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(2023) 03 BOM CK 0018

In the Bombay High Court

Case No : Criminal Appeal No. 1258, 1259 Of 2022

Jagdish Sajjankumar Banka And Others — APPELLANT

Vs

State Of Maharashtra And Others — RESPONDENT

Date of Decision : 10-03-2023

Acts Referred:
Constitution Of India, 1950 — Article 142, 154(4)
Scheduled Caste And Scheduled Tribe (Prevention Of Atrocities) Act, 1989 — Section 1, 3, 3(i), 3(1)(r), 3(1)(s), 6, 10, 14A, 14A(1), 18
Indian Penal Code, 1860 — Section 279, 427, 504, 506
Code Of Criminal Procedure, 1973 — Section 41(A), 41(A1), 164, 170, 438

Citation : (2023) 03 BOM CK 0018

Hon'ble Judges : A. S. Gadkari, J Prakash D. Naik, J

Bench : Division Bench

Advocate : Subhash Jha, Tushar Bansode, Meena Mishra, S.D. Shinde, Laxman Kale, Shantilal Jadhav

Final Decision : Allowed

Judgement

Prakash D. Naik, J

1. Both these appeals are preferred by Appellants under Section 14-A of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short "SC/ST Act") challenging Order dated 19th November, 2022 passed by learned Additional Sessions Judge, Thane/Special Court (Atrocities Act) in Criminal Anticipatory Bail Application No.4055 of 2022 rejecting application for pre-arrest bail in C.R. No.309 of 2022 registered with Bhayander Police Station on 22nd June, 2022 for offences under Section 427, 504 and 506 of Indian Penal Code (for short 'IPC') and Sections 3(1)(r) and 3(1)(s) of SC/ST Act.

2. The complainant has alleged that, he belongs to Chambhar Community which is Scheduled Caste. He owns a shop dealing in sale and repairs of foot wear at Bhayander (West). Accused are conducting business as decorators and caterers from the shop situated near complainant's shop. On 21st June, 2022, the

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complainant was present at his shop. His son-in-law Manoj Amarchand More and his three friends Pravin Hiraman Bare, Rupesh Ramesh Khetle and Dilip Shankar Giri came to his shop for installing Tarpaulin shade adjacent to his shop. While they were carrying on the said work Jagdish and his brother Satish came there. Satish told the complainant not to install bamboo at the said place. Jagdish shouted at complainant and abused him on his caste. He also removed the bamboo installed at the said place. The complainant informed the accused that he has been provided Police protection and case is pending in the Court. He should not be troubled. He questioned the accused for parking vehicles on the gutter causing obstruction to traffic. Jagdish threatened him and both of them left the place of incident. The complaint was lodged on 22nd June, 2022 at about 15:10 p.m.

3. The Assistant Commissioner of Police/Investigating Officer issued notice dated 23rd June, 2022 under Section 41(A)-1 of Code of Criminal Procedure to the Appellant in Criminal Appeal No.1258 of 2022 and notice dated 27th June, 2022 to Appellant in Criminal Appeal No.1259 of 2022.

4. Appellants preferred Criminal Bail Application No.3092 of 2022 before the Additional Sessions Judge and Special Court (Atrocities Act), Thane for anticipatory bail. Application Exh.3 was preferred in anticipatory bail application seeking interim protection. Vide Order dated 11th August, 2022, application Exh.3 was rejected.

5. Appellants preferred Criminal Anticipatory Bail Application No.2369 of 2022 before this Court seeking interim protection. By Order dated 29th August, 2022, this Court noted that, the application pending before Sessions Court is slated for hearing on 2nd September, 2022. This Court did not entertain the application and directed that, on the next date of hearing the Special Judge shall grant an ad-interim relief or reject the application since it cannot be kept pending without any orders adhering to procedure prescribed under Section 438 of Cr.P.C. (Maharashtra Amendment Act).

6. Learned Additional Sessions Judge decided the application for anticipatory bail finally and rejected the same vide Order dated 2nd September, 2022

7. Appellants preferred Criminal Appeal No.888 of 2022 before this Court. The appeal was heard and disposed off vide Order dated 14 th September, 2022 by directing the appellants to attend Investigating Officer, Bhayander Police Station on 21st September, 2022 and 22nd September, 2022 and join the process of investigation. It was further directed that, in case the Investigating Officer forms an opinion that the arrest of Appellant is necessary, he shall issue notice 48 hours in advance to them. Order dated 2nd September, 2022 was set aside.

8. The Investigating Officer served the notice under Section 41(A)-1 of Code of Criminal Procedure dated 31st October, 2022 to Appellants stating that, the notice is issued to them in accordance with Order dated 14th September, 2022 passed by this Court. The notice also indicated that, charge-sheet would be filed

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against the appellants before the competent Court.

9. In view of the said notice Appellants preferred Criminal Bail Application No.4055 of 2022 before Special Court (Atrocities Act). Vide Order dated 19th November, 2022, the application for anticipatory bail preferred by Appellants was rejected.

10. Vide order dated 22nd December, 2022, this Court had granted interim protection to Appellants, by observing that, the concerned Officer was not only casual but in disregard to the provisions for lodgment of First Information Report (for short 'FIR') has inserted certain irrelevant and redundant provisions in it.

11. Mr. Jha appearing for Appellants has urged several grounds assailing the impugned Order rejecting application for anticipatory bail. It is submitted that, the complaint was filed with malafide intentions. There is delay in lodging FIR. The notice under Section 41(A) of Cr.P.C. was issued without understanding the object of the said provision. The alleged abuses were not supported by statement of any independent witnesses. The FIR is false. Custodial interrogation of Appellants is not necessary. Bar under Section 18 of the SC/ST Act is not attracted in the present case. The Special Court has mechanically rejected the application for anticipatory bail. The Respondent No.2 is in habit of filing vexatious complaints by misusing the provisions of Atrocities Act. When the chequered history of filing such vexatious complaints in the past was brought to the notice of the Special Court it was imperative for the Court to follow the dictum of the Apex Court in case of Siddharam Satlingappa Mhetre Vs. State of Maharashtra (2011) 1 SCC 694. The alleged incident cannot be said to have occurred within a public view. The witnesses were closely associated with the complainant. The alleged abuses on caste were attributed to Appellant in Criminal Appeal No.1258 of 2022. Detention of a person in a Police lockup causes incalculable harm to his reputation and self-esteem. The offences under the SC/ ST Act are not made out against Appellants.

12. Learned Advocate Mr. Jha has relied upon the following decisions :-

i. Siddharam Satlingappa Mhetre Vs. State of Maharashtra, (2011) 1 SCC 694.

ii. Swaran Singh and Others V/s. State through standing Counsel and Another, (2008) 8 SCC 435.

iii. Sidharth V/s. State of Uttar Pradesh and Another, (2022) 1 SCC 676.

iv. Javed Raza Shroff V/s. The State of Mahrashtra and Anr., decided by this Court vide Criminal Appeal No.1119 of 2022 dated 20th December, 2022.

13. Learned APP submitted that, during the course of investigation statement of complainant and four other eye witnesses to the incident were recorded under Section 164 of Cr.P.C. which support the prosecution case that Accused had abused the complainant on his caste. On instructions it is submitted that, investigation is completed, custodial interrogation of Appellants is not necessary

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for the purpose of investigation. However, the offences under the provisions of Atrocities Act are made out and in view of bar under Section 18 of the said Act, the Appellants are not entitled for pre-arrest bail.

14. Learned Advocate Mr. Laxman Kalel appearing for Respondent No.2 submitted that, overtact has been attributed to both Appellants. Both Appellants are liable for commission of offence under under Section 3(1)(r) and 3(1)(s) of SC/ST Act. The complainant was abused by Accused on his caste. The incident had occurred at public place and within public view. The statements of witnesses support the version of complainant. Since the offence under the Atrocities Act is made out, the Accused are not entitled for relief under Section 438 of Code of Criminal Procedure. Bar under Section 18 of SC/ST Act is attracted in this case.

15. Learned Advocate for the complainant has relied upon the decision of the Apex Court in the case of Prathvi Raj Chauhan V/s Union of India and Ors., AIR 2020 Supreme Court 1036.

16. According to complainant the accused are known to him. They are allegedly conducting their business in the vicinity of the shop of the complainant. Accused had allegedly obstructed the work of installing Tarpaulin carried out at the instance of complainant. From the FIR it appears that, the abuses on caste are attributed to Appellant in Criminal Appeal No.1258 of 2022. The alleged incident had occurred on 21st June, 2022 at about 5:30 p.m. The incident was reported to Police on 22nd June, 2022 at about 14:41 p.m. and the FIR was registered on 22nd June, 2022 at about 15:10 p.m. Appellants are relying upon the information received through R.T.I. which has been annexed to this appeal wherein it is stated that, at the instance of Baburao Ramchandra Yadav (complainant/ Respondent No.2), other complaints were lodged and FIR's were registered, viz. C.R. No.II-25/2006 under Section 3, 1, 10 and 6 of SC/ST Act. C.R. No.II-28/2012 under Section 279 of IPC. Initially notice under Section 41(A)-1 of Code of Criminal Procedure was issued to Appellants on 23rd June, 2022 and 27th June, 2022 respectively directing them to remain present before the Investigation Officer for investigation. Appellants preferred anticipatory bail application before Sessions Court and Special Court. The said application was rejected by learned Additional Sessions Judge, Thane vide Order dated 2nd September, 2022, on the ground that prima facie case is made out against Appellants and the bar under Section 18 of SC/ST Act would be applicable. Thereafter, this Court had directed that the Investigating Officer shall issue notice of 48 hours in advance to Appellants in the event he forms an opinion that the arrest of Appellants is necessary. Fresh notice under Section 14(A)-1 of Cr.P.C. was issued to Appellants on 31st October, 2022 which prompted them to again approach the Sessions Court for anticipatory bail. The said application was rejected vide Order dated 19th November, 2022.

17. It is pertinent to note that the notice dated 31st October, 2022 purportedly issued under Section 41(A)-1 of Cr.P.C. mentions that, charge-sheet is to be filed before Competent Court and in view of the Order passed by this Court notice

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under Section 41-A of Code of Criminal Procedure is issued to them. From the said notice it is apparent that the investigation is completed and for the purpose of investigation custodial interrogation of Appellants is not necessary. The question then arises for consideration is whether the bar under Section 18 of the Atrocities Act can be invoked in the present case to deny pre-arrest bail to Appellant in respect to crime in question.

18. We have perused the investigation papers. There is delay in lodging FIR. The FIR smacks malafides. In the past the complainant has filed one complainant under the Atrocities Act against another person. The statements of witnesses were recorded under Section 164 of Cr.P.C. One of the witness is son-in-law of complainant. Other witnesses are friends of complainants son-in-law who were allegedly present at the spot for installing bamboo and Tarpaulin shade. The witnesses are closely associated with the complainant. They cannot be termed as independent witnesses. There are no statements of independent witnesses corroborating the version of complainant about abuses on caste.

19. Learned Advocate Mr. Jha has invited out attention to the observations in the decision of the Apex Court in the case of Siddharam Satlingappa Mhetre (Supra) wherein it has been observed that, the complaint filed against Accused needs to be thoroughly examined including the aspect whether the complainant has filed a false and frivolous complaint on earlier occasion. The Apex Court has also laid down the factors and parameters which can be taken into consideration while dealing with the anticipatory bail.

20. In the case of Sidharth V/s. State of Uttar Pradesh and Another (Supra), charge-sheet was ready to be filed but Appellant applied for anticipatory bail since the trial Court takes a view that unless the person is taken into custody, the charge-sheet will not be taken on record in view of Section 170 of Cr.P.C. It was observed that, Section 170 of Cr.P.C. does not impose an obligation on the officer incharge to arrest each and every accused at the time of filing of the charge-sheet. The word 'Custody' appearing in Section 170 of Cr.P.C. does not contemplate either Police or Judicial custody but it merely connotes the presentation of the accused by the Investigating Officer before the Court while filing the charge-sheet. Personal liberty is an important aspect of constitutional mandate. Merely, because an arrest can be made because it is lawful does not mandate that arrest must be made. Distinction must be made between the existence of the power of arrest and justification for exercise of it. We are conscious of the fact that the observation made in the case of Sidharth V/s. State of Uttar Pradesh and Another (Supra) are not conducive to the present case. We are dealing with prayer for anticipatory bail. The Sessions Court has rejected the application for anticipatory bail in view of bar under Section 18 of SC/ST Act after coming to conclusion that prima facie offence is made out against Appellants. Section 18 prohibits exercise of powers under Section 438 of Cr.P.C.

21. Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 reads as follows :

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"18. Section 438 of the Code not to apply to persons committing an offence under the Act. - Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

22. In the case of Vilas Pandurang Pawar V/s State of Maharashtra and Others, 2012 (8) SCC 795 it was observed that Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code. However, a duty is cast upon the Court to verify the averments in the complaint and to find out whether an offence under Section 3(i) of the SC/ST Act has been prima facie made out. In the case of Sumitha Pradeep V/s Arun Kumar C.K. and Another, 2022 SCC Online 1529, the Apex Court was dealing with cancellation of anticipatory bail granted by High Court in a case involving offence under POCSO Act. The Apex Court had observed that in many anticipatory bail matters, it is noticed that one common argument being canvassed that, no custodial interrogation is required and therefore, anticipatory bail may be granted. There appears to be a serious misconception of law that, if no case for custodial interrogation is made out by the proecution, then that alone would be a good ground to grant anticipatory bail. Custodial interrogation can be one of the relevant aspects to be considered alongwith other grounds while deciding an application seeking anticipatory bail. There may be many cases in which the custodial interrogation of the accused may not be required, but that does not mean that, the prima faice case against the accused should be ignored or over looked and he should be granted anticipatory bail. In the case of Dr. Subhash Kashinath Mahajan V/s State of Maharashtra and Another (2018) 6 SCC 454 the Hon'ble Supreme Court had considered the question whether there is an absolute bar to the grant of anticipatory bail under SC/ST Act. The Court referred to several decisions including the decisions in the case of Vilas Pandurang Pawar (Supra) and Shakuntala Devi V/s Baljinder Singh (2014) 15 SCC 521. In Paragraph 56 of the decision it was observed that, there can be no dispute with the proposition that mere unilateral allegation by any individual belonging to any caste, when such allegation is clearly motivated and false, cannot be treated as enough to deprive a person of his liberty without an independent scrutiny. Thus exclusion of provision for anticipatory bail cannot possibly, by any reasonable interpretation, be treated as applicable when no case is made out or allegations are patently false or motivated. If this interpretation is not taken, it may be difficult for public servants to discharge their bonafide functions and in given cases, they can be blackmailed with the threat of a false case being registered under Atrocities Act, without any protection of law. Even a non public servant can be blackmailed to surrender his civil rights. This is not the intention of law. Such law cannot stand judicial scrutiny. It will fall foul of guaranteed fundamental rights of fair and reasonable procedure being followed if a person is deprived of life and liberty. In paragraphs 57 it was observed that exclusion of 438 Cr.P.C. applies when a prima facie case of commission of offence under the Atrocities Act is made out. On the other hand, if it can be shown that, the allegations are prima facie motivated and false, such exclusion will not apply.

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The decision of Gujarat High Court in Pankaj D. Suthar V/s State of Gujarat (1992) Guj. L.R.405, N.T. Desai V/s. State of Gujarat (1997)2 Guj. L.R. 942 and State of M.P. V/s. Ram Krishna Balothia (1995) 3 SCC 221 were referred and in paragraph 60 it was observed that the above Judgments correctly lay down the scope of exclusion as well as permissibility of anticipatory bail in cases under the Atrocities Act. In paragraphs 65 and 71 of the decision it is observed that exclusion of provision for anticipatory bail will not apply when no prima facie case is made out or the case is patently false or malafide. This may have to be determined by the Court concerned in facts and circumstances of each case in exercise of its judicial discertion. In cases under the Atrocities Act, exclusion of right of anticipatory bail is applicable only if the case is shown to bonafide and that prima facie it falls under Atrocities Act and not otherwise. Section 18 does not apply where there is no prima facie case or to cases of patent false implication or when the allegation is motivated for extraneous reasons. The view of Gujarat High Court in Pankaj D. Suthar (Supra) and N.T. Desai (Supra) was approved. The conclusions were formulated in paragraph 79 (Paragraph 83 of the same decision reported in AIR 2018 SC 1498) as follows:

"79.1. Proceedings in the present case are clear abuse of process of Court and are quashed.

79.2. There is no absolute bar against grant of anticipatory bail in the cases under Atrocities Act, if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. We approve the view taken and approach of Gujarat High Court in Pankaj D. Suthar and N.T. Desai and clarify the Judgments of this Court in Balothia and Manju Devi.

79.3. In view of acknowledged abuse of law of arrest in the cases under Atrocities Act, arrest of a public servant can only be after approval by the SSP appointing authority and of a non-public servant after approval of S.S.P,. which may be granted inappropriate cases, if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.

79.4. To avoid false implication of an innocent, a preliminary inquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under Atrocities Act and the allegations are not frivolous or motivated.

79.5. Any violation of directions (79.3) and (79.4) will be actionable by way of disciplinary action as well as contempt.

79.6. The above directions are prospective."

23. Pursuant to the aforesaid decision, the Union of India filed review petitions viz. Review Petition (Cri.) Nos. 228 with 275 of 2018 in Criminal Appeal No.416 of 2018. The review petitions were decided on 1st October, 2019AIR 2019 SC 4917. The Union of India had filed the petition for review of above decision dated 20th March, 2018 in the case of Dr. Subhash Kashinath Mahajan (Supra). In

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review the Apex Court dealt with the conclusions formulated in the above decision. The Court considered the scope and object of the Act. The final conclusion is reflected in paragraph 67 of the decision in review petition which reads as follows:

"67. We do not doubt that directions encroach upon the field reserved for the legislature and against the concept of protective discrimination in favour of downtrodden classes under Article 15(4) of the Constitution and also impermissible within the parameters laid down by this Court for exercise of powers under Article 142 of Constitution of India. Resultantly, we are of the considered opinion that directions Nos. (iii) and (iv) issued by this Court deserve to be and are hereby recalled and consequently we hold that direction No.(v), also vanishes. The review petition is allowed to the extent mentioned above."

24. Direction No.(iii), (iv) and (v) which were recalled in above decision relates to approval of the appointing authority before arrest of public servant and SSP before arrest of non-public servant be granted in appropriate cases if necessary for reasons recorded and that reasons be scrutinized by Magistrate for permitting further detention. Conducting preliminary inquiry by DSP to find out whether allegations make out a case under Atrocities Act and that allegations are not frivolous or motivated. Violation of direction (iii) and (iv) will be actionable by way of disciplinary action and contempt. It is pertinent to note that direction No.79.2 (ii) viz., there is no absolute bar against grant of anticipatory bail in cases under under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie malafide, was not recalled.

25. Pursuant to the decision in the case of Dr. Subhash Kashinath Mahajan V/s State of Maharashtra (Supra) Section 18-A was introduced in the Atrocities Act which read as follows :

"18-A. (l) For the purposes of this Act. -

(a) Preliminary enquiry shall not be required for registration of a First Information Report against any person; or

(b) the investigating officer shall not require approval for the arrest, if necessary, of any person, against whom an accusation of having committed an offence under this Act has been made and no procedure other than that provided under this Act or the Code shall apply.

(2) The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court."

26. In the case of Prathviraj Chauhan V/s Union of India and Others (Supra) the petitioners questioned the provisions inserted by way of carving out Section 18-A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. It was submitted that Section 18-A has been enacted to nullify the Judgment in the case of Dr. Subhash Kashinath Mahajan V/s State of

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Maharashtra and Another, AIR 2018 SC 1498 . The Court referred to conclusions in decision of Dr. Subhash Mahajan (Supra). The Apex Court than observed that it is not disputed at the Bar that, the provision of Section 18-A in the Act of 1989 had been enacted because of the Judgment in Dr. Subhash Mahajan's case, mainly because of direction Nos. (iii) to (v) contained in para 83 (AIR 2018 SC 1498). The Union of India had filed review petitions, and the same have been allowed and direction No. (iii) to (v) have been recalled. Thus, in view of the Judgment passed in review petitions, the matter is rendered of academic importance as the Court had restored the position as prevailed by various Judgments that were in vogue before the matter of Dr. Subhash Mahajan (Supra) was decided. Only certain clarification are required in view of provisions carved out in Section 18-A. There can be protective discrimination, not reverse one. It was further observed that concerning the provisions contained in Section 18-A, suffice it to observe that with respect to preliminary inquiry for registration of FIR, the Court has recalled general directions (iii) and (iv) issued in Dr. Subhash Mahajan's case (AIR 2018 SC 1498). A preliminary inquiry is permissible only in the circumstances as per the law laid down in Lalita Kumari V/s. Government of U.P. (2014) 2 SCC 1 shall hold good as explained in the order passed by this Court in the review petitions and amended provision of Section 18-A have to be interpreted accordingly. Section 18-A (I) was inserted owing to the decision of this Court in Dr. Subhash Kashinath Mahajan V/s State of Maharashtra and Another (Supra) which made it necessary to obtain the approval of the appointing authority concerning a public servant and the S.S.P. in the case of arrest of accused persons. Court had recalled that direction in Review Petition No.228 of 2018 decided on 1st October, 2019 (AIR 2019 SC 4917). Thus the provisions which have been made in Section 18-A are rendered of academic use as they were enacted to take care of mandate issued in Dr. Subhash Kashinath Mahajan V/s State of Maharashtra and Another (Supra) which no more prevails. The provisions were already in Section 18-A of the Act with respect to anticipatory bail. Concerning the applicability of provisions of Section 438 of Cr.P.C., it shall not apply to the cases under the Act of 1989. However, if the complaint does not make out a prima facie case for applicability of the provisions of the Act, 1989, the bar created by 18 and 18-A(i) shall not apply. This aspect has been clarified while deciding review petitions.

27. In the case of Swaran Singh and Others V/s. State of Maharashtra and Others, 2008 SCC 435. It was observed that the abuses on the caste should be uttered in the presence of independent witnesses. The independent person may not be those persons who are relatives or friends of complainant.

28. In recent decision in the case of Javed Raza Shroff (Supra) decided by us on 20th December, 2022, we have referred several decisions on the issue relating to bar under Section 18 of Atrocities Act and applying the principles enunciated therein. The relief of anticipatory bail was granted to Appellant therein by observing that bar under Section 18 would not be attracted in the said case.

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29. In the light of observation made hereinabove, we are of considered opinion that, the bar under Section 18 of the Atrocities Act cannot be invoked against Appellants in the present case for depriving them the pre-arrest bail. The custodial interrogation of Appellants is not necessary.

ORDER

i. Criminal Appeal No.1258 of 2022 and Criminal Appeal No.1259 of 2022 are allowed.

ii. Impugned Order dated 19th November, 2022 passed by learned Additional Sessions Judge, Thane/Special Court (Atrocities Act) in Criminal Anticipatory Bail Application No.4055 of 2022 rejecting application for pre-arrest bail in C.R. No.309 of 2022 registered with Bhayander Police Station is set aside.

iii. Interim Order dated 22nd December, 2022 is confirmed.

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