

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Date : 26/11/2019

PRESENT

THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

CRL OP(MD). No.17224 of 2019

- 1.Dr.S. Ariharan,
S/o.Late.C.Sundaramoorthi,
Tutor Homeopathy,
Government Homeopathy Medical College and Hospital,
Thirumangalam, Madurai District.
 - 2.S.Rajeswari, W/o.R.Rengaraj,
Nurse, Government Homeopathy Medical
College and Hospital,
Thirumangalam,
Madurai District.
- ... Petitioners

Vs.

- 1.The Inspector of Police,
Thirumangalam Town Police Station,
Thirumangalam, Madurai District
(Crime No. of 2019).
 - 2.Mayammal, W/o.Muthaiah,
Government Homeyopathi Medical
Hospital and College,
Thirumangalam, Madurai District.
- ... Respondents

(R-2 is suo motu impleaded
as per the order of this Court dated 25.11.2019)

For Petitioners : Mr.P.M. Vishnuvarthanan,

For Respondents : Mr.A.Robinson,
Government Advocate (Crl.Side) for R-1
Mayammal,R-2, Party-in-person.

Amicus Curiae Mr.M.Ajmal Khan, Senior Counsel,

PETITION FOR ANTICIPATORY BAIL Under Sec.438 of Cr.P.C.

PRAYER :- For Anticipatory bail in Crime No. of 2019 on the file of the respondent police.

ORDER : The Court made the following order :-

The question that arises for my consideration is whether anticipatory bail can be granted to the petitioners herein when they stand accused of having intentionally insulted a member of a scheduled caste with intent to humiliate her within public view.

2.I place on record my gratitude to Shri.M.Ajmal Khan, learned Senior Counsel, for assisting this Court as amicus curiae.

3.The Scheduled Castes and the Schedules Tribes (Prevention of Atrocities Act), 1989 was enacted to prevent the commission of offences of atrocities against the members of the Scheduled Castes

and Schedules Tribes. Section 18 of the Act excluded the applicability of Section 438 of Criminal Procedure Code right from the inception. Its constitutionality was upheld in **(1995) 3 SCC 221 (State of M.P. and Ors. vs. Ram Krishna Balothia)**. However, the Bar found an ingenious way of overcoming the situation. Petitions under Section 482 of Cr.Pc were filed in such cases with the prayer to permit the accused to surrender before the jurisdictional court and to mandate the court concerned to accept the surrender and dispose of the bail petition on the same day. Unless serious offences under the Penal Code were involved, the usual practice was to allow the petitions as prayed for. Of course, some Judges held that such petitions were not maintainable. Some used to give directions that the bail petitions were to be considered expeditiously. They avoided the use of the words "on the same day".

4. Such a camouflaging became unnecessary following the definite ruling of the Hon'ble Supreme Court in the decision reported in **(2018) 6 SCC 454 (Dr. Subhash Kashinath Mahajan vs. State of Maharashtra and another)**. The Hon'ble Supreme Court held that there is no absolute bar against grant of anticipatory bail in cases

under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. But then, the Bar had to revert to the old ways following the enactment of Central Act No.27 of 2018 introducing Section 18 A which reiterated that the provisions of Section 438 of the Code shall not apply to a case under the Atrocities Act, notwithstanding any judgment or order or direction of any court.

5.The Union of India not wanting to take chances also filed Review Petition (Crl) No.228 of 2018. The same was disposed of vide judgment dated 01.10.2019 by a three Judges Bench. On a careful reading of the judgement dated 01.10.2019, one can note that the essence and soul of Dr.Subhash Kashinath Mahajan judgment has not only survived but remains intact.

6.Let us go back to Dr.Subhash Kashinath Mahajan decision. The conclusions are set out in Paragraph 79.1 to 79.6 (as reported in SCC). They read as under :

“79.1.Proceedings in the present case are clear abuse of process of Court and are quashed.

79.2. There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny, the complaint is found to be prima facie mala fide. We approve the view taken and approach of the Gujarat High Court in Pankaj D. Suthar and N.T. Desai and clarify the judgments of this Court in Balothia and Manju Devi.

79.3. In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the SSP which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention.

79.4. To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and the allegations are not frivolous or motivated.

79.5. Any violation of Directions 79.3 and 79.4 will be actionable by way of disciplinary action as well as contempt.

79.6. The above directions are prospective."

The operative portion of the judgment in the Review Petition is as under :

“67....Resultantly, we are of the considered opinion that direction Nos.(iii) and (iv) issued by this Court deserve to be and are hereby recalled and consequently we hold that direction No.(v), also vanishes. The review petitions are allowed to the extent mentioned above.”

Thus, the direction set out in Paragraph No.79.2 in Subhash Kashinath Mahajan judgment has not at all been touched. It still holds good.

7.It is pertinent to note that the review judgment was pronounced long after Central Act No.27 of 2018 amending the statute and bringing in Section 18 A came into force on 17.08.2018. Section 18 A of the Atrocities Act reads as under :

"18A. (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."

Having noted that the review judgment of the Hon'ble Supreme Court has not taken away what was held in Paragraph No.79.2 in Dr.Subhash Kashinath Mahajan, the question that next arises is whether in view of Section 18 A, the power of the court to grant anticipatory bail for cases under the Atrocities Act still holds.

8.It is obvious that Section 18 A (2) has not ushered in anything new. Section 18 A (1) had to be incorporated to undo some of the directions set out in Dr.Subhash Kashinath Mahajan. Even without Section 18 A (1), in view of the review judgment, the directions set out in Section 79.3, 79.4 and 79.5 have gone. Section 18 A (2) is a mere reiteration of Section 18 which provided for exclusion of Section 438 of Cr.Pc. The question is whether the use of the expression "notwithstanding any judgment or order or direction of any court" can make any difference.

9.While it is not open to the legislature to declare that a judicial pronouncement given by a court of law would not be binding, it can

alter the very basis upon which the decision has been given. They are known as validating Acts. They may make ineffective the judgments and orders of competent courts. The alteration should be made in such a manner that it would no more be possible for the court to arrive at the same verdict. In other words, the very premise of the earlier judgment should be uprooted, thereby resulting in a fundamental change of the circumstances upon which it was founded (***Bakhtawar Trust and Ors. vs. M.D. Narayan and Ors, (2003) 5 SCC 298***). However, as held in ***Janapada Sabha Chhindwara and Ors. vs. Central Provinces Syndicate Ltd. and Ors (1970) 1 SCC 509***, it is not open to the legislature to say that a judgment of a Court properly constituted and rendered in exercise of its powers in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court.

10. In Dr. Subhash Kashinath Mahajan, the Hon'ble Supreme Court had specifically held that the exclusion of Section 438 of Cr.PC applies when a prima facie case of commission of offence under the Atrocities Act is made out. On the other hand, if it can be shown that

the allegations are *prima facie* motivated and false, such exclusion will not apply. Thus, the decision rendered by the Hon'ble Supreme Court in Dr.Subhash Kashinath Mahajan rests on an interpretation of Section 438 of Cr.PC. Section 18 A does not appear to have removed the basis on which Dr.Subhash Kashinath Mahajan judgment is founded. Mere employment of the expression "notwithstanding any judgment or order or direction of any Court" may not make any difference. I am therefore tempted to hold that even post amendment, Sessions Courts also will have the power to grant anticipatory bail. However, I cannot lose sight of the fact that the constitutional validity of Section 18 A has been challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court specifically declined to stay the operation of this provision, though a strong request was made. Thus, as on date, in view of Section 18 A, Section 438 of Cr.PC stands excluded in cases arising under the Atrocities Act.

11.The outcome of the challenge can be one way or the other. Section 18 A of the Act can be upheld. Or it can be struck down. Even if its validity is upheld, the High Courts would still be entitled to grant anticipatory bail. The statute only excludes the applicability of Section

438 of Cr.PC. In the State of Uttar Pradesh, Section 438 of the Code has been deleted by the State amendment and the said deletion has been upheld in **(1994) 3 SCC 569 (Kartar Singh vs. State of Punjab)**. But, that has not curtailed the extraordinary power of the High Court to entertain a plea of anticipatory bail and this power was held to be available in **Hema Mishra vs. State of U.P. and Ors, (2014) 4 SCC 453**.

12. Section 438 of Cr.PC is not the sole repository of the power to grant anticipatory bail. The High Courts are endowed with inherent powers to make such orders as to secure the ends of justice. I hope I am not indulging in quibbling or hair-splitting when I say that neither Section 18 nor Section 18 A engraft a bar against grant of anticipatory bail. They are to the effect that the provision of Section 438 of the Code shall not apply to a case under the Atrocities Act. Even if Section 438 of Cr.PC is not available, Section 482 of Cr.PC can very much be invoked. Hence, I hold that this Court is very much possessed of the power to grant anticipatory bail even in cases arising under the Schedules Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The petitions can be filed under Article 226 of the Constitution of India or under Section 482 of Cr.PC.

13.If the provision is struck down, in view of Dr.Subhash Kashinath Mahajan judgment, the Sessions Courts also will have the power to grant anticipatory bail. Of course, the test laid down in Dr.Subhash Kashinath Mahajan judgment will have to be met. I initially felt that Sessions Courts can also grant anticipatory bail in such cases. But, so long as Section 18 A (2) of the Act is in the statute book, since Sessions Courts cannot invoke Section 482 of Cr.PC, I hold that it is only the High Court which can grant the relief of anticipatory bail and not the Sessions Courts.

14.It is relevant to note that when a petition for anticipatory bail was filed before the Madras High Court and the Registry refused to number the same on the ground of maintainability, the Hon'ble Supreme Court in the decision reported in **2019 (2) Crimes 321 (SC) (P.Surendran vs. State by Inspector of Police)**, held that the High Court Registry could not have exercised such judicial power to answer the maintainability of the petition when the same was the realm of the court. The Registry was directed to number the petition and place it before the appropriate Bench. However, the Hon'ble Apex Court made it clear that they have not expressed any views on the

nature of the amendment, the standard of judicial review and the extent of justiciability under Section 18 A of the SC & ST Act which was left open for the appropriate Bench to consider.

15. When an accused in a case under the Atrocities Act takes out an application for grant of anticipatory bail, he has to necessarily implead the victim/dependant/defacto complainant. It shall be the duty of the investigation officer to inform the defacto complainant/victim/dependant about the listing of the case. This function has to be discharged in an expeditious manner. Section 15 (1) (3) of the Act states that a victim or his dependent shall have the right to reasonable, accurate, and timely notice of any Court proceeding including any bail proceeding and the Special Public Prosecutor or the State Government shall inform the victim about any proceedings under this Act. The victim or the defacto complainant has to be heard. But, if proceedings are going to be adjourned on this ground, it does have a bearing on the liberty of the accused. When the Special Public Prosecutor or the Government counsel is served with the relevant papers, it shall be their duty to pass on the information to the victim/dependant/defacto complainant with utmost expedition. It

is not necessary for the accused or the petitioner to serve the papers on the victim or effect notice in any other mode. The statute even while conferring a right on the victim has carefully chosen to cast the duty only on the Special Public Prosecutor/the State Government.

16.It is necessary to make a mention at this juncture about the manner in which a petition for anticipatory bail has to be drafted. In a leading case in ***Bharat Singh and Ors. vs. State of Haryana and Ors (1988) 4SCC 534***, the Hon'ble Supreme Court drew a distinction between a pleading under the CPC and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it. If an accused is to be granted anticipatory bail in a case arising under the Atrocities Act, he has to fulfil the test laid down in ***Dr.Subhash Kashinath Mahajan*** case. It is true that there are no strict rules of pleading in Criminal Procedure Code as those in the Civil Procedure Code. Nevertheless, the principles of natural justice require that the victim is not taken by surprise. Hence, the petition to be filed by the

accused along with the annexures should contain all the necessary and relevant materials. Only after a judicial scrutiny of those materials and particulars, the court can come to a decision as to whether the accused is entitled to anticipatory bail. Of course, the finding given by the court is only based on a prima facie view for the purpose of granting anticipatory bail and it will not have any bearing on the investigation as such.

17. Having held that a petition for anticipatory bail is maintainable even if the case has been registered under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, I now proceed to analyse the facts on hand. The first petitioner is a Tutor in the Government Homeopathy Medical College and Hospital, Thirumangalam. The second petitioner is working as a Nurse in the same institution. They apprehend arrest at the hands of the first respondent since the second respondent-Mayammal who is working as a Sweeper in the said institution lodged a complaint against them before the Inspector of Police, Thirumangalam Town police station.

18.The matter was listed for admission on 22.11.2019, it was adjourned to 25.11.2019. On the adjourned date, the learned Government Advocate (crl.side) made a submission that the issue has been amicably resolved and that no First Information Report was registered. In the normal course of events, the criminal original petition should have been closed by recording the said submission. But then, the petitioners' counsel strongly submitted that the petitioners are not parties to any compromise as claimed by the police and he pressed for an adjudication. He pointed out that the defacto complainant in her complaint dated 16.11.2019 had alleged that both the petitioners herein have abused her by referring to her community. It is relevant to mention that the defacto complainant belongs to a notified Scheduled Caste.

19.The petitioners' counsel alleged that the defacto complainant would rarely report for duty on time and often play truant. The first petitioner was given additional charge as Assistant Superintendent for a period of three months from 02.11.2019. The administrative work included closing the Attendance Register of the staff. On 16.11.2019,

when the defacto complainant did not report for duty at 7.00 a.m., he made an endorsement to that effect and went to the Old Homeopathy Hospital Block attached to the Government Hospital Block, Thirumangalam. It is a full 2 kms., away from the Government Homeopathy Medical College and Hospital, Thirumangalam. He had submitted a report on the previous day against the defacto complainant and her unauthorised absence and the delay in reporting for duty. He had also pointed out that the defacto complainant used to make corrections in the Attendance Register.

20. According to the petitioners, the defacto complainant came a full one hour late and when she saw that the Attendance Register had already been closed, she picked up quarrel with the second petitioner. Thereafter, the defacto complainant challenged the first petitioner when he was in the cabin of the Principal. She tried to justify her late reporting and threatened the Principal that she would get even with the petitioners herein by lodging a complaint under the Atrocities Act. She actually lodged a complaint two days later before the local police. In her complaint dated 16.11.2019, the defacto complainant had stated that the petitioners abused her in filthy language by referring

to her caste. In the petitioners' typed set of papers the true copy of the said complaint was enclosed.

21.I called for the case file. Interestingly, it contained only four papers, namely, (i)complaint dated 20.11.2019 given by Mayammal in which she had alleged that the petitioners herein used inappropriate words while scolding her on 16.11.2019 at 08.00 a.m. (ii)Acknowledgement issued by the Sub Inspector of Police bearing C.S.R No.522 of 2019. (iii)letter dated 22.11.2019 given by Mayammal in which she states that since the Principal of the College had given an assurance that no disciplinary action will be taken against her, she was not pursuing her complaint dated 20.11.2019 given against the petitioners herein. (iv)letter dated 22.11.2019 given by Dr.B.Karthikeyan, M.D., Principal of the said institution indicating that the management does not propose to take any action against Mayammal and that her service grievances would be redressed within three months and that her Attendance Register would also be kept in the college.

22.I was surprised that while the petitioners had enclosed the typed copy of the complaint of Mayammal containing the allegation that the petitioners abused her by referring to her community, the case file of the first respondent police did not reflect the same. I therefore directly asked Ms.Mayammal as to whether she had given any complaint against the petitioners under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989. Mayammal readily and immediately answered in the affirmative. Like a magician pulling rabbits out of his hat, Mayammal pulled out a bunch of complaints from her bag. She passed on a copy of the complaint dated 16.11.2019 to the court. It tallied with what was enclosed in page No. 3 of the petitioners' typed set.

23.Mayammal was suspended from service on 22.11.2019. Her explanation was sought. Now, she lodged one more complaint dated 23.11.2019. The latest and updated and revised complaint had allegations against one matron Shanthi also as if she also abused her by referring to her community.

24.I have to record my displeasure over the conduct of the respondent police. Mayammal, the defacto complainant herein had given a written complaint against the petitioners herein alleging that they have abused her with reference to her community. The said complaint has been deliberately suppressed and the first respondent has tried to act as a mediator. The Principal had been coerced into to giving an undertaking that he would not take any disciplinary action against the defacto complainant. When the police official from the first respondent police station took the stand that no such complaint under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been received from the defacto complainant, Mayammal contradicted the same and stated that she did give more than one complaint in this regard.

25.On a careful scrutiny of the entire material on record, I have no hesitation to come to the conclusion that the complaint of the defacto complainant against the petitioners that they abused her by referring to her community is false and mala fide. She appears to be a habitual late comer. When her superior officers attempted to discipline her, she chose to hit back and hide behind her communal

identity. She had lodged complaints under the Atrocities Act to foreclose any disciplinary action against her. In fact, she initially succeeded in her endeavour. Only because the petitioners took a principled stand, she could not get away with her filibustering tactics.

26.Though as on date, there is no FIR against the petitioners, they are having a legitimate apprehension that they may be arrested as and when the case based on the complaint of Mayammal is registered. Applying the principles laid down by the Hon'ble Supreme Court, I hold that the petitioners are entitled to the relief of anticipatory bail. Accordingly, the petitioners are ordered to be released on bail in the event of arrest or on their appearance before the learned Judicial Magistrate, Thirumangalam and on their executing a bond for a sum of Rs.10,000/- (Rupees Ten thousand only) with two sureties each for a like sum to the satisfaction of the learned Magistrate concerned and on further condition that the petitioners shall appear before the respondent police as and when required for interrogation. The petitioners shall comply with the conditions stipulated under Section 438 of Cr.P.C scrupulously. The petitioners shall appear before the concerned Magistrate within a period of 15

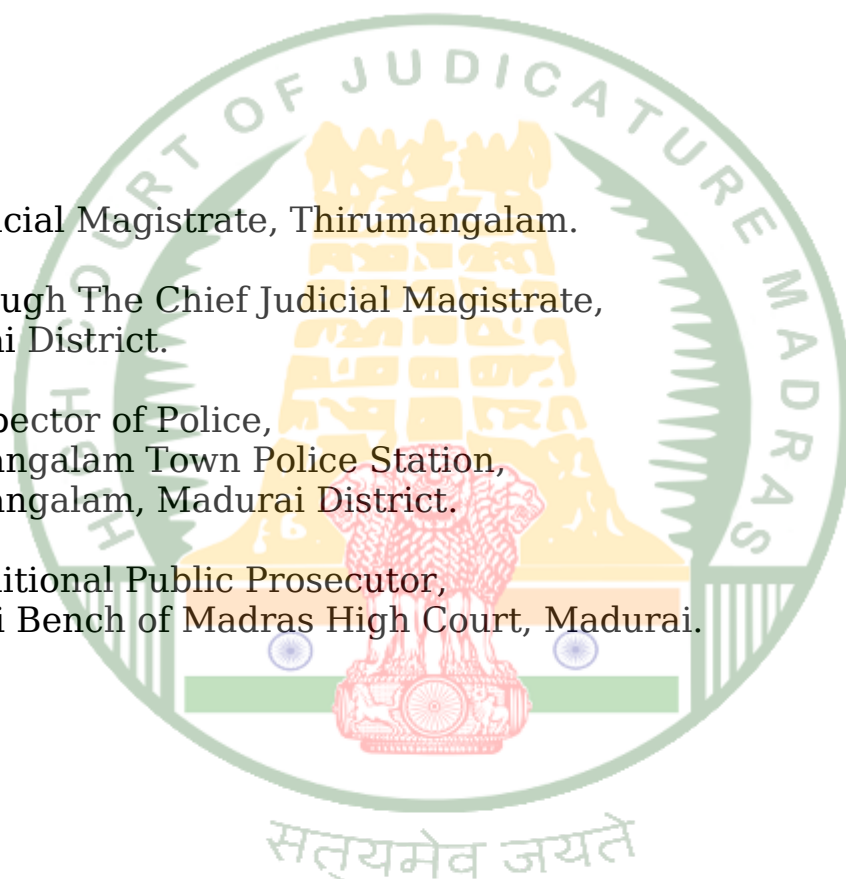
days from the date on which the order copy made ready, failing which, the petition for anticipatory bail shall stand dismissed.

(G R S J)
26.11.2019

Skm

To,

- 1.The Judicial Magistrate, Thirumangalam.
- 2.Do-Through The Chief Judicial Magistrate,
Madurai District.
- 3.The Inspector of Police,
Thirumangalam Town Police Station,
Thirumangalam, Madurai District.
- 4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.



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G.R.SWAMINATHAN, J.

Skm



**ORDER
IN
CRL OP(MD) No.17224 of 2019**

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Date : 26/11/2019