्ही आग लावायच्या बातम्या लावताय व निघून जाताय."

3) Upon being questioned by Complainant why such statement was made, Appellant made further said that "माहिती घेवून बातम्या करायच्या, खरोखर बलात्कार झालेला आहे का? तुम्ही विनयभंगाला बलात्काराचे स्वरूप देता काय." After Complainant told Appellant that she was reporting the truth, he made further utterances "तुझा रेप झाला आहे काय? तू बातम्या करायला येते." According to the FIR statement, the last utterance was made by making gestures in a manner outraging Complainant's

modesty. According to the prosecution, the Appellant belongs to *Agari* community and was aware of Complainant belonging to Buddha community and despite such knowledge, he insulted her. Based on the above statement, FIR came to be lodged on 21 August 2024 for offences punishable under Sections 74 and 79 of the BNS and Sections 3(1)(w)(ii) and 3(2)(va) of the SC & ST Act against the Appellant.

4) Appellant accordingly filed application before the learned Special Judge for grant of anticipatory bail on 22 August 2024. Since the anticipatory bail application was not being decided by the learned Special Judge, the Appellant filed Criminal Appeal No. 922 of 2024 before this Court, in which this Court was required to issue a direction to the learned Special Judge for decision of the application of pre-arrest bail. Order dated 27 August 2024 passed in Criminal Appeal No. 922 of 2024 reads thus:

1) This Appeal is sought to be filed under Section 14-A of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989 (SCST Act), complaining that though an Application for pre-arrest bail has been filed on 22 August 2024 the same has not been decided even for grant of interim protection to the Appellant. With this limited complaint, production of the present Appeal was sought before this Court on 23 August 2024. This Court adjourned the hearing of the Appeal to 26 August 2024 since this Court was informed that the learned Sessions Judge had kept the Application filed by the Appellant for hearing and decision on 26 August 2024. Under a hope that the learned Judge would decide the Application in the morning session on 26 August 2024, this Court listed the present Appeal at 2.30 p.m. on 26 August 2024. However, it was informed to this Court on 26 August 2024 that the learned Judge was likely to hear the Application for Anticipatory Bail at 2.30 p.m. on 26 August 2024 and this is how the present Appeal came to be listed today. However, it now transpires that even on 26 August 2024 no decision is taken on the Appeal even qua the prayer for grant of interim protection.

2) While Mr. Purwant the learned counsel appearing for Appellant complains that the Application came to be adjourned for no reason, it is the contention of Ms. Gajare-Dhumal the learned APP that the adjournment on 26 August 2024 is granted as time was sought by the complainant to file reply.

3) It appears that the Application for Anticipatory Bail is now posted by the learned Judge for hearing and decision on 29 August 2024. When the question of liberty of a citizen is involved, it is necessary that the Application for pre-arrest bail is taken up for decision and decided either finally or atleast for grant of interim protection in an expeditious manner. In the present case, the application is kept pending since 22 August 2024.

4) In that view of the matter, the learned Judge is directed to decide the Application for pre-arrest bail filed by the Appellant in accordance with law on 29 August 2024. Ordinarily this court would avoid issuing direction to the Trial Court to decide any proceedings on a particular day. However, in another Anticipatory Bail Application, this Court had noticed tendency on the part of the learned Judicial Officer to simply adjourn the Application, which was not decided even after a request was made by this Court. This Court was then required to direct the learned Judge to decide that Anticipatory Bail Application. This is why an unusual mode of directing the learned Judge to decide the Application on 29 August 2024 is required to be adopted in the present case. A report about status of the Anticipatory Bail Application shall be placed by the learned Judge before the Registry of this Court in the evening of 29 August 2024.

5) Since no decision has been taken on the Application for Anticipatory Bail, the present Appeal cannot be entertained. Therefore, the present Appeal is disposed of since the learned Judge is already directed to decide the Application for pre-arrest bail on 29 August 2024.

5) The learned Special Judge has accordingly passed order dated 29 August 2024 rejecting Appellant's application for pre-arrest bail. Appellant has filed the present Appeal challenging the order dated 29 August 2024. This Court issued notice to Respondent No. 2 on 30 August 2024 and granted interim protection in Appellant's favour. Respondent No.2-Complainant had appeared through Advocate and has filed Affidavit-in-Reply opposing the Appeal.

6) Mr. Purwant, the learned counsel appearing for Appellant would submit that *prima-facie* offences under Sections 3(1)(w)(ii) and 3(2)(va) of the SC & ST Act are not made out since the Appellant neither knew the caste of the Complainant nor had any reason to know her caste. That the FIR does not indicate that the utterances are made only because the Complainant belongs to Scheduled Caste. That there is no intention alleged in the FIR of humiliating the Complainant with reference to her caste. That Tanmay Tambe has apparently recorded video of the incident but has not produced the same before the Investigating Officer. That the Complainant herself does not stand by the allegations in the FIR statement and has stated in the Affidavit-in-Reply that the FIR statement was not recorded as per her version. He would also rely on provisions of Section 22 of the

SC & ST Act in support of his contention that the actions of the Appellant are bonafide and in good faith. Mr. Purwant would therefore pray for making the interim order absolute.

7) The Appeal is opposed by Mr. Vaidya, the learned counsel appearing for Respondent No.2-Complainant. He would submit that ingredients of offences under Sections 3(1)(w)(ii) and 3(2)(va) of the SC & ST Act are clearly made out and that therefore bar under Section 18 of the SC & ST Act would apply in the present case. That the incident has occurred in public place and the concerned utterances are made by the Appellant with a view to humiliate the caste of the Complainant. That in the present case, offence under Section 3(1)(u) of the SC & ST Act is also attracted as the utterances are made with the intention of promoting feelings of enmity, hatred and ill-will against the member of Scheduled Caste. That deliberate intention in making the utterances to a member of Scheduled Caste is a writ large in the present case. That Appellant has served as Corporator and President of Badlapur Municipal Council and has acted as a public servant, who is not expected to use such foul language against a lady journalist. That the background in which the utterances are made is also required to be borne in mind where this Court is seized of Public Interest Litigation relating to the unfortunate incident of sexual assault in Badlapur case. Mr. Vaidya would further submit that Appellant is likely to threaten the Complainant and has uploaded photos and messages on social media giving threats in respect of lodging of any Complaints against him. That in such case this Court may have recourse to Section 10 of the SC & ST Act for the purpose of removal of Appellant from the area where he is likely to commit further offences. Mr. Vaidya would accordingly pray for dismissal of the Appeal.

8) Ms. Gajare-Dhumal, the learned APP appearing for the Respondent No.1-State would also oppose the Appeal submitting that the Investigations are still underway. She would take me through the statement of Tanmay Tambe, in which he has stated about unsuccessful attempt to record the incident on mobile phone. That no such video recording on mobile phone is available. That the Investigating Officer wants to record statement of Complainant under Section 183 of the BNSS and that therefore bail cannot be granted to Appellant. She would pray for dismissal of the Appeal.

9) I have considered the submissions canvassed by the learned counsel appearing for parties and have gone through the records of the case.

10) Petitioner is sought to be charged for offences punishable under Sections 74 and 79 of the BNS and Sections 3(1)(w)(ii) and 3(2)(va) of the SC & ST Act. Though the BNS sections are non-bailable, considering the nature of allegations levelled in the FIR statement, the Sessions Judge would have hesitated in granting anticipatory bail to Appellant if only BNS sections were included in the FIR. However in the present case, Appellant is also accused of committing offences under sections 3(1)(w)(ii) and 3(2)(va) of the SC & ST Act and therefore the learned Judge has rejected the application for anticipatory bail in view of bar under section 18 of the Act.

11) It is settled position of law that if *prima facie* case of commission of offences under the SC & ST Act is not made out, the bar under Section 18 does not apply. I accordingly proceed to examine, if *prima facie* case of commission of any offence under the Act is made out in the present case. Section 3(1)(w)(ii) of the SC & ST Act provides thus:

“(ii) uses words, acts or gestures of a sexual nature towards a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe.”

12) Section 3(2)(va) of the SC & ST Act reads thus:

“(va) commits any offence specified in the Schedule, against a person or property, knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with such punishment as specified under the Indian Penal Code (45 of 1860) for such offences and shall also be liable to fine.”

13) Thus, under Section 3(1)(w)(ii) of SC & ST Act use of words or commission of acts or making of gestures of sexual nature towards woman belonging to Scheduled Caste, knowing that she belongs to Scheduled Caste becomes a punishable offence. In the present case, offence under section 3(1)(w)(ii) of SC & ST Act is added in the FIR possibly on account of the allegations of gestures made by Appellant towards Complainant. The relevant statement for attracting offence under section 3(1)(w)(ii) of the SC & ST Act reads thus:

“त्यावर ते म्हणाले "तुझा रेप झाला आहे काय? तू बातम्या करायला येते" हे सर्व विचित्र हावभाव करून मला बोलले. "ज्यामुळे मला स्वतःलाच लाज वाटली"

(emphasis and underlining added)

14) The exact gestures made by Appellant are not reflected in the FIR statement, which merely alleges making of “विचित्र हावभाव” (bizarre gestures). *Prima facie* therefore whether the gestures allegedly made by Appellant would fit into the expression “*gestures of a sexual nature*” becomes questionable at this stage. Also of relevance is the fact that offence under Section 3(1)(w)(ii) of the SC & ST Act cannot be made out unless there is knowledge on the part of the accused that the person to whom the gestures are made is a member of Scheduled Caste. In the present case, though FIR statement alleges that Appellant has knowledge about Complainant belonging to Budha

community, she is a mere acquaintance of the Complainant and *prima facie* it appears that there was no reason for him to have prior knowledge of factum of she belonging to Scheduled Caste community. The FIR statement indicates that the concerned utterances and gestures are made by Appellant because he was perturbed by reporting of the incident by complainant and not because she belonged to Scheduled Caste community. The FIR statement *prima facie* does not indicate that there was any intention on the part of Appellant to humiliate the caste of the Complainant. Therefore, it is doubtful at this stage whether the offence under section 3(1)(w)(ii) of the SC & ST Act could be made out against the Appellant.

15) So far as offence under Section 3(2)(va) of the SC & ST Act is concerned, the same relates to an offence specified in the Schedule being committed against member of Scheduled Caste and provides for additional punishment as specified under the Indian Penal Code, 1860 (**Code**). The *pari materia* offences under Sections 354 and 509 of the Code, 1860 are included in the Schedule of the SC & ST Act. However it appears that provisions of SC & ST Act are not yet amended so as to incorporate offences under BNS in the Schedule. Be that as it may. The alleged gestures made by Appellant towards Complainant amounting to gestures of sexual nature is itself is a debatable issue. In my view therefore, it is doubtful as to whether even offence under Section 3(2)(va) of the SC & ST Act would be made out. In my view therefore *prima facie* there is room for holding that the offences under provisions of SC & ST Act are not made out against Appellant. Therefore, the bar prescribed under Section 18 of the SC & ST Act would not be attracted in the present case.

16) Appellant is already on interim protection granted by this Court since 30 August 2024. He has remained present before the

Investigating Officer as directed by this Court and has co-operated with conduct of investigations. Though a photograph on social media platform of Facebook is sought to be relied upon by Respondent No.2 to suggest threatening behavior of Appellant, it appears that the concerned post is of one Mr. Aju Pawar and not of Appellant. The date of posting of the said message is also not reflected in the said photograph. Again, the said post cannot be construed to mean issuance of any threat to Complainant. In my view therefore, it would be too dangerous to infer that Appellant has threatened or is likely to threaten the Complainant upon grant of anticipatory bail. In any case necessary conditions can be put so as to ensure that Appellant does not interfere with the course investigations.

17) Considering the above circumstances, in my view, interim protection granted in favour of Appellant deserves to be made absolute. I accordingly proceed to pass following order:

ORDER

- i) Order dated 29 August 2024 passed by the learned Special Judge, Kalyan is set aside;
- ii) Interim protection granted in favour of the Appellant vide order dated 30 August 2024 is made absolute.
- iii) Appellant shall co-operate with the completion of the investigations by remaining present before the Investigating Officer as and when summoned.
- iv) Appellant shall attend dates of hearing of the case, unless exempted by the Court;
- v) The Appellant shall not contact the Complainant, or any witnesses associated with the case either directly or indirectly nor shall tamper with the evidence. In the event it is found that the Appellant has threatened the Complainant or any witness

associated with the case, prosecution as well as Complainant would be at liberty to apply for cancellation of bail.

18) With the above directions, the Appeal is **allowed**. Needless to say that the observations made in the order are prima facie and the same shall not affect the trial of the case.

(SANDEEP V. MARNE, J.)

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signed by
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