

ORISSA HIGH COURT: CUTTACK.

BLAPL NO. 7046 OF 2014

In the matter of an applications under Section 438 of the Code of Criminal Procedure.

Dharani Pradhan & another Petitioners

-Versus-

State of Orissa Opp. Party

For Petitioners : M/s. A.P. Bose,
N.Hota and Mrs.V.Kar,

For Opp. Party : M/s.J. P. Patra, Addl.Standing Counsel
S. S. Kanungo, Addl.Standing Counsel

Date of order: 25.07.2014

PRESENT :

THE HONOURABLE SHRI JUSTICE S.K.SAHOO

S.K.Sahoo, J. This is an application under Section 438 Cr.P.C. for grant of anticipatory bail to the petitioners in connection with Subalaya P.S. Case No. 18 of 2014 corresponding to G.R. Case No. 58 of 2014 pending in the Court of learned SDJM, Birmaharajpur for alleged commission of offences under Sections 376(2)(h)/294/323/34 of the IPC read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 and Section 3(1) (xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'SC/ST Act').

2. Learned counsel for the petitioners submits that an F.I.R. was lodged by the victim alleging therein that she had love affair with one Anil Pradhan, the son of the present petitioners since last three years and on 15.3.2014, while she was returning home, the said Anil Pradhan forcibly took her inside his house and cohabited with her. It is alleged that the present petitioners came at that point of time, abused her and also assaulted her for which she became senseless. He further submits that the main accused is Anil Pradhan as it appears from the case records and the only allegation against the petitioners is that they abused the informant/victim and assaulted her.

Learned counsel for the petitioners further submits that in view of the allegations made, neither the ingredients of offence under Section 376(2)(h) of the IPC nor Section 4 of POCSO Act is made out against the petitioners and it may at best be a case under Sections 294 and 323 IPC against them.

Learned counsel for the petitioners further submits that the victim has stated that the petitioner no.2 assaulted her by means of a lathi and petitioner no.1 gave him a slap and fist blows. He further submits that on perusal of the injury report of the victim, it is noticed that there is neither any sign of forcible sexual intercourse nor there is any injury on her private part of the body or injury on any part of the body and her age is opined to be 17 to 18 years. He further submits that from the nature of allegation levelled against the petitioners, it is

clear that the ingredients of offence under Section 3(1) (xii) of the SC/ST Act are not made out and as such Section 18 of SC/ST Act is not a bar in entertaining this application under Section 438 Cr.P.C.

3. Learned counsel for the State, on the other hand, after producing the case diary, places the statement of the informant recorded under Section 161 Cr.P.C. and submits that though the victim/informant alleged the main offences against Anil Pradhan, but she has also stated that while she was inside the house of Anil Pradhan, the petitioners came there and abused her for spoiling their son and told him that she belongs to a lower caste and thus anticipatory bail cannot be entertained in view of the bar under Section 18 of the SC/ST Act.

4. Section 18 of the SC/ST Act reads 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 persons on an accusation of having committed an offence under this Act.”

The Constitutional validity of Section 18 of the SC/ST Act was decided in the case of ***State of Madhya Pradesh and another –v- Ramakrishna Balothia and another, reported in 1995 Criminal Law Journal 2076*** wherein the Hon’ble Supreme Court held that Section 18 of SC/ST Act can not be considered as violative of Articles 14 and 21 of the Constitution of India. In the case of ***Chittaranjan***

Nandy –v- Union of India, reported in (2014) 58 OCR 685, our Hon'ble Court also held that Section 18 of the SC/ST Act cannot be said to be ultra vires to the Constitution.

In the case of **Vilas Pandurang Pawar and another –v- State of Maharashtra and others, reported in AIR 2012 SC 3316**, it was held as follows:

“8. Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3 (1) of the SC/ST Act has been prima facie made out. In other words, if there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.

9. The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no Court shall entertain application for anticipatory bail, unless it prima facie finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence.”

The said view was also accepted by the Hon'ble Supreme Court in the case of **Bachhu Das –v- State of Bihar, reported in (2014) 2 Supreme Court Cases (Crl.) 212**.

In the case of ***Manjit Singh -v- State of Delhi, reported in 2013 Criminal Law Journal 3070***, it was held as follows:

“11. xxx xxx xxx

The strictly limited exceptions to the bar imposed by Section 18 appear to be where the complaint does not contain any specific averment about the insult or intimidation with intent to humiliate by calling by the caste name, absence of a specific averment that it was uttered in public view etc. If there is a specific averment in the complaint to this effect, Section 18 of the SC/ST Act is attracted.

xxx xxx xxx”

5. Keeping in view the ratio decided in the aforesaid cases, it is held as follows:

- (i) Merely because a case is registered under Section 3 of the SC/ ST Act, there is no bar in entertaining an application 438 Cr.P.C.;
- (ii) Where there is specific averment in the complaint/F.I.R. relating to violation of the provisions of the SC/ST Act and such offence is prima facie made out, the bar under Section 18 of the SC/ST Act would apply.

6. Coming to the facts and circumstances of the case, let us see whether there is any prima facie case under Section 3(1)(xii) of the SC/ST Act against the petitioners.

Section 3 (1) (xii) of SC/ST Act reads as follows:

“3. Punishments for offences of atrocities.—(1)

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

xxx xxx xxx

(xii) being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed;

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shall be liable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

Thus, in order to attract the ingredients of Section 3 (1)(xii) of SC/ST Act, the following ingredients must be satisfied:

- (i) The accused must not belong to either a member of Scheduled Caste or a Scheduled Tribe;
- (ii) The victim women must belong to a member of Scheduled Caste or a Scheduled Tribe;
- (iii) The accused must be in a position to dominate the will of the victim women;
- (iv) The accused must use such position to exploit the victim women sexually to which she would not have otherwise agreed;

“Position to Dominate” means “commanding and controlling position”. The position of the accused coupled with the use of such position to exploit the victim women sexually are important criteria apart from the caste/tribe factor of the victim/accused.

9. Considering the nature of allegation against the petitioners and the injury report and the submission made by the parties, I am of the view there is no prima facie case under Section 3(1) (xii) of SC/ST

Act against the petitioners. Merely because of their relationship with the main accused, bail can not be refused. Accordingly, I am inclined to release the petitioners on anticipatory bail. It is directed that in the event of arrest of the petitioners in connection with the aforesaid case, they shall be released on bail on furnishing bail bond of Rs.5,000/- (Rupees five thousand) with one surety each for the like amount to the satisfaction of the arresting officer with further conditions that they shall make themselves available for interrogation by the I.O. as and when required and they shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade them from disclosing any facts to the courts or to the Investigating Officer.

Violation of any of the above conditions shall entail cancellation of bail.

The BLAPL is accordingly disposed of.

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S.K. Sahoo, J.

Orissa High Court, Cuttack.
Dated the 25th July, 2014/Km