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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/CRIMINAL MISC.APPLICATION NO. 1472 of 2021

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BABITA SUKAR KASHYAP
Versus
STATE OF GUJARAT

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Appearance:

MR ZUBIN BHARDA FOR MR A A ZABUAWALA(6823) for the Applicant.
MS MAITHILI MEHTA APP(2) for the Respondent-State of Gujarat

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CORAM:HONOURABLE MR. JUSTICE S.H.VORA

Date : 03/08/2021

CAV ORDER

1. By way of present application, under the provisions of Section 439(2) of the Code of Criminal Procedure (for short Cr.PC), applicant-Ms.Babita Sukar Kashyap seeks regular bail in connection with the FIR being I-CR No.04 of 2020 registered with ATS Police Station, Ahmedabad dated 24/07/2020 for the offences punishable under Sections 121(A), 124(A), 153(A) read with Section 120-B of the Indian Penal Code of 1860 (for short IPC).

2. Brief facts of the prosecution case read thus:

2.1 The applicant and other co-accused in offence registered at various Police Stations in Jharkhand State related to Anti-national activities, abduction, murder, rape, waging war against India entered their activities in tribal area of Kevadiya, Dahod, Chhota Udeipur and Vyara in Gujarat and thus instigating the followers of Sati-Pati Cult of tribal to take violent means by wrong interpretation of the Fifth Schedule of

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Constitution of India and wage war against India. It is the case of the prosecution that co-accused made people to fight on the basis of caste and class by instigating the people and they have been caught with documents and mobile phones containing incriminating material in their possession and thus committed aforesaid offence.

3. The specific role of the applicant as alleged in the FIR, if reproduced, can be read thus:

".....In last few years, interaction of leaders of Pathalgadi Movement of Jharkhand and Sati-Pati Cult in Gujarat had started taking place. The leaders of Pathalgadi movement had attended various functions of Sati-Pati Cult Gujarat, including functions held at Ketasvan, District-Tapi in the year 2015, 2017 and 2019. In the meanwhile, Pathalgadi movement has started following the path of violence to achieve their objections, and the activities of Pathalgadi Movement restored to violent clashes against government authorities, and propagated disaffection and violence against the duly elected government. In June, 2018, five women of an NGO, who were in Khunti district to abducted and raped by the activists of pathalgadi movement in another incident, seven tribal villagers were killed by the supporters of Pathalgadi Movement on 19th January 2020 in village Burugulikher, District West Singbhum, Jharkhand.....

.....An intelligence input was received from the reliable source that Babita Kachhap is involved in instigating the followers of Sati-Pati cult to resort to violent means in the pursuit of their objectives. The intelligence input further indicated that her area of activity is Keavadia, Dahod and

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Chhota Udeipur. Further, as per intelligence received Samu Oreya and Brisa Oreya are also active in instigating to the followers of Sati-Pati cult in Vyara Taluka of Tapi District. They are instigating the followers of Sati-Pati Cult by wrong interpretation of 5th Schedule of the Constitution of India and Panchayats (Extension of Schedule Areas) Act, 1996. The intelligence input further indicated that Birsa Oreya and Babita Kachhap are absconding accused under various offences registered in police stations in Jharkhand regarding the illegal acts of sedition, conspiracy to wage war, abduction, kidnapping, etc., committed by the activists of Pathalgadi Movement. Some of the offences registered against Babita Kachhap are enumerated herein below:-

1. *Khunti FIR No.102/17 Dated 24/08/2017 under Sections 109, 114, 117, 186, 290, 353 and 124(a) of IPC.*
2. *Khunti PS FIR No.143/17, Dated 25/08/2017 u/s – 147, 148, 149, 341, 342, 323, 327, 353,504, 506, 120(b) IPC.*
3. *Murhu PS FIR No.11/18, Dated 09/02/2018 u/s 109, 114, 117, 124(A), 153(A), 153(B), 186, 290, 353, 34 IPC.*
4. *Murhu PS FIR No.20/18, Dated 13/03/2018 u/s – 147, 148, 149, 341, 342, 448, 323, 109, 114, 117, 124(A), 121(A), 390, 353, 120(B), 504, 506, 186 IPC.*
5. *Khunti PS FIR No.33/18, Dated 09/03/2018 u/s – 147, 148, 149, 341, 342, 109, 114, 124(A), 153(A), 153(B), 295(A), 186, 353, 290 IPC.*

..... She is instigating the tribal populace by claiming that by virtue of provisions of Panchayat (Extension of Scheduled Area) and 5th Scheduled of the Constitution, no representative of State or Union Government can enter the village inhabited by tribal, and the laws of Union and State have no applicability in these tribal villages. She is asking the tribal without the

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permission of gram-sabha. The inquiry further revealed that Babita Cachhap is propagating that “Bharat me Ger Adivasi Diku Brahmin Hindu Videshi Kendra Sarkar ka sashan chalane aur rahne ka Lease Agreement 1961 me his samapt ho gaya he. The ideology of Pathalgadi Movement is being espoused by her and she is asking the tribal villages following the Sati-Pati Cult to resort to violent means to stop the representatives of Union and State Government from entering the villages.....

.....Material seized from the accused person, Babita Kachhap titled “pathalgadi” has references to the need of the Adivasi Communities to adopt a path of struggle to counter the open challenges made by the powerful elite communities to deprive the Adivasis of their existential freedom. The literature further states that the democratic methods of countering these efforts by means of elections and judicial methods are biased against Adivasis. It also states that any hope of impartiality from these democratic systems would be foolish and extorts the Adivasis to develop a potent weapon in their class struggle. The literature states that the Pathalgadi Movement is the most potent weapon in his struggle as the movement seems to have prepared all and it stakeholders in struggle. The material obtained from them have stated that the system of pathalgadi by erecting stones are aimed at preventing non-Adivasis from entering the land of the Adivasis and residing there. It also extols the readers to spread the pathalgadi movement in all village and areas as the primary weapon in the class struggle. They have asked that the movement based on the pathalgadi system to be made into a pan India Adivasi Movement.....”

4. Pursuant to FIR in question registered against the applicant, applicant came to be arrested on 24/07/2020 and after investigation, charge-sheet has been filed before the

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Court of learned JMFC, Vyara on 19/10/2020.

5. It is submitted by learned Advocate Mr.Zubin Bharda for Mr.Zabuawala, learned Advocate for the applicant that the prosecution has failed to make out a case under Sections 121(A), 124(A) and 153(A) of IPC and the FIR is registered because the applicant was having similar antecedents at State of Jharkhand. According to him, so far as the similar offences registered against the applicant in State of Jharkhand is concerned, the Government of Jharkhand has ordered to withdraw all cases which are registered against her in connection with PATTALGADI MOVEMENT and pursuant to the said decision, a notification dated 28/01/2020 has been issued by the Secretary of State of Jharkhand.

5.1 It is submitted that a bare perusal of charge-sheet papers would indicate that the prosecution has relied upon to Facebook posts and criticism of policy of the Government on non-implementation of constitutional provisions for the benefit of scheduled tribes, cannot be considered as sedition under Section 124(A) of the IPC.

5.2 It is further submitted that the applicant has filed substantive proceedings under Extraordinary Civil Writ Jurisdiction of the Hon'ble Apex Court being Writ Petition (Civil) No.649 of 2019 prior to lodgment of the FIR in the capacity as National Organization Secretary of the Adivasi Mahasabha and a member of a Scheduled Tribes which has resulted in stultification of the inherent and constitutional right of self-determination which is an important facet of their right to life, seeking redressal against the twin-pronged approach of the

State, inter-alia, seeking issuance of writ or direction to be issued on the functions of the Governor in the areas covered by the Fifth Schedule.

5.3 It is further submitted that the applicant has made various prayers before the Hon'ble Apex Court with respect to the right of self-determination as available to the schedule tribes which is combination of firstly, reservation of seats during election to the House of People as well as the respective Legislative Assemblies; and secondly the Special Executive and legislative role of the Governor acting on the aid and advice of the Tribes Advisory Council (in relation to the scheduled areas as mandated by the Fifth Schedule) in contradistinction with his normal duties to act on the aid and advice of the Council of Ministers.

5.4 It is pleaded before the Hon'ble Apex Court that the Governor shall be directed to function as per the advice / consultation with the Tribes Advisory Committee (TAC) for Schedule Areas and Tribes Areas as per the provisions of Fifth Schedule and not on the advice of the Council of Ministers as per Article 163(1) of the Constitution.

5.5 It is submitted by learned Advocate for the applicant that as has been held by the Hon'ble Apex Court in the case of ***Kedar Nath Singh vs State Of Bihar [1962 AIR 955]*** to constitute an offence under Section 124(A) of the IPC, there must be actual violation of incitement to violence associates with the words and therefore, mere involvement in the movement of PATTALGADI MOVEMENT cannot amount to commission of offence.

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5.6 It is submitted that there is no iota of evidence of hatching a conspiracy and the investigation is complete qua the applicant as all the recoveries from her have been made and therefore, no fruitful purpose would be served by keeping her behind the bars, more particularly, even if her involvement in PATTALGADI MOVEMENT is found, which is governed by customary laws and for such purpose she has already taken legal recourse to demonstrate her respect for the judicial system established under the Constitutional provisions and therefore, she may be enlarged on bail by imposing suitable terms and conditions as this Court may deem, fit and proper.

6. *Per contra*, the respondent-State while objecting to grant of bail has filed affidavit-in-reply *inter-alia* stating that the applicant is provoking tribal community against the Government as well as declares that no Indian laws shall apply to districts/regions of adivasi areas and further that no government officers enters into the adivasi locality and provokes the tribal to assault government officers if they enter the tribal regions.

6.1 According to learned APP, there are similar such seven offences registered in the State of Jharkhand which are reproduced herein above. While referring to the allegations made in the FIR itself and for such purpose, the State has relied upon statement of some 17 witnesses. Except, this no other material is relied upon by the respondent-State.

7. On consideration of rival contentions, following picture emerges on record :-

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- I. Charge sheet is filed.
- II. Applicant is a female accused and is behind the bars since 24/07/2020.
- III. Prior to lodgment of present FIR, the applicant has already taken legal recourse for issuance of appropriate writ / order or direction whereby the Governor shall be directed to function as per advice of the Tribes Advisory Council for schedule areas and tribe areas as per provisions of the Fifth Schedule and such prayers are pending before the Hon'ble Apex Court for consideration.
- IV. No any actual violence or breach of peace occurred at any point of time and more particularly during her presence in State of Gujarat and the FIR in question is registered only on account of other similar such offences registered in the State of Jharkhand.
- V. Learned APP has not challenged the submission as to the decision taken by the State of Jharkhand with regard to withdrawal of prosecution against the applicant and issuance of Notification as afore-stated for the same.
- VI. The seized material / literature is available on internet and no incriminating material is pointed out or demonstrated by learned APP to infer that any attempt is made on the part of the applicant to

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make out an offence punishable under Sections 121(A) and 124(A) of IPC on the face of the material itself.

VII. A bare perusal of the statements of witnesses recorded under Section 161 of Cr.PC, do not indicate that on account of raising voice by the applicant in the line of her interpretation of Fifth Schedule, there is any overt act or any response from anyone in public and therefore, presence of mens rea which is essential element to make out an offence under Sections 124(A) and 153(A) of IPC is not available on record.

VIII. Learned APP could not point out single events to show that any disturbance whatsoever was caused or has been caused or public in general was affected in their normal activities on account of her PATTALGADI MOVEMENT as alleged in the FIR and more particularly in certain specific areas of State of Gujarat.

IX. Learned APP has not expressed any apprehension that if the applicant is released on bail then, there are chances of his fleeing from justice or escape the trial on account of fear of conviction.

X. The incriminating material collected by the Investigating Agency is now in their custody and therefore, there is no likelihood or possibility of tampering with the same.

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XI. The applicant has deep root in the society, no apprehension as to flee away or escape trial or tempering with the evidence /witnesses is expressed.

XII. In view of above position emerging at the end of hearing, the application deserves consideration, but by imposing suitable condition to be observed by the applicant, pending investigation and trial.

8. Hence, the application is allowed and the applicant is ordered to be released on bail in connection with FIR being I-CR No.04 of 2020 registered with ATS Police Station, Ahmedabad, on executing a bond of **Rs.20,000/- (Rupees Twenty Thousand only)** with one surety of the like amount to the satisfaction of the trial Court and subject to the conditions that the applicant shall;

- [a] not take undue advantage of liberty or misuse liberty;
- [b] not act in a manner injurious to the interest of the prosecution;
- [c] not leave the territory of India without prior permission of the Sessions Judge concerned;
- [d] appear before the Investigation Officer concerned, as and when required for investigation purpose and attend the Court concerned regularly.
- [e] furnish the present address of residence along with the proof to the I.O. concerned and also to the Court at the time of execution of the bond and shall not change the residence without prior permission of Sessions Court

concerned;

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9. The competent authority will release the applicant only if the applicant is not required in connection with any other offence for the time being. If breach of any of the above conditions is committed, the Sessions Judge concerned will be free to take appropriate action in the matter. Bail bond to be executed before the lower court having jurisdiction to try the case. It will be open for the concerned Court to delete, modify and/or relax any of the above conditions in accordance with law. At the trial, the trial court shall not be influenced by the observations of preliminary nature, qua the evidence at this stage, made by this Court while enlarging the applicant on bail.

10. Rule made absolute to the aforesaid extent. Direct service is permitted.

(S.H.VORA, J)

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