

(2019) 04 BOM CK 0046

In the Bombay High Court

Case No : Criminal Appeal No. 233, 254 Of 2019

Jyostana

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 10-04-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 438

Indian Penal Code, 1860 — Section 34, 143, 147, 324, 328, 427, 452, 463, 506

Scheduled Castes And Scheduled Tribes (Prevention Of Atrocities) Act, 1989 — Section 3, 3(1), 3(2), 3(1)(r)(s), 3(1)(x), 3(2)(v), 14A(2), 18, 18A, 143, 147

Citation : (2019) 04 BOM CK 0046

Hon'ble Judges : K.K. Sonawane, J

Bench : Single Bench

Advocate : Abhishek Kulkarni, K.N. Lokhande, M.S. Sonwane, Suresh Pandav

Judgement

1. Heard. Admit. Present appeals are taken up for final hearing on merit with the consent of both sides. These appeals can be disposed of by common Judgment as both these appeals arise from one and the same impugned order passed by learned trial Court for identical relief.

2. These appeals are directed against the impugned order dated 05-03-2019, passed by the Additional Sessions Judge(Special Judge SC & ST), Aurangabad in Criminal Bail Application No. 405 of 2019 filed by the appellants for the relief of their pre-arrest bail under section 438 of the Code of Criminal Procedure (for short "Cr.P.C.") in crime No. 81 of 2019 registered at Mukundwadi Police Station, Aurangabad under Sections 328, 324, 452, 463, 506 and 427 read with section 34 of the Indian Penal Code (for short "IPC") and under section 3(1) (r) (s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "Act of 1989" for the sake or brevity). The appellants invoking remedy under section 14-A(2) of the Act of 1989 preferred these appeals to redress their grievances.

3. The factual aspects which led to the prosecution of appellants / applicants in

brief are that, the first informant Pooja W/o Harshit Naidu @ Pooja Fakirchand Sonwane filed report on 18-02-2019 to the Police of Mukundwadi Police Station, Aurangabad and ventilated the grievance that on 16-02-2019 at about 1.00 p.m. her friend Pooja Patil accompanied with rest of the accused came in white colour car and barged into her house. They started quarreling and threatened her that if the amount which the complainant had taken as hand loan is not returned, she will have to face dire consequences. It has been alleged that when she tried to shout, her mouth was gagged with odhani. The appellants Pooja and Sheetal forcibly administered the Dettol to the first informant and thereafter she was taken to T.V.Center area. The accused Pooja Patil and others informed the sister of complainant on phone about the incident and asked her to come to TV centre and take away her sister i.e. complainant back to home. The witness Mahesh Ghule Bhaiiya came and took the first informant to the house and thereafter first informant lodged report to police for penal action against the culprits.

4. Pursuant to the FIR of the Puja Naidu, the Police of Mukundwadi Police Station, Aurangabad registered the crime No. 81 of 2019 under Sections 328, 324, 452, 363, 506 and 427 read with section 34 of the IPC and swung into action. Pursuant to supplementary statement of the first informant, Sections 143, 147 and Section 3(1)(x) of the Act of 1989 corresponding new Section 3(1)(r)(s) of the Act of 1989 came to be added. The appellants have an apprehension that they may be arrested in the crime for the sake of investigation. Therefore, apprehending arrest by the Police, the appellants rushed to the Court of Additional Sessions Judge, Aurangabad and filed the application bearing Criminal Bail Application No. 405 of 2019 for the relief of anticipatory bail under section 438 of the Cr.P.C. However, the learned Additional Sessions Judge did not give response to the application for pre-arrest bail of appellants and rejected the same under the impugned order, which is the subject-matter of present appeals.

5. Learned counsels Mr. Kulkarni and Mr. Pandav appearing for respective appellants vehemently submit that the appellant Jyotsana is the student and preparing for MPSC examination.

The appellant - Pooja Patil is undergoing training of Air Hostess from reputed Institute at Pune whereas appellant - Sheetal Dawkar is preparing for lady Police Constable examination. They have no concern at all with alleged crime but they are falsely implicated in this case. Learned Sessions Judge did not appreciate the circumstances on record in its proper perspective. In view of nature of allegations, there is no necessity of custodial interrogation of the appellants for investigation purpose. The circumstances on record are not sufficient to constitute the offence under Act of 1989, therefore, the bar under section 18 of the Act of 1989 cannot be invoked in this case. There is also no reference in the FIR that the appellants-accused were aware or they had an knowledge about the caste of first informant. There are no allegations about caste abuses in the FIR which are the main and basic ingredients of offence under Section 3(1)(r) and (s) of the Act of 1989 for its consideration at this initial

stage for relief of pre-arrest bail of the appellants-accused. There is no possibility of tampering with the evidence of prosecution. The appellants are resident of Aurangabad and they are ready to abide the condition, if any, imposed on them. Hence, respective learned counsel for the appellants requested to grant relief of pre-arrest in favour of the appellants.

6. Learned APP for respondents-Police authorities and learned counsel for respondent - original complainant / first informant raised objection and submit that the section 18-A of the Act of 1989 put embargo on the Court for exercising powers under section 438 of the Cr.P.C. The appellants abused the complainant on his caste within public view. The circumstances reflect from the FIR as well as supplementary statement of first informant are sufficient to make out offence under sections 3(1)(r)(s) of the Act of 1989. Learned counsel for respondent-first informant added that accused persons assaulted the first informant in brutal manner by committing house trespass. The appellants-accused in connivance with each other forcibly administered the liquid Dettol to the first informant, which is not a consumable liquid. Therefore, application for anticipatory bail of the appellants cannot be entertained. They prayed for rejection of both the appeals. The learned APP produced on record the relevant documents of investigation of the crime for perusal. The learned counsel for respondent-first informant placed on record her affidavit-in-reply for consideration.

7. It is to be noted that this Court in the decision of Criminal Appeal No. 787 of 2018 (Kiran Madhukar Ingle Versus State of Maharashtra and another), elaborately dealt with the issue of applicability of Section 18 of the Act of 1989 to entertain the application for pre-arrest bail under Section 438 of the Cr.P.C. and made observations in paragraph Nos. 13 and 15 as under :-

13. It is explicitly made clear that the Court of Sessions or High Court can entertain the application for pre- arrest bail to ascertain its maintainability. The law does not permit to reject the application for anticipatory bail merely because the case has been registered under section 3 of the Act of 1989. But, it is incumbent on the part of the Court to examine as to whether the applicant at all is a fit person to be treated as accused of the crime registered under the Act of 1989. Section 18 of the Act of 1989 does not bar judicial scrutiny of the accusation made in the complaint. When the Court is held competent to enter into scrutiny of the allegations to determine whether the person can be treated as accused of commission of offence under the Act of 1989, then question would arise as to what extent the Court would be justified to examine material to determine the prima facie case against him.

14. xx xx xx xx xx xx xx

15. The exposition of law as referred above unequivocally pointer to the inference that the application for anticipatory bail can be entertained only on the ground of inapplicability of the provisions of Act of 1989 and it would be ascertainable only on perusal of recitals of the FIR or complaint and not beyond

that, because once it is gathered from the FIR that the applicant is accused of committing the offence prescribed under section 3 of the Act of 1989, a bar under section 18 of the Act of 1989 would instantly operate against him. Therefore, the Courts are not permitted to enter into roving enquiry in regard to sustainability of accusation nurtured on behalf of complainant. Moreover, further scrutiny by summoning the case diary or other material to test veracity of the allegations made in the FIR also not permissible under the law.

8. In the instant appeals, the prosecution applied the provisions of section 3(1)(r) (s) and 3(2)(v) of the Act of 1989 against the present appellants, which reads as under :

"3. Punishments for offences of atrocities :-

(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe :-

(a) xxxxxxxx to

(q) xxxxxxxx

(r) Intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view ;

(s) abuses any member of a Scheduled Caste or a Scheduled Tribe by caste name in any place within public view;

Explanation : For the purposes of this clause, the expression "object" means and includes statue, photograph and portrait."

"3. Punishments for offences of atrocities :-

(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe :-

(i) xxxxxxxx to

(iv) xxxxxxxx

(v) commits any offence under the Indian Penal Code (45 of 1960) punishable with imprisonment for a term of ten years or more 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 within imprisonment for life and with fine;"

9. After perusal of the FIR lodged against the present appellants, prima facie it reveals that the ingredients of aforesaid penal provisions do not match with factual aspect of the present case. The basic ingredients of section 3(1)(r)(s) are that there must be "intentional insults" or "intimidation" with "intent" to humiliate a member of Scheduled Castes and Scheduled Tribes in any place within "public view". It is abundantly clear that mens rea is the decisive factor in the offence under Act of 1989. There must be "intentional insults" or "intimidation" with "intent" to humiliate member of Scheduled Caste and

Scheduled Tribes in any place within "public view". In the case of *Shantabai Vs. State of Maharashtra* reported in 1982 Cr.L.J. 872, it has been held that merely calling a person by his caste name though may amount to insult or abuse to him, it cannot be said to be with intent to humiliate such person.

10. In the matter in hand, it has been alleged that appellants hurled abuses in the name of caste of first informant by uttering words "धेड or महार". If word "'धेड or महार'" are taken out from the complaint for moment then other utterances "...तुझी औकात काय आहे लोकासोबत कोणी मैत्री सुध्दा करीत नाही.." perceived from the FIR though indicate "threat" or "intimidation" but does not pointer to the inference that there was any intent or mensrea to humiliate the complainant on his caste within public view. The allegations in the FIR of threat or intimidation would be at the most fall under the Indian Penal Code.

11. There are also allegations about offence under Section 3(2)(v) of the Act of 1989. In order to attract the offence under Section 3(1) or 3(2) of the Act of 1989, it is essential to point out that the appellants committed crimes under Act of 1989, not being a members of Scheduled Caste or Scheduled Tribe. The opening sentence of Sections 3(1) and 3(2) of the Act of 1989, itself shows, "whoever not being a member of Scheduled Caste or Scheduled Tribe". It means that there must be prima facie affirmation or say in the FIR / complaint that the appellants-accused are not the member of Scheduled Caste or Scheduled Tribe. In the instant case, there are no whisper or averment in the FIR that appellants are not the members of Scheduled Castes or Scheduled Tribes or they are from higher caste. There is also no reference in the FIR that the appellants-accused were aware or they had an knowledge about the caste of first informant. These are the main and basic ingredients of offence under Section 3(1) and 3(2) of the Act of 1989 for its consideration at this initial stage pertains to pre-arrest bail of the appellants-accused under section 438 of Cr.P.C.

12. Taking into consideration over all aspect of the matter, it seems that in spite of bar under section 18 of the Act of 1989, for invocation of powers under section 438 of the Cr.P.C., it is still open to this Court to find out by looking to the FIR of the case itself as to whether prima facie case is made out by the complainant against appellants. I am of the opinion that the incriminating circumstances to show that intentional insult or intimidation with intent to humiliate the complainant within public view on the part of appellants are lacking in this case. There is no impediment to arrive at the conclusion that there are no material prima faice on record to draw the inference that the appellants have committed offence under section 3(1)(r)(s) and 3(2)(v) of the Act 1989. As such, there is no statutory bar for this Court to consider the applications of the appellants filed under section 438 of the Cr.P.C. It is also required to take into consideration that other offences of I.P.C. applied against present appellants all are of bailable in nature, except Sections 324 328, 452, of the IPC. It is rather doubtful as to hold the belt and wooden log weapons used by appellants, as a dangerous weapons or means. Moreover, there are simple injuries caused to first informant.

Therefore, custodial interrogation of appellants is not necessary for the sake of investigation. There is also no possibility of absconding of the accused in this crime. So far as the apprehension of tampering with the evidence of prosecution is concerned, the requisite conditions would be imposed on the appellants. In the result, there is no difficulty to allow the present appeals for the relief of anticipatory bail in favour of appellants-accused in the present crime. Hence, appeals deserve to be allowed.

13. In sequel, the appeals stand allowed. The impugned orders dated 05-03-2019, passed by the Additional Sessions Judge(Special Judge SC & ST), Aurangabad in Criminal Bail Application No. 405 of 2019 filed by the appellants is hereby quashed and set-aside. The application of the appellants-applicants filed under Section 438 of the Cr.P.C. for their pre-arrest bail before the learned trial Court stands allowed. The appellant- Jyostana D/o Ashok Patil, in Criminal Appeal No. 233 of 2019, and the appellants- (1) Pooja d/o Duryodhan Ghuge Patil (2) Sheetal W/o Prashant Dawkar in Criminal Appeal No. 254 of 2019 be released on bail in the event of their arrest in connection with Crime No. 81 of 2019 registered at Mukundwadi Police Station, Aurangabad, for the offence punishable under Sections 143, 147, 328, 324, 452, 463, 506 and 427 read with section 34 of the IPC and Section 3(1)(r)(s) as well as Section 3(2)(v) of the Act of 1989, on furnishing PR bond of Rs.25,000/-(Rupees Twenty Five Thousand) with one solvent surety of like amount each. It is stipulated that appellants-applicants shall not indulge, directly or indirectly, in any kind of activities of tampering with the evidence of prosecution witness. The appellants/applicants shall attend the Mukundwadi Police Station, Aurangabad, on every Sunday in between 11.00 a.m. to 3.00 p.m. till filing of the charge-sheet and shall co-operate with the Investigating Officer for the sake of investigation into the crime. Inform the concerned Investigating Officer accordingly.

14. The present Criminal Appeals stand disposed of in above terms. No order as to costs.