

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on: 07th January, 2022**
Pronounced on: 28th January, 2022

+ **BAIL APPN. NO. 4511/2021**

JOY DEV NATH Petitioner

Through: Mr. Amit Yadav, Mr. Jitender
Gupta and Mr. Deepak Rohilla,
Advocates

versus

STATE (NCT OF DELHI) Respondent

Through: Ms. Kusum Dhalla, APP for
State

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

(THROUGH VIDEO CONFERENCING)

CHANDRA DHARI SINGH, J.

1. The present application has been filed under Section 438 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") on behalf of the petitioner/applicant praying anticipatory bail in FIR bearing No. 1251/2021 registered under Police Station Nihal Vihar, Delhi for offence punishable under Sections 376/506 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and Sections 3 (1)(r) and 3(1)(s)

of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as “SC/ST Act”).

2. As per the FIR the prosecution story is as follows:

(i) The Complainant is a divorced woman belonging to Scheduled Caste (Pasi) category and is currently residing at House No. 63, Kunwar Singh Nagar, Temple Galli, Nangloi, Delhi-110041 along with her daughter.

(ii) Complainant got married to Sh. Shashi Shekhar on 31st December, 1999 according to Hindu rites and ceremonies.

(iii) The Petitioner/Applicant used to regularly visit Complainant’s matrimonial house. He continued to visit her even after her divorce.

(iv) One day the Petitioner/Applicant made physical relations forcefully with the Complainant and took objectionable pictures of her and also threatened to kill her and her daughter, if she told anything about it to anyone.

(v) The Petitioner/Applicant used to extort money from complainant by blackmailing her. The Petitioner/Applicant had extorted around Rs.15,00,000/- (Rupees Fifteen Lakhs) and a gold chain of Rs.58,407/- (Rupees Fifty Eight Thousand Four Hundred Seven) from the complainant.

(vi) After reaching at her parental residence in Patna, the Complainant tried contacting the Petitioner/Applicant several times, but he did not answer her calls. After returning back to Delhi, Complainant came to know that the Petitioner/Applicant has already married with another girl.

(vii) On 20th September, 2021, the Complainant accidentally met the Petitioner/Applicant near Narayan Dharamkanta and asked him as to why he has cheated her. The Petitioner/Applicant replied that why should he marry a Pasi (Harijan) women like her. He has also given threat to the complainant.

(viii) On 28th September, 2021, the Complainant gave a complaint to the concerned Police station. On the said complaint, on 31st October, 2021, the FIR bearing No. 1251/2021 was registered at Police Station Nihal Vihar for the offences punishable under Sections 376/506 of the IPC & Sections 3(1)(r) and 3(1)(s) of SC/ST Act. The case was also registered against the Petitioner/Applicant, regarding extortion of money on the pretext of giving false promise of marriage, spewing death threats, abusive language and passing casteist remarks.

(ix) The Petitioner/Applicant moved an anticipatory bail application before the Learned Sessions Judge, West, Tis Hazari Court. Vide order dated 18th December, 2021, the Court below had dismissed the bail application filed under Section 438 of the

Cr.P.C. The relevant observations of the order dated 18th December, 2021 are as follows:

“I have considered rival arguments and the case law relied by Ld. Counsel for applicant.

I am in agreement with the submissions of Ld. state Counsel that the anticipatory bail is not maintainable in view of the fact that there are prima facie allegations against the applicant that he made physical relations with the complainant without her consent and hence, prima facie offence u/s 3 (w) of the SC/ST Act. Also the Hon’ble Supreme court of India in Prithvi Raj (supra) has clearly held that the provisions of 438 Cr.P.C shall not apply in case prima facie offence under SC/ST Act is made out, which is the case at Hand. Therefore, in view of the judgment Prithvi Raj (supra), I am of the considered view that the present application is not maintainable and is accordingly dismissed.

Copy of this order be given dasti to Ld. Counsel for applicant.”

3. Mr. Amit Yadav, learned counsel appearing on behalf of the Petitioner submitted that the Petitioner/Applicant has been falsely implicated in the present case with a view to harass Petitioner/Applicant. It is submitted that there are several material contradictions in the statements of the complainant, the Petitioner/Applicant never abused or passed any casteist remarks against the Complainant in the public or otherwise. Hence no offence under SC/ST Act is made out against the Petitioner/Applicant. There is also an extraordinary delay in lodging the instant FIR without any explanation.

4. In support of the argument, learned counsel referred to the judgment passed by the Bombay High Court in ***Akshay Manoj Jaisinghani v. State of Maharashtra***, BAIL APPN. No. 2221/2016 dated 9th January 2017, to suggest that the Complainant was well educated and a mature lady to understand the nature of their relationship, and that she knowingly and willingly consented to the sexual relations (even during her marriage) between them. The FIR does not reveal either the date or time or even the year when the alleged sexual relation took place, however, the registration of the FIR has been done only after a significant time has elapsed. It is submitted that as per the decision in ***Vikul Bakshi v. State of NCT Delhi***, 2016 (1) JCC 54, such an unexplained delay casts a *prima facie* doubt on the complaint itself, thereby entitling the Petitioner/Applicant for Anticipatory Bail under Section 438 of the Cr.P.C. However, the veracity of the claim of applicant/petition promising the complainant to marry her, if at all was made, is a question that can only be adjudged during the trial.

5. Learned Counsel appearing on behalf of the Petitioner/Applicant also relied on the judgment of Hon'ble Supreme Court of India in ***Jayanti Rani Panda v. State of West Bengal***, 1984 CRL(J) 1535, wherein it was held that if an adult girl had consented sexual intercourse with a person who made false promise to marry her, it would not amount to consent under the misconception of the fact under Section 90 of the IPC and sexual intercourse under these circumstances would not be an offence of rape as defined under Section 375 of the IPC.

6. It is submitted on behalf of the Petitioner/Applicant that even the charges under the SC/ST Act are false. The Hon'ble Supreme Court of India in *Prithvi Raj Chauhan Vs Union of India and Others, 2020 SCC SC 159* held that the High Court has inherent powers to grant pre-arrest bail in appropriate cases, whether, the petitioner would be entitled to anticipatory bail or not when Sections 18 and 18A of the SC/ST Act provide that the provisions of Section 438 Cr.P.C. will not be available in cases under the Act. Nevertheless, the Supreme Court, while dealing with the validity of these provisions in *Prithvi Raj Chauhan (Supra)*, held that the High Court has inherent powers to grant pre-arrest bail in appropriate cases and bar against Anticipatory Bail under Section 18 of the SC/ST Act could only be invoked if a *prima facie* case is made out. Furthermore, under Section 3(1)(r) of the SC/ST Act, it is required that the abusive insults against a member of the SC/ST community must happen at a place within 'the public view.'

7. It is vehemently submitted by the learned counsel appearing on behalf of the Petitioner/Applicant that the Petitioner/Applicant is ready to join the investigation as and when required.

8. In view of such facts and circumstances, he submitted that no *prima facie* evidence is found that the Petitioner/Applicant had abused the Complainant in public using casteist slurs and that the applicant ever made sexual relationship with the Complainant without her consent and therefore the application may be allowed, and Petitioner/Applicant must be granted the relief under Section 438 of the Cr.P.C.

9. *Per Contra*, Ms. Kusum Dhalla, learned APP appearing on behalf of the State has vehemently opposed the application and stated that as per the judgment of *Prithvi Raj Chauhan (supra)*, Section 18 of the SC/ST Act bars anticipatory bail generally and only in such circumstances where it is *prima facie* shown that the Applicant had not committed an offence against the Complainant 'knowingly' that the lady is from an SC/ST community, bail can be granted. Therefore the maintainability of the present anticipatory bail application under section 438 Cr.P.C. is in question. It is submitted that there are specific and direct allegations against the Petitioner/Applicant in the complaint that he forcefully made physical relations with the Complainant and took objectionable photographs of the complainant and therefore present case falls under Section 3(w) of the SC/ST Act. It is further submitted that the Petitioner/Applicant had also threatened the complainant to kill her.

10. It is further submitted that the question as to whether the alleged act was done with or without the consent of the Complainant is a matter of Trial, and at this stage it cannot be said that Complainant's case is false and fabricated.

11. The rival submissions now fall for consideration before this Hon'ble Court.

12. Heard the counsels for parties at length and perused the record.

13. This Court has given thoughtful consideration to the submissions made by learned counsel for the parties and has also perused the material on record.

14. Before advertng to the facts of the case, it is necessary to set-out the relevant provisions of the SC/ST Act, which are reproduced as under:

“3. Punishments for offences atrocities.—

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

Xxx xxx xxx

(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;

Xxx xxx xxx

(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 act of touching is of a sexual nature and is without the recipient's consent; (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.

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 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.”

15. As stated above, both sides have relied upon the decision of the Hon’ble Supreme Court in *Prithvi Raj Chauhan (supra)*, in which the court has rendered two separate but concurrent decisions, the relevant paras of which are as follows :

“10. Concerning the applicability of provisions of section 438 Cr.PC, it shall not apply to the cases under Act of 1989. However, if the complaint does not make out a prima facie case for applicability of the provisions of the Act of 1989, the bar created by section 18 and 18A (i) shall not apply. We have clarified this aspect while deciding the review petitions.

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.

12. The Court can, in exceptional cases, exercise power under Section 482 CrPC for quashing the cases to prevent misuse of provisions on settled parameters, as already observed while deciding the review petitions. The legal position is clear, and no argument to the contrary has been raised.”

(Opinion of Arun Mishra J.)

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“20. while considering any application seeking pre-arrest bail, the High Court has to balance the two interests: i.e. that the power is not so used as to convert the jurisdiction into that under Section 438 of the Criminal Procedure Code, but that it is used sparingly and such orders made in very exceptional cases where no prima facie offence is made out as shown in the FIR, and further also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law. I consider such stringent terms, otherwise contrary to the philosophy of bail, absolutely essential, because a liberal use of the power to grant pre-arrest bail would defeat the intention of Parliament.

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.

33. I would only add a caveat with the observation and emphasise that while considering any application seeking pre-arrest bail, the High Court has to balance

the two interests : i.e. that the power is not so used as to convert the jurisdiction into that under Section 438 of the Criminal Procedure Code, but that it is used sparingly and such orders made in very exceptional cases where no prima facie offence is made out as shown in the FIR, and further also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law. I consider such stringent terms, otherwise contrary to the philosophy of bail, absolutely essential, because a liberal use of the power to grant pre-arrest bail would defeat the intention of Parliament.”

(Opinion of S. Ravindra Bhat J.)

It is held that the High Court has inherent powers to grant pre-arrest bail in appropriate cases.

16. It is an admitted fact that the Petitioner/applicant and the Complainant were indeed involved in a physical relationship even before she was married, and it was a consensual one which is evident from the screenshots attached along with this application. The Petitioner/Applicant and the Complainant had been in a relation for last more than ten years and even deeply involved within the family and the same can be corroborated from the fact that the Petitioner/Applicant went to attend the Complainant's Sister's wedding in Patna, in the year 2017 and stayed there for five days from 2nd December, 2017 to 7th December, 2017. Their deep involvement can also be seen from the fact that when the Complainant purchased her car Maruti Swift, bearing Registration No. DL 4C AU 4095 then it was the Petitioner who had given his ALTO car No. DL 4C AS 0128 in the exchange scheme, which was worth Rupees Two Lakhs.

17. The perusal of the complaint filed by the complainant also does not make out *prima facie* case for the applicability of the provisions of SC/ST Act, therefore, the bar created by Sections 18 and 18A will not be applicable to the instant case.

18. It is also an admitted fact that other offences alleged are not punishable with death or imprisonment for life and the petitioner/applicant has also undertaken to cooperate with the police in the investigation.

19. The Complainant does not allege in her complaint that she was sexually victimised by reason of her caste status throughout her relationship with the Petitioner/Applicant and only brings in the allegation relating to her caste in an alleged episode of 20th September, 2021, which arose in the backdrop and context of the applicant refusing to marry the prosecutrix and not in the context of the allegations of sexual assault upon her. It is perhaps for this reason that initially section 3(1)(w) of the SC/ST Act was not alleged in the FIR, but was added subsequently, when raised before the Court below, which has also been recorded in the order dated 18th December 2021. It appears that the offences in the nature of sexual assault, alleged to have been committed by the Petitioner/Applicant, had no reference to the prosecutrix's caste, thereby, Section 3(1)(w) of the SC/ST Act does not *prima facie* come into play in the instant case.

20. Furthermore, insofar as the provisions of Sections 3(1)(r) and 3(1)(s) of the SC/ST Act are concerned, there is no allegation that the

alleged casteist slur was made “within public view” as required in Sections 3(1)(r) and 3(1)(s) of the SC/ST Act. In fact, it has been pointed out that, the court below in order dated 18th December 2021 recorded that the learned Counsel for the State had fairly conceded after speaking to the Complainant that she was not aware if any public person was present or not at the time of alleged incident.

21. Thus, absence of the ingredients of Section 3(1)(w) of the SC/ST Act, or even for the offence under Sections 3(1)(r) and 3(1)(s) of the SC/ST Act, the question of applicability of the Sections 18 or 18A(2) of the SC/ST Act getting triggered does not arise in the instant case.

22. In view of the aforementioned facts, circumstances, analysis and reasoning, and keeping in mind the legal position, this court is persuaded to allow the instant anticipatory bail application. It is accordingly directed that in the event of arrest, the Petitioner/Applicant shall be admitted to bail by the Investigating Officer/Arresting Officer on furnishing a personal bond of Rs. 50,000/- (Rupees Fifty Thousand Only), with one surety of the like amount from a family member to the satisfaction of the Investigating Officer/Arresting Officer, subject to following conditions:

- a) he shall surrender his passport, if any, to the Investigating Officer and shall under no circumstances leave India without prior permission of the Court concerned;
- b) he shall cooperate in the investigation and appear before the Investigating Officer of the case as and when required;
- c) The petitioner/applicant shall remain present before the

jurisdictional police station on Second and Fourth Saturday every month for the period of two months or till filing of the final report, whichever is earlier;

d) he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case;

e) he shall provide his mobile number(s) to the Investigating Officer and keep it operational at all times;

f) he shall drop a PIN on the Google map to ensure that his location is available to the Investigating Officer; and

g) In case of change of residential address and/or mobile number, the same shall be intimated to the Investigating Officer/ Court concerned by way of an affidavit.

23. The application stands disposed of in the above terms.

24. Other pending applications, if any, also stand disposed of.

25. It is made clear that above observations made by this Court while allowing the instant application shall have no affect on the proceedings of the Court below.

26. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

January 28, 2021

Dy/ot