Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No 883 of 2020
(Arising out of SLP (Crl) No 5693 of 2020)

Rahna Jalal **Appellant(s)**

Versus

State of Kerala and Another **Respondent(s)**

J U D G M E N T

Dr Dhananjaya Y Chandrachud, J

1 Leave granted.

2 This appeal arises from a judgment of a learned Single Judge of the High Court of Kerala, rejecting the application for anticipatory bail under Section 438 of the Code of Criminal Procedure 1973[1]. Originally, the Special Leave Petition under Article 136 of the Constitution was filed by two petitioners. The first petitioner is the spouse of the second respondent, who has filed the complaint leading to the registration of the first information report. The second petitioner is the mother of the first petitioner. By an order of this Court dated 3 December 2020, the Special Leave Petition was not entertained at the behest of the first petitioner

[1] CrPC

and he was granted time to surrender before the competent court of jurisdiction and apply for regular bail.

3 The issue which survives in the present appeal is whether the High Court was justified in declining the prayer for anticipatory bail moved by the appellant (the second petitioner in the Special Leave Petition as it was originally filed). The marriage between the second respondent and the appellant's son was solemnized on 14 May 2016. They have a child who was born in May 2017. On 27 August 2020, the second respondent lodged a first information report, complaining of offences under the provisions of Section 498-A read with Section 34 of the Indian Penal Code[2] and the Muslim Women (Protection of Rights on Marriage) Act 2019[3]. On 27 August 2020, the first information report, being FIR No 908, was lodged at North Parur Police Station, District Ernakulam Rural. Insofar as is material to the controversy in the present appeal, the FIR contains an allegation that on 5 December 2019, at about 2.30pm, the appellant's son pronounced talaq three times at their house. Following this, it has been stated, the appellant's son entered into a second marriage.

4 The Kerala High Court was moved with an application for anticipatory bail by both petitioners. The first application was withdrawn[4], apparently due to a lack of proper pleadings. The second application, it has been recorded by the High Court,[5] was not pressed since there was a chance of a settlement between the complainant and her spouse. Since no settlement occurred, the High Court was

[2] IPC
[3] Act
[4] B.A. No. 5748 of 2020, order dated 14.09.2020 (Kerala High Court)
[5] B.A. No. 5944 of 2020, order dated 09.10.2020 (Kerala High Court)

moved for grant of anticipatory bail.[6] The Single Judge of the High Court, on 02 November 2020, while declining to grant anticipatory bail observed:

> "If the prosecution case is correct, the 1st petitioner is now enjoying with his second wife when the matrimonial relationship with the *de facto* complainant is in existence."

The order of the High Court contains no reason why the appellant was being denied anticipatory bail.

5 We have heard Mr Haris Beeran, learned counsel on behalf of the appellant. Mr. V. Chitambaresh, learned senior counsel with Mr. Harshad V. Hameed, learned counsel for the second respondent; and Mr. G. Prakash, learned counsel for the State of Kerala.

6 Mr. V. Chitambaresh, learned senior counsel has submitted that the power of the court to grant anticipatory bail under Section 438 of the CrPC has been taken away by the provisions of Section 7(c) of the Act. Opposing this submission, Mr. Haris Beeran has argued that Section 7(c) of the Act provides no express prohibition on the exercise of the power of the court to grant anticipatory bail.[7] This submission needs close scrutiny for the court to deduce as to whether the provisions of Section 7(c) would bar the grant of anticipatory bail under Section 438 of the CrPC.

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[6] B.A. No. 6981 of 2020

[7] We note that the appellant's counsel has placed reliance on the judgment and order of the Kerala High Court dated 3 August 2020 in the case of **Nahas** v. **State of Kerala**, B.A. No. 9163 of 2019 to support their submission.

7 Sections 3 and 4 of the Act provide as follows:

> "**3. *Talaq* to be *void* and illegal:** Any pronouncement of *talaq* by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal.
>
> **4. Punishment for pronouncing *talaq*:** Any Muslim husband who pronounces *talaq* referred to in Section 3 upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine."

8 Under Section 3, a pronouncement of talaq **by a Muslim husband upon his wife** has been rendered void and illegal. Under Section 4, **a Muslim husband who pronounces *talaq* upon his wife**, as referred to in Section 3, is punishable with imprisonment for a term, which may extend to three years. The prohibition in Sections 3 and 4 is evidently one which operates in relation to a Muslim husband alone. This is supported by the Statement of Objects and Reasons accompanying the Muslim Women (Protection of Rights on Marriage) Bill 2019, when it was introduced in the Parliament. The reasons for the introduction of the bill specifically stated that the bill was to give effect to the ruling of this court in **Shayara Bano v. Union of India [(2017) 9 SCC 1]**, and to 'liberate' Muslim women from the customary practice of *talaq-e-biddat* (divorce by triple *talaq*) by Muslim men. It is in this context that the provisions of Section 7 would have to be interpreted. Section 7 provides as follows:

> "**7. Offences to be cognizable, compoundable, etc**: Notwithstanding anything contained in the Code of Criminal Procedure, 1973, -
>
> (a) an offence punishable under this Act shall be cognizable, if

> information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom *talaq* is pronounced or any person related to her by blood or marriage;
>
> (b) an offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom *talaq* is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine;
>
> (c) no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the married Muslim woman upon whom *talaq* is pronounced, is satisfied that there are reasonable grounds for granting bail to such person."

The provisions of Section 7(c) apply to the Muslim husband. The offence which is created by Section 3 is on the pronouncement of a *talaq* by a Muslim husband upon his wife. Section 3 renders the pronouncement of *talaq* void and illegal. Section 4 makes the Act of the Muslim husband punishable with imprisonment. Thus, on a preliminary analysis, it is clear that the appellant as the mother-in-law of the second respondent cannot be accused of the offence of pronouncement of triple *talaq* under the Act as the offence can only be committed by a Muslim man.

9 Having said that, we shall now deal with the contention that Section 7(c) of the Act bars the power of the court to grant anticipatory bail under Section 438 of the CrPC. Under clause (c) of Section 7, Parliament has provided that no person who is accused of an offence punishable under the Act shall be released on

bail unless the Magistrate, on an application filed by the accused *and* after hearing the married Muslim woman upon whom the *talaq* is pronounced, is satisfied that there are reasonable grounds for granting bail.

10 Section 7 begins with a *non-obstante* clause, which operates "notwithstanding anything contained" in the CrPC. However, it is equally necessary to emphasize that the *non-obstante* clause operates only in the area covered by clauses (a), (b) and (c). Under clause (a), the offence is cognizable if the information is given by the married Muslim woman or a person related to her by blood or marriage to the officer in charge of a police station of the commission of the offence. Under clause (b), the offence is compoundable at the instance of the married Muslim woman upon whom the talaq is pronounced. However, in clause (b), the permission of the Magistrate is required. The Magistrate can specify the terms and conditions for compounding. Facially, clause (c) begins with the words "no person accused of an offence punishable under this Act shall be released on bail". But what follows is equally important, because it conditions what precedes it. Two conditions follow. One of them is in the realm of procedure while the second is substantive. The former requires a hearing to be given to the married Muslim woman upon whom *talaq* has been pronounced. The latter requires the court to be "satisfied that there are reasonable grounds for granting bail to such person". This substantive condition is only a recognition of something which is implicit in the judicial power to grant bail. No court will grant bail unless there are reasonable grounds to grant bail. All judicial discretion has to be exercised on reasonable grounds. Hence, the substantive condition in clause (c) does not deprive the court of its power to grant bail. Parliament has

not overridden the provisions of Section 438 of the CrPC. There is no specific provision in Section 7(c), or elsewhere in the Act, making Section 438 inapplicable to an offence punishable under the Act. The power of the court to grant bail is a recognition of the presumption of innocence (where a trial and conviction is yet to take place) and of the value of personal liberty in all cases. Liberty can, of course, be regulated by a law which is substantively and procedurally fair, just and reasonable under Article 21. In **Hema Mishra** v. **State of U.P.** (2014) 4 SCC 453, this Court emphasized on the mandate of a constitutional court to protect the liberty of a person from being put in jeopardy on account of baseless charges. This Court held that a writ court is even empowered to grant anticipatory bail inspite of a statutory bar imposed against the grant of such relief.

11 The statutory text indicates that Section 7(c) does not impose an absolute bar to the grant of bail. On the contrary, the Magistrate may grant bail, if satisfied that "there are reasonable grounds for granting bail to such person" and upon complying with the requirement of hearing the married Muslim woman upon whom *talaq* is pronounced. Hence, though Section 7 begins with a *non obstante* clause which operates in relation to the CrPC, a plain construction of Section 7(c) would indicate that it does not impose a fetter on the power of the Magistrate to grant bail, save and except, for the stipulation that before doing so, the married Muslim woman, upon whom talaq is pronounced, must be heard and there should be a satisfaction of the Magistrate of the existence of reasonable grounds for granting bail to the person. This implies that even while entertaining an application for grant of anticipatory bail for an offence under

the Act, the competent court must hear the married Muslim woman who has made the complaint, as prescribed under Section 7(c) of the Act. Only after giving the married Muslim woman a hearing, can the competent court grant bail to the accused.

12 The above interpretation is fortified by the fact that the legislature has not expressly barred the application of Section 438 of CrPC. In this context, it would be useful to refer to an earlier decision of this Court in **Balchand Jain** v. **State of Madhya Pradesh** (1976) 4 SCC 572. A three judge Bench of this Court had to interpret Rule 184 of the Defence and Internal Security of India Rules, 1971, which provided as follows:

> "Rule 184. Notwithstanding anything contained in the CrPC, 1898 (V of 1898) no person accused or convicted of a contravention of these Rules or orders made thereunder shall, if in custody, be released on bail or his own bond unless-
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> (a) the prosecution has been given an opportunity to oppose the application for such release, and
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> (b) where the prosecution opposes the application and the contravention is of any such provision of these Rules or orders made thereunder as the Central Government or the State Government may by notified order specify in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention."

The issue before this Court was whether an order of anticipatory bail can be made by a Court of Session or High Court in the case of an alleged offence falling under Rule 184. This Court speaking through Justice P.N. Bhagwati (as he

then was) held:

> "3…It is not possible to read Rule 184 as laying down a self-contained code for grant of bail in case of a person accused or convicted of contravention of any rule or order made under the Rules so that the power to grant bail in such a case must be found only in Rule 184 and not in the Code of Criminal Procedure. Rule 184 cannot be construed as displacing altogether the provisions of the CrPC in regard to bail in case of a person accused or convicted of contravention of any Rule or order made under the Rules. These provisions of the CrPC must be read along with Rule 184 and full effect must be given to them except in so far as they are, by reason of the non obstante clause overridden by Rule 184."

This Court, harmoniously constructed Rule 184 and Section 438 of the CrPC and held:

> "4… Section 438 and Rule 184 thus operate at different stages, one prior to arrest and the other, after the arrest and there is no overlapping between these two provisions so as to give rise to a conflict between them. And consequently, it must follow as a necessary corollary that Rule 184 does not stand in the way of a Court of Session of a High Court granting "anticipatory bail" under Section 438 to a person apprehending arrest on an accusation of having committed contravention of any rule or order made under the Rules.
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> 5. But even if Rule 184 does not apply in such a case, the policy behind this rule would have to be borne in mind by the court while exercising its power to grant "anticipatory bail" under Section 438….When a person apprehending arrest on accusation of having committed contravention of any rule or order made under the Rules applies to the court for a direction under Section 438, the court should not ordinarily grant him "anticipatory bail" under that section unless a notice has been issued to the prosecution giving it an opportunity to oppose the application and in case the contravention is of a rule or order specially notified in this

> behalf, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention.."

Justice Fazal Ali in his concurring opinion held that the above view is in consonance with the principles applicable to the interpretation of *non obstante* clauses in statutes. The learned judge observed:

> "15....Now if the intention of the Legislature were that the provisions of Section 438 should not be applicable in cases falling within Rule 184, it is difficult to see why the Legislature should not have expressly saved Rule 184 which was already there when the new Code of 1973 was enacted and excepted Rule 184 out of the ambit of Section 438. **In other words, if the intention of provision of Rule 184 of the Rules were to override the provisions of Section 438 of the Code, then the Legislature should have expressly stated in so many words that the provisions of Section 438 of the Code shall not apply to offences contemplated by Rule 184 of the Rules.** There is, however, no such provision in the Code. In these circumstances, therefore, the Legislature in its wisdom left it to the Court to bring about a harmonious construction of the two statutes so that the two may work and stand together. This is also fully in consonance with the principles laid down by this Court in construing the non obstante clauses in the statutes..."
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> (**emphasis added**)

13 Certain other statutes expressly exclude the provisions of Section 438 of the CrPC. The provisions of Section 7(c) of the Act must be distinguished from provisions which are contained in such statutes. For instance, the Maharashtra Control of Organised Crime Act, 1999[8] explicitly excludes the application of Section 438 of CrPC. Section 21 (3) of MCOCA stipulates:

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[8] MCOCA

"(3) 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 punishable under this Act."

14 The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 also contains similar provisions, which exclude the application of Section 438 of CrPC. Sections 18 and 18-A provide 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 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 Section 18 explicitly excludes the application of Section 438 of the 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 of the CrPC, notwithstanding any judgment, order or direction of a court. The provisions of Section 18 and 18A have been interpreted by a three Judge Bench of this Court

in **Prathvi Raj Chauhan** v. **Union of India and Others** (2020) 4 SCC 727 ("**Chauhan**"). Justice Arun Mishra speaking for himself and Justice Vineet Saran, while construing these provisions, observed that:

> "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."

16 The same view has been taken in the concurring judgment of Justice S Ravindra Bhat, in the following observations:

> "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."

17 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 of the 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** (supra) 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.

18 For the above reasons, we have come to the conclusion that on a true and harmonious construction of Section 438 of CrPC and Section 7(c) of the Act, there is no bar on granting anticipatory bail for an offence committed under the Act, provided that the competent court must hear the married Muslim woman who has made the complaint before granting the anticipatory bail. It would be at the discretion of the court to grant ad-interim relief to the accused during the pendency of the anticipatory bail application, having issued notice to the married Muslim woman.

19 By the order of this Court dated 3 December 2020, interim protection from arrest has been granted to the appellant. The primary allegation which is pressed in aid to deny anticipatory bail is the pronouncement of triple *talaq* by the spouse of the second respondent. In the preceding paragraphs we have observed that an offence under the Act is by the Muslim man who has pronounced talaq upon his spouse, and not the appellant, who is the mother-in-law of the second respondent. Though, Mr. G. Prakash, learned counsel appearing on behalf of the State of Kerala has adverted to the allegations under Section 498A of the CrPC to oppose the grant of bail, we are of the view that having regard to the vague and general nature of those allegations in the FIR, bereft of details, the appellant (whose son is in a marital relationship with the second respondent) should not be denied the benefit of the grant of anticipatory bail. It must also be noted that the Judicial Magistrate First Class-I, North Parur, by an order dated

23 October 2020, while deciding the second respondent's application[9] under Section 23 of the Protection of Women from Domestic Violence Act, 2005 did not find any substance in the allegations against the appellant.

20 We accordingly order and direct that in the event of the arrest of the appellant, she shall be released on bail by the competent court, subject to her filing a personal bond of Rs 25,000. The appellant shall cooperate in the course of the investigation by the Investigating Officer.

21 The appeal is allowed in the above terms.

22 Pending applications, if any, stand disposed of.

……J.
[Dr Dhananjaya Y Chandrachud]

……J.
[Indu Malhotra]

……J.
[Indira Banerjee]

New Delhi;
December 17, 2020
CKB

[9] CMP 1529/2020 and CMP 1530/2020 in MC 28/2020