

(2011) 12 GUJ CK 0009
In the Gujarat High Court
Case No : Criminal Reference No. 1 of 2011

Pravinchandra N Solanki and Others

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 02-12-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 226
Criminal Procedure Code, 1973 (CrPC) — Section 437(3), 438, 482
Penal Code, 1860 (IPC) — Section 439
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 18

Citation : (2011) 12 GUJ CK 0009

Hon'ble Judges : Bankim. N. Mehta, J;A.L. Dave, J

Bench : Division Bench

Advocate : Shivang J Shukla, for the Appellant; Kamal Trivedi, Advocate General with Ms. Sangita Vishen, APP, for the Respondent

Judgement

Honorable Mr. Justice A.L. Dave

1. Two Criminal Misc. Applications were preferred before the learned Single Judge seeking anticipatory bail invoking provisions of Section-438 of the Criminal Procedure Code, 1973, by applicants, who were facing charges for offences punishable under the provisions of the Scheduled Castes & Schedule Tribes (Prevention of Atrocities) Act, 1989, for short "the Atrocities Act". Section-18 of the Atrocities Act provides that 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 the Atrocities Act. The applicants relied upon on the following decisions:

- i. Jashubhai Majdan Gandhavi vs. State of Gujarat, 1992 (2) GLH 492;
- ii. Dr. N.T. Desai Vs. State of Gujarat,
- iii. Harivallabh Parikh Vs. State of Gujarat,

Where a view was taken that there is no total prohibition on entertaining an application for anticipatory bail under Section-438 of the Criminal Procedure Code in cases where there is accusation of offence punishable under the Atrocities Act.

1.1 The learned Single Judge of this Court in the case of Harivallabh Parikh vs. State of Gujarat (supra), has referred to the decision in the case of AIR 1995 1198 (SC) In that very decision, the Apex Court has ruled that the Section-18 of the Atrocities Act cannot be considered as violative of Article 21 of the Constitution of India. The learned Single Judge also referring to a Full Bench decision in the case of Jai Singh and Another Vs. Union of India (UOI) and Others, , ultimately, found that the law laid down in the decision of Harivallabh Parikh (supra) is contrary to the Apex Court's decision in the case of State of M.P. vs. Ram Krishna Balothia (supra) and, therefore, the learned Single Judge directed the Registry to place the matters before the Hon'ble Chief Justice for passing appropriate orders by referring following questions to Larger Bench.

(i) Whether provisions of Section-438 of the Code of Criminal Procedure, 1973 can be invoked by a person, who is facing accusation of having committed an offence under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, in view of specific bar contained in Section-18 of the Act of 1989?

ii) Whether a court, exercising powers u/s 438 of the Code of Criminal Procedure, 1973, can grant anticipatory bail under Section-438 of the Code in favour of a person, who is facing accusation of having committed an offence under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, in view of a specific bar contained in Section-18 of the Act, 1989?

2. This Court is, therefore, required to address and answer the above referred questions in this Reference.

3. We have heard learned Advocate Mr. Shivang J. Shukla for the original applicants and learned Advocate General Mr. Kamal Trivedi appearing with Ms. Sangita Vishen, learned APP, for the State.

4. Learned Advocate Mr. Shukla submitted that individual liberty is held to be a constitutional right guaranteed under Article 21 of the Constitution of India and it has to be protected. When there are stringent provisions of law, there are more chances of accusations of breach of such law and accusations for offences punishable under the Atrocities Act can easily be made if the provisions contained under Section-18 of the said Act are strictly applied, it would affect the individual liberty in cases where the accusations are false and fabricated. Section-18 of the Atrocities Act, therefore, cannot be applied to all cases of accusation of offences punishable under the Atrocities Act. As a matter of rule, it has to be left to the discretion of the Court to examine whether the accusation is correct or not and it is found that the accusation is not correct, the accused will be permitted to take shelter under the umbrella of Section-438 of the Criminal

Procedure Code, 1973, by seeking anticipatory bail and thereby protect his liberty. According to Mr. Shukla, Gujarat High Court, in following cases, has dealt with this issue:

i) 1992 (1) GLH 86

ii) 1992 (2) GLH 492

iii). Harivallabh Parikh Vs. State of Gujarat,

iv). Dr. N.T. Desai Vs. State of Gujarat,

4.1 Mr. Shukla also relied on a decision of the Karnataka High Court in the case of Sri N.B. Gungarakoppa and Others Vs. State of Karnataka, where a view was taken that Section-18 of the Atrocities Act is not a complete bar for entertaining anticipatory bail application under Section-438 of the Cr. P.C. and the Court can lift the veil to ascertain true nature of charge or prima facie case. He also relied on decisions of the Karnataka High Court in the case of Chikkappa and Others Vs. State, the Delhi High Court, in the case of Mukesh Kumar Saini and ors Vs. State (Delhi Administration), the Orissa High Court, in the case of Ramesh Prasad Bhanja and Others Vs. State of Orissa, and the Chattisgarh High Court, in the case of Somesh Das Vs. State of Chhattisgarh, where a view is taken that if prima facie case is not made out or if the complaint does not inspire confidence, High Court can consider application under Section-438 of the Criminal Procedure Code in spite of bar under Section-18 of the Atrocities Act.

4.2 Mr. Shukla relied on the decision of the Orissa High Court in 2005 Cri.L.J. 2689 where a view is taken that anticipatory bail can be granted exercising powers under Section-482 of the Criminal Procedure Code and reliance was also placed on the decision of Rajasthan High Court in Girdhari Lal and Others Vs. State of Rajasthan, wherein it is held that judicial scrutiny of an accusation is permissible. Mr. Shukla also relied on a decision of the Punjab and Haryana High Court in Phulla Dass Vs. State of Punjab and Another, where a view is taken that jurisdiction under Article 226 of the Constitution of India can be invoked to grant anticipatory bail in such a situation.

5. Learned Advocate General Mr. Trivedi submitted that the Questions referred to in the Reference are well answered by the Apex Court in the case of AIR 1995 1198 (SC) wherein Section-18 of the Atrocities Act has been held to be not violative of Articles 14 and 21 of the Constitution of India. He also relied on the decision in the case of Jai Singh and Another Vs. Union of India (UOI) and Others, wherein a similar view was taken, which came to be upheld by the Apex Court in the decision of State of M.P. Vs. Ram Kishna Balothia (supra). Mr. Trivedi submitted that in view of the above two decisions, Section-18 of the Atrocities Act has to be read as it stands in the statute and cannot be diluted or watered down for visualizing the misuse of the provisions of the Atrocities Act or false accusations, resulting in arrest of an individual.

6. Mr. Trivedi, therefore, submitted that the Questions referred to, may be

answered accordingly.

7. Learned Advocate Mr. Shukla in the rejoinder relied on the decision of the Apex Court in the case of Siddharam Satlingappa Mhetre Vs. State of Maharashtra, 2010 (8) SC 353 wherein right to personal liberty is held to be a right guaranteed under Article 21 of the Constitution of India.

8. We have examined the relevant provisions of law and have also perused the decisions relied upon by the learned Advocates.

9. Before we proceed to deal with the questions referred to us, it would be appropriate to quote the relevant provisions of Section-438 of the Code of Criminal Procedure, 1973 and Section-18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Section 438: Direction for grant of bail to person apprehending arrest:

(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact that as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii). the possibility of the applicant to flee from justice; and

(iv). where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Sessions, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including

- i. a condition that the person shall make himself available for interrogation by a police officer as and when required;
- ii. a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
- iii. a condition that the person shall not leave India without the previous permission of the Court;
- iv. such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989:

Section 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.

10. A plain reading of the aforesaid two provisions would make it clear that Section-438 of the Criminal Procedure Code grants protection against arrest of persons apprehending arrest on an accusation of having committed a non-bailable offence, which can be granted by either a Court of Session or a High Court where the court is satisfied that such protection is required to be given.

10.1 Against this, Section-18 of the Atrocities Act puts an embargo on applicability of Section-438 of the Criminal Procedure Code to the cases where the accusation is for an offence under the Atrocities Act. Said Section along with non-obstante clause would exclude all cases from application of Section-438 of the Criminal Procedure Code.

11. The arguments for holding that Section-18 of the Atrocities Act is not a complete bar for entertaining an application is the possibility of false accusation and misuse of the provisions of the Act which may result in dilution of individual liberty guaranteed under Article 21 of the Constitution of India.

12. There are various decisions relied upon by the learned Advocate Mr. Shukla, where a view is taken that a court can lift the veil to ascertain the true nature of charge and prima facie case and if the complaint does not inspire confidence or if prima facie case is not made out, anticipatory bail may be granted even if Section-18 of the Atrocities Act prohibits applicability of Section-438 of the Criminal Procedure Code to the cases of accusation for offences punishable under the Atrocities Act.

12.1 Against this, the Full Bench of Rajasthan High Court and the Apex Court have taken a view that Section-18 of the Atrocities Act is not violative of Article 21 of the Constitution of India whereas a view is taken by the Apex Court that an individual liberty is a right guaranteed under Article 21 of the Constitution of India.

13. In our view, therefore, to answer the question whether anticipatory bail can be granted in cases where there is an accusation for offence punishable under the Atrocities Act, court will have to examine whether a court can ignore or read a provision of law in a different manner once it is held to be not unconstitutional by the Apex Court? In our view, once a provision of law enacted by Legislature, is held to be not unconstitutional or violative of Article 21 of the Constitution of India, the same stands on statute book and has to be read as it is and court while interpreting the same, cannot read what is not provided for in the provision nor can it ignore what is provided for in the provision. The Section has to be read and given its ordinary meaning.

13.1 Differently put, Section-18 of the Atrocities Act has to be read as it is and once it says that 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 the said Act, a person apprehending arrest, cannot legally invoke the provisions contained in Section-438 of the Criminal Procedure Code nor can a court invoke powers u/s 439 of the I.P. C. and undertake the exercise of lifting the veil and decide upon the genuineness or otherwise, the truthfulness or bona fide or otherwise of the complaint or complainant's case and take a decision thereon for deciding whether to exercise of powers u/s 438 of the Criminal Procedure Code or not.

14. The above referred view is founded on the following factors:

(a) Once the Section-18 of the Atrocities Act is held to be not unconstitutional and not violative of Article 21 of the Constitution of India, it will apply with its full vigor and will bind the accused, the prosecution and the court alike. The court cannot read what is not provided therein nor can it ignore what is provided therein for taking one view or the other. When the Provisions start with a non-

obstante clause, there is hardly any discretion left with the court to examine the truthfulness or genuineness of the accusation. Even otherwise, it would not be appropriate for the court to go into that question at the very preliminary stage of anticipatory bail when the investigation is pending, a competent criminal court will hold a trial and decide those questions. If it is done at the stage of anticipatory bail, the complainant's case would be scuttled at the very stage.

(b) The view taken by the Apex Court in the case of State of M.P. & Anr Vs. Ram Kishna Balothia & Anr. (supra) is that Section-18 of the Atrocities Act is not violative of Article-21 of the Constitution of India. The Supreme Court in the case of Siddharam Satlingappa Mhetre vs. State of Maharashtra (supra) has taken a view that personal liberty is a right protected by Article-21 of the Constitution of India. It is also true that Section-438 of the Criminal Procedure Code is an instrument to protect the individual liberty against arrest in a given situation. In this situation, Section-18 of the Atrocities Act has to be read as a reasonable restriction. It is nobody's case that no person can ever be arrested as individual liberty is protected by Article 21 of the Constitution of India.

It is also to be noted that the protection against arrest envisaged under Section-438 of the Criminal Procedure Code is a right that flows from a statute enacted by the Legislature. Differently put, an individual is given that right statutorily. The makers of law by enacting another law, can certainly put a restriction on the right given by an earlier statute.

(c) Right flowing from Section-438 of the Criminal Procedure Code, flows from a general statute wherein Section-18 of the Atrocities Act puts an embargo on the said right by a special enactment, namely, the Atrocities Act and, therefore, that special provision will prevail over a general provision.

15. For the foregoing reasons, we answer the Questions referred to us as under:

Answer to Question No. 1:

A person who is facing accusation of having committed an offence under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, cannot legally invoke provisions of Section-438 of the Criminal Procedure Code, 1973 in view of specific bar contained under Section-18 of the Atrocities Act.

Answer to Question No. 2:

A court exercising powers u/s 438 of the Criminal Procedure Code, 1973, cannot grant anticipatory bail under Section-438 of the Criminal Procedure Code in favour of a person who is facing accusation of having committed an offence under the Scheduled Castes and Scheduled Tribes Act, 1989 in view of a specific bar contained in Section-18 of the Atrocities Act?

16. Reference stands answered accordingly.

17. The decisions relied upon by Mr. Shukla indicating that anticipatory bail can be granted by exercising powers under Section-482 of the Code of Criminal

Procedure, 1973 or Article 226 of the Constitution of India, are not dealt with as being not relevant for the purpose of Reference.