

(2022) 02 CAL CK 0035
In the Calcutta High Court
Case No : CRM (A) No. 361 Of 2022

Sk. Golam Murshed&Ors

APPELLANT

Vs

State Of West Bengal &Ors.

RESPONDENT

Date of Decision : 11-02-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 21
Code Of Criminal Procedure, 1973 — Section 161, 438, 438(2)
Indian Penal Code, 1860 — Section 34, 325, 354, 423, 427, 448, 506
Scheduled Castes And Scheduled Tribes (Prevention Of Atrocities Act), 1989 — Section 3, 3(i), 3(r), 3(s), 3(w), 3(1)(x), 8, 18, 18A, 18A(i), 18A(2)

Citation : (2022) 02 CAL CK 0035

Hon'ble Judges : Debangsu Basak, J;Bibhas Ranjan De, J

Bench : Division Bench

Advocate : Sk. Golam Murshed, Sankar Nath Mukherjee, Niraj Gupta, Aditya Biswas, Mousumi Das, Swapan Banerjee, Suman De

Final Decision : Disposed Of

Judgement

Bibhas Ranjan De, J

1. We are dealing with an application under Section 438 Cr.P.C in connection with Panskura Police Station case no.556 of 2021 dated 18.11.2021

under Sections 448/423/325/354/427/506/34 of Indian Penal Code read with section 3 (i)(x) of Scheduled Castes and Scheduled Tribes (Prevention of

Atrocities Act),1989 (herein after referred to as 1989 Act), where petitioners have sought anticipatory bail.

2. According to First Information Report (FIR), on 18.11.2021 one Mangali Hansda had been to Panskura Police station and lodged a written

complaint stating inter alia that on 31.10.2021 at about 12 at night, the petitioners came in front of her house and started hitting on the tile shed room by

â??lathiâ??. As a result of which some tiles had been broken. She had raised her voice but the petitioners started abusing her in filthy languages

towards her caste. She had been assaulted by fist blows and also by â??lathiâ?? and she became undressed and she was dragged through the road.

Local people had rescued them. Petitioners had also threatened to set her house on fire. On receipt of that complaint the instant case had been initiated.

3. Mr. Murshed, Ld. Counsel appearing on behalf of the petitioners has submitted that there are long standing disputes between the parties and several

litigants which are pending between the parties. And for that reason, petitioners had been falsely implicated in this case with mala fide intention. In

support of his contention, he has relied on several documents showing land dispute between the parties.

4. Mr. Murshed has relied on the following judgements:-

(a) (2018) SCC 454 Bombay (Dr. Subhash Kasinath Mahajan vs State of Maharashtra & Arm.)

(b) (2019) SCC online 1279 Bombay (Salim Abdul Shaikh vs. State of Maharashtra)

(c) (2020) 4 Supreme Court Cases 761 (Union of India vs. State of Maharashtra & Othrs.)

5. Mr. Murshed has further contended that the Honâ??ble Supreme Court observed in aforementioned cases that if the FIR does not make out a

prima facie case for applicability of the provisions of the 1989 Act, the bar created by sections 18 and 18 A (i) shall not apply.

6. Per contra, Mr. Banerjee, appearing on behalf of the State has opposed opposes the prayer for bail and submitted that this Court has no jurisdiction

to hear application under section 438 within the meaning of provisions of sections 18 and 18A of the 1989 Act. He has referred to the case diary and

submits that there are statements under Section 161 Cr.P.C made by the neighborsâ?? who witnessed the incident. And accordingly he submitted

that prima facie offence under section 3 of the 1989 Act, has been made out.

7. In support of his contention Mr. Banerjee has relied upon the following cases :

(a) (2021) 1 SCC 733 (Rahna jalal vs. State of Kerala & Anr.)

(b) (2020) 4 SCC 727 (Prathvi Raj Chauhan vs. Union of India &Ors.)

8. At the outset, we would like to recall the provisions of Section 18 and 18 A of the 1989 Act, as follows:

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.

[18-A. No enquiry or approval required.- (1) 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 investigation 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.]

9. In Subhash Kasinath Mahajan's case (supra), the Hon'ble Apex Court has observed that:

There is no absolute bar against grant of anticipatory bail in cases under Atrocities Act if no prima facie case is made out or where on

judicial scrutiny complaint is found to be prima facie mala fide. Section 18 of Act excluding application of Section 438 CrPC, valid and can

be justified to protect victims of perpetrators of crime and does not violate Articles 21 and 14 of the Constitution. However, Section 18

cannot be read as being applicable to cases where individuals are falsely implicated for extraneous reasons. Access to justice being a

fundamental right, grain has to be separated from chaff. Liberty of one citizen cannot be placed at whim of another. Law has to protect

innocent and punish guilty. Thus, exclusion of Section 438 CrPC in Section 8 of Act can be applied to genuine cases and not to false one.

This will help achieve object of law. Judicial notice of abuse of Act in last three decades. Inherent powers of Court cannot be taken away

by legislature. Court has inherent power to grant interim bail even if there is no provision for anticipatory bail. Legislation could not have

intended to exclude judicial function of going into correctness of criminal allegations,â??

10. In Salim Abdul Shaikhâ??s case (supra), the Honâ??ble High Court of judicature at Bombay has held that so far as the offence punishable

under Section 3 is concerned, offence of atrocities is made out only when the same takes place â?? in any place within public viewâ??. In this regard

it has relied upon a case of Pradnya Pradeep Kenkare&Ors. Vs. State of Maharashtra (2005) (3) Mh. L. J. 368. In that case Honâ??ble High Court

observed in paragraph 8 as follows:

â??8â?|â?| The provisions of Section 3 (1) (x) of the said Act would be attracted only in case of insulting or intimidating a member of the

scheduled caste in any place within a public view. The expression â??in any place within public viewâ? has specific meaning. It does not

mean that every allegation made in a public place that itself would amount to an offence under the said Act. The expression â??public

viewâ? has been prefixed by the preposition â??withinâ? which in fact follows the expression â??in any placeâ?. In other words, the

expression relating to the location of the alleged offence is qualified by the requirement of being â??within public viewâ?. The act of insult

or intimidation must be visible and audible to the public in order to constitute such act to be an offence under Section 3(1) (x) of the said

Act. In the provision of law comprised under Section 3 (1) (x) of the said Act, the word â??viewâ? refers to that of â??publicâ? but

prefixed by the expression â??in any place withinâ?. Being so, the word â??publicâ? not only relates to the location defined by the word

â??placeâ? but also to the subjects witnessing the incidence of insult or intimidation to the member of scheduled caste or tribe. Therefore,

the incidence of insult or intimidation has to occur in a place accessible to and in the presence of the public. The presence of both these

ingredients would be absolutely necessary to constitute an offence under the said provision of law. The complaint disclosing absence of

both or even any one of those ingredients would not be sufficient to accuse the person of having committed an offence under Section 3 (1)

(x) of the said Act.â??

11. Accordingly in Salim Abdul Shaikhâ??s case Honâ??ble Court has observed

that the word "public" not only relates to the location defined

by the word but also to the subjects witnessing the incidence of insult or intimidation to the member of scheduled castes or scheduled tribes Presence

of both ingredients are absolutely necessary for making out the offence of atrocity.

12. In the case of Union of India vs State of Maharashtra and ors. (supra) we find that Hon'ble Apex Court has dealt with the provisions of

Section 18 and 18A of the 1989 Act. Section 18A relates to sanction for prosecution in case of involvement of any public servant. Here in our case the

petitioner is not a public servant. So, we refrain ourselves from going into the discussions with regard to the provisions of Section 18A of 1989 Act.

With regard to bar under Section 18 of 1989 Act Hon'ble Apex Court has observed as follows:

"57. The guidelines in paras 79.3 and 79.4 appear to have been issued in view of the provisions contained in Section 18 of the 1989 Act;

Whereas adequate safeguards have been provided by a purposive interpretation by this Court in State of M.P.v. Ram Kishna Balothia,

(1995) 3 SCC 221 : 1995 SCC (Cri) 439. The consistent view of this Court that if prima facie case has not been made out attracting the

provisions of the SC/ST Act of 1989 in that case, the bar created under Section 18 on the grant of anticipatory bail is not attracted. Thus,

misuse of the provisions of the Act is intended to be taken care of by the decision above. In Kartar Singh, a Constitution Bench of this Court

has laid down that taking away the said right of anticipatory bail would not amount to a violation of Article 21 of the Constitution of India.

Thus, prima facie it appears that in the case of misuse of provisions, adequate safeguards are provided in the decision mentioned above."

13. Next we come to the cases as has been relied upon on behalf of the State. In Rahna Jalal's case (supra) Hon'ble Apex Court has

observed as follows:

"22. Section 18 explicitly excludes the application of Section 438 CrPC in relation to any case involving the arrest of any person on an

accusation of having committed an offence under the Act. Sub-section (2) of Section 18-A specifically excludes the application of the

provisions of Section 438 CrPC, notwithstanding any judgment, order or direction

of a court.

23. The provisions of Sections 18 and 18-A have been interpreted by a three-Judge Bench of this Court in *Prathvi Raj Chauhan v. Union of*

India (2020) 4 SCC 727 (Chauhan). Arun Mishra, J. speaking for himself and Vineet Saran, J. While construing these provisions,

observed that: (SCC p. 751, para 11)

“11. Concerning the applicability of provisions of Section 438 CrPC, it shall not apply to the cases under the 1989 Act. However, if the

complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act, the bar created by Sections 18 and 18-

A(i) shall not apply. We have clarified this aspect while deciding the review petitions.”

24. The same view has been taken in *Prathvi Raj Chauhan* in the concurring judgment of S. Ravindra Bhat, J. in the following observations

: (*Prathvi Raj Chauhan* case, SCC p. 759, para 32)

“32 As far as the provision of Section 18-A and anticipatory bail is concerned, the judgment of Mishra, J. has stated that in cases where

no prima facie materials exist warranting arrest in a complaint, the court has the inherent power to direct a pre-arrest bail.”

25. Thus, even in the context of legislation, such as the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, where

a bar is interposed by the provisions of Section 18 and sub-section (2) of Section 18-A on the application of Section 438 CrPC, this Court

has held that the bar will not apply where the complaint does not make out “a prima facie case” for the applicability of the provisions

of the Act. A statutory exclusion of the right to access remedies for bail is construed strictly, for a purpose. Excluding access to bail as a

remedy, impinges upon human liberty. Hence, the decision in *Chauhan* held that the exclusion will not be attracted where the complaint does

not prima facie indicate a case attracting the applicability of the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of

Atrocities) Act, 1989.

14. At the outset, it is pertinent to mention here that in the formal FIR the Section 3(i) (x) of the 1989 Act has been depicted. If we go through the

provision of 3 (i) and (x) we find as follows:

â??(i) Compels a member of a Scheduled Caste or a Scheduled Tribe to dispose or carry human or animal carcasses, or to dig graves;

(x) corrupts or fouls the water of any spring, reservoir or any other source ordinarily used by members of the Scheduled Castes or the

Scheduled Tribes so as to render it less fit for the purpose for which it is ordinarily used;â??

The facts we are dealing in our case are not at all related either to Section 3(i) or to Section 3(x) of the 1989 Act. Therefore, quoting of those Sections

in the FIR may be given by mistake.

15. Therefore, it is consistent view of the Honâ??ble Apex Court that bar under Section 18 and (2) of Section 18A will not apply if the complaint

does not make out a prima facie case for the applicability of the provisions of the 1989 Act. Keeping an eye to the observations of the Honâ??ble

Apex Court we have proposed to consider the contents of the written complaint.

16. After travelling through the written complaint we do not find any offence alleged to have been committed Under Section 3 (i) (x) of the 1989 Act.

Rather we find that the offence alleged in the written complaint may at the highest attract the provisions of Section 3 (r), (s) and (w) (i) and offence

under the aforesaid provision runs as follows:

â??(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;

(w) (i) intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste

or a Scheduled Tribe, when such a act of touching is of a sexual nature and is without the recipientâ??s consent;â??

17. After careful scrutiny of the written complaint we have come across the following circumstances:-

A. The incident alleged to have been taken place at 12 hours at night on 31.10.2021. So, it is expected that no independent person was present at the relevant point of time.

B. The incident alleged to have been taken place in the house of the complainant which is not a public place.

C. Petitioners had started hitting on the tile shed room with the help of stick and as a result some tiles were broken. After going through the case diary

very carefully we have not found any single paper showing seizure of tiles.

D. Petitioners are alleged to have assaulted the complainant by fist and blows and also by Lathi and as a result she became undressed and she was

dragged through the road i.e rough surface. Again after perusal of the case diary we have not found any scrap of paper in the name of injury report.

E. It has been further stated in the written complaint that local people rescued the complainant. After going through the entire case diary we have

found that the Investigating Officer visited place of occurrence on 19.11.2021 and he recorded the statements of Mithun Hansda, Harun ujjaman

Khan and Mongali Hansda, complainant of this case. Thereafter, on 29.11.2021 Investigation Officer had again recorded statement of Anima Hansda

and Nakul Hansda. Though Investigation Office had investigated the case till 15.01.2022 no other witness was examined under Section 161 CrPC.

F. During investigation Investigation Officer had prepared a seizure list only of wearing apparel of the complainant as produced by the complainant

herself in presence of Mithun Hansda and one Harun ujjaman Khan .

G. Admittedly, there is a long standing land dispute between the complainant and the petitioners. In this regard the Investigation Officer has collected

huge number of documents during investigation.

H. To attract the provisions under Section 3 (r) (s) the offence alleged has to take place within public view. To attract the provisions of Section 3 (w)

(i) prima facie it has to be shown that the offence alleged is of a sexual nature and is without the recipient's consent. In this case no such

allegation was ever made.

18. So far as 'public view' is concerned it would be appropriate to refer the Salim Abdul Shaikh's case (supra) where in Hon'ble Court

relied on the expression 'public view' which has been clarified by a case of Balu s/o. Bajirao Galande vs. State of Maharashtra and Another All

India Reporter 2006BOM 251. It has observed in paragraph 19 of the said judgment thus:

'19 Considering the judicial pronouncements on the subject, the expression within public view must be construed to mean that the insult

or humiliation must take place in the presence of or in the proximity of at least

one independent person. The test of audibility and visibility can be taken to have been satisfied if an independent person is actually present or is at a place where the utterances are clearly audible and reaches the scene of occurrence while the incident is still in progress.â??

19. Therefore, the offences under this Act as alleged in our case must have to take place in presence of at least one independent witness. If we go

through the statement of the witnesses recorded under Section 161 CrPC we find that Investigation Officer has succeeded to examine only four

witnesses among them Harun Ujjaman Khan seems to be an independent witness and rest witnesses are family member of the complainant. On

careful scrutiny of the statement of independent witness namely Harun Ujjaman Khan recorded under Section 161 CrPC we have found that on

hearing hue cry he along with other neighbors rushed to the place of the occurrence. But in the mean time, all petitioners were fleeing away

threatening the complainant with dire consequences. Therefore, this only independent witness neither saw the incident alleged to have been committed

either under Section 3(r), (s) or any other offence Under Section (w) (i). That apart, it is needless to mention that the Investigating Officer did not

record the statement of any other independent witness under Section 161 CrPC. Therefore, it is worthy to mention that the complaint did not disclose

even any kind of offence within the meaning of Section 3 (w) (i).

20. Conglomeration of the discussion made above we cannot rule out the implication of the petitioners in this case only due to long standing land

dispute. Therefore, the complaint containing narrations of the incident by the complainant does not seems to have made out a case within the meaning

of provisions of Section 3 (r),(s) of the Act, 1989.

21. Thus, bar under Section 18 of the Scheduled Castes and Scheduled tribes (Prevention of Atrocities) Act, is not applicable to the case in our hand.

22. Accordingly, we grant anticipatory bail to the petitioners.

23. We direct that in the event of arrest, the petitioners shall be released on a bail upon furnishing a bond of Rs. 10,000/- (Rupees ten thousand only),

with two sureties of like amount each, to the satisfaction of the arresting officer and subject to the condition has laid down under Section 438 (2) of the

Code of Criminal Procedure 1979 and on further condition that the petitioners shall meet the Investigating Officer once in a month till investigation is

concluded and petitioners shall appear before the jurisdictional Court and apply for regular bail within four weeks from date.

24. The prayer for anticipatory bail is allowed CRM(A) No. 361 of 2022 is disposed of.