Karnataka High Court
Sri N.B. Gungarakoppa And Ors. vs State Of Karnataka on 10 April, 2002
Equivalent citations: 2002 CriLJ 3311
Bench: M Saldanha, N Patil
ORDER

1. The learned single Judge of this Court Narayan J. vide order dated 18-1-2002 has referred the following three points to the Division Bench for adjudication:-

(1) Whether Section 18 of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989, (hereinafter called "Act" for short) is a bar for entertaining the petition under Section 438, Cr.P.C. ?

(2) Whether the Courts entertaining the petitions under Section 438, Cr.P.C. can meticulously examine the material on record and attempt to find out a prima facie case under the provisions of the Act at this stage ? and (3) Whether only the High Court has got jurisdiction to entertain the petition of this nature filed under Section 438, Cr.P.C. excluding the concurrent jurisdiction of the learned Sessions Judge ?

The controversies with regard to the grant of anticipatory bail in relation to offences under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has been an issue of serious debate despite the fact that Section 18 of the Act appears to place an embargo on the Courts that the provisions of Section 438 of the Code of Criminal Procedure cannot be invoked in relation to accusations for offences under the Act in question. Since there has been a hotly contested legal debate on the issue, it would be useful to reproduce the provisions of Section 18 of the Act which 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 person on an accusation of having committed an offence under the Act."

The circumstances under which the learned single Judge was required to make the reference arose because of the fact that in an earlier decision of this Court namely the case of Chikkappa ILR 2001 Kant 5483 : (2001 AIR Kant HCR 3127) the learned single Judge of this Court Bannjumath J. took the view that it is certainly permissible for the High Court to entertain an application under Section 438, Cr.P.C. for the grant of anticipatory bail to the extent that it was open to the Court to examine as to whether the applicability of the provisions of the Act was justified. In other words, after examining the legal position that has emerged particularly after the Supreme Court decision in State of M.P. v. Ram Krishna Balothia , that even though the Supreme Court upheld the validity of the provisions it had kept open the question of consideration of anticipatory bail application though the scope was considerably pruned. The learned single Judge has extensively extracted reference to the Supreme Court decision referred to supra as also several other decisions which are set out below:-

1. , State of M.P. v. Ramkrishna;

2. (1998) 1 Crimes 310, Thavam v. State of Tamil Nadu;

3. 1996 Cri LJ 2743 (Orissa), Ramesh Bhanja v. State of Orissa;

4. 1996 Cri LJ 2743 (sic), Pankaj Sutar v. State of Gujarat;

5. (1994) 4 Crimes 562, Rakesh v. State of Rajasthan;

6. , Smt. Nagawwa v. Veeranna;

7. , State of West Bengal v. Swapan Kumar Guha;

8. , State of Karnataka v. Muniswamy;

9. , State of Haryana v. Bhajanlal;

10. , Pepsi Foods Ltd. v. Special Judicial Magistrate;

11. 2000 Cri LJ 2899, Virendra Singh v. State of Rajasthan;

12. 1987 Cri LJ 272, Baste Subrayalu v. Robert Mariadassou;

13. 1982 Cri LJ 872, Shantabai v. State of Maharashtra;

14. Cr.P. 14458/1995, dated 27-1-1997, Channegowda v. State;

15. (1987) 4 Kant LJ 81, Chandra Poojari v. State;

2. After an elaborate consideration of the law, the learned single Judge observed that it was certainly open to the High Court to examine the allegations, to examine the facts, to examine the legal provisions and to decide as to whether the provisions of the Atrocities Act would be applicable or not and, in those of the situations wherein the Court came to the conclusion that the provisions have wrongly been invoked or quoted and that the case otherwise qualifies for the grant of anticipatory bail that, it was open to the High Court to enlarge the accused on bail. The important aspect of this decision emanates from the fact that while the learned single Judge has essentially held that Section 18 does not prescribe a total and absolute bar to the entertainment of an anticipatory bail application, it has been provided therein that the Court is not precluded from examining the position in the event of such an application being preferred. The learned single Judge, however, has mandated, that the anticipatory bail application in this class of cases will have to be preferred only to the High Court. No reasons have been set out for this restriction and this is one of the principal grounds on which our colleagues Narayan J. who has referred the present issue to the Division Bench appears to have been under the impression that an anticipatory bail application under the provisions of the Cr.P.C. could be addressed either to the Court of Session or to the High Court and that consequently, if there is any reason why this class of applications in those cases alone should be

restricted to the High Court that these would have to be specified. Obviously, Narayan, J. was of the opinion that the guidelines laid down in Chikkappa's case (2001 AIR - Kant HCR 3127) would apply to the consideration of all anticipatory bail applications under the Atrocities Act irrespective of whether they are addressed to the Court of Session or the High Court. In the referring order, the observations made by Narayan J. are more or less parallel to those of Bannurmath, J. in Chikkappa's case insofar as both the learned single Judges are of the view that there is no initial or threshold bar to the entertainment of an anticipatory bail application in cases under the Atrocities Act.

3. We have heard the learned Counsel who represents the original petitioners Sri Jadhav and we have also heard the learned S.P.P. at considerable length. Mr. Jadhav commenced by submitting that the provisions of this Act are unjustifiably and unnecessarily invoked in proceedings that have nothing to do with the type of atrocities that have been set out in Section 3 of the Act. The Law Commission Reports which have been referred to by the learned S.P.P., the statement of objections and reasons and the list of atrocities that are listed out in Section 3 of the Act are the foundational basis really for the law as laid down by the Supreme Court in Balothia's case wherein the Supreme Court has observed rather appropriately, that there are a class of offences that are not only antisocial but inhuman, that they are virtually a blot on civilised behaviour and that the reason why very special and stringent provisions have been made by the Legislature through the medium of this Act and consequently, that it is not discriminatory. The Supreme Court iri essence has pointed out that these are a special class of offences directed against restricted sector of society which gets specially targeted, that the Government is deeply concerned about the fact that the existing laws have not been either sufficient adequate or deterrent when it comes to this class of offences and that consequently, special and very rigorous provisions were required. Obviously, drawing a parallel from some of the then existing special statutes like TADA, FERA, the N.D.Ps. Act and the like, the Supreme Court had occasion to observe that it would not be permissible to strike down Section 18 as being either arbitrary or discriminatory as far as the vires is concerned.

4. We refer further to the general challenge presented by Mr. Jadhav because the learned Counsel was obviously aware of the fact that having regard to the decision of the Apex Court the challenge to the Section is no longer permissible and he, therefore, confined his arguments to the second aspect which did not fall for determination before the Supreme Court and for that matter, strangely enough did not appear to receive the requisite attention by any of the several High Courts including this High Court on earlier occasions namely the question as to what are the remedies against instances where the provisions of the Act are misused or wrongly invoked. We have pointed out earlier that as far as the class of atrocities set out in Section 3 of the Act are concerned that the obvious legislative intent was to ensure that persons who have indulge in such horrifying atrocities are not permitted to forestall their arrest and custody by obtaining anticipatory bail but while there may be no two opinions with regard to situations that may arise where the Act has been very validly and genuinely invoked, the Courts cannot lose sight of the situations in which abuses may be prevalent. Mr. Jadhav demonstrated that even in the present petition where his clients are alleged to have been involved in some offences under the I.P.C. that the sole objective was to ensure that they cannot get the benefit for which Section 438 was promulgated by the Legislature when the new Code was introduced by grafting on the allegation that the provisions of the Atrocities Act are attracted. The Law Commission and the Legislature itself took serious note of the fact that extremely grave

repercussions are possible where false or unjustified charges are levied and accused are arrested often times by choosing a time and place whereby the maximum harassment can occur such as situations wherein the accused are sought to be arrested on an evening preceding the weekend or times when even a bail application will take considerable amount of time and the accused must necessarily be at the mercy of the police officers in custody when later on it may be demonstrated that the whole exercise was malicious and vindictive not to use the word motivated. One needs to take note of the fact that these were the considerations which agitated the mind of Law Commission and the Lok Sabha and it was preceded by what had happened in the Ram Manohar Lohia case whereupon the Legislature recognised the very important need to provide a safety system so that citizens who are exposed to the danger of arrest on charges that are thoroughly unjustified can avail of the provisions of Section 438 of the Code of Criminal Procedure by preferring an anticipatory bail application and experience has shown that cases of abuse have not been few and far between but that they have been rampart. We do need to observe here that the Courts exercising these powers are required to do so judicially and ensure that a truly guilty accused does not get any undue benefit by virtue of an order of anticipatory bail and more importantly it does not interfere with or frustrate an investigation but over a period of time the Courts have evolved sufficient guidelines to take care of instances of abuse. We refer to these aspects of the law because the initial submission canvassed by Mr. Jadhav was that it is the case of the petitioners in the present criminal petition that they approached the High Court for anticipatory bail, on the ground that the allegations against them were false and politically motivated. Apart from that, the main contention was that the invocation of the Atrocities Act provisions was directly towards preventing them from being released on bail.

5. To summarise, therefore, the real thrust of the arguments were that if the provisions of the Act are wrongly and unjustifiably invoked whether Section 18 would still prohibit the aggrieved party from approach-. ing the Court and asking for bail on one of two grounds, the first being that the facts do not at all justify any accusation under the Atrocities Act or secondly that in law the provisions could not or did not apply and that the invocation of the provisions is motivated and unjustified. The learned S.P.P. submitted that the bar under Section 18 is very restrictive insofar as it only prohibits anticipatory relief but that it will not at all come in the way of the competent Court examining the facts and the law and granting regular bail in appropriate cases. His submission was that if the facts or the law do not justify the invocation of the provisions of the Act, that the accused can certainly ask for bail but as far as the anticipatory bail is concerned that the Section as it is worded prescribes a total bar. With regard to the question of abuse, the learned S.P.P. submitted that this is a question that will have to be examined from case to case, that the trial Courts or the higher Courts are always there to safeguard the interests and liberty of the accused and that since the validity of Section 18 has been upheld, the Courts will have to confine themselves to the hearing of bail applications alone and not entertain any application for anticipatory bail. We shall deal with certain other aspects of the law relating to Section 18 presently but suffice it to say that the Courts cannot be blind to certain facts and situations. The conscience of this country has been schocked from time to time because of some horrifying barbaric acts directed against weaker sections and when an incident of this type takes place, the law very rightly prescribes that the accused cannot avoid the consequences of the law by asking for anticipatory bail. This, however, is only one side of the story. If this Court were to do a rough evaluation of the statistics over the last few years the disturbing position that is revealed is that in more than 96% of the cases where the provisions of this Act have been invoked it has

subsequently been established that the invocation was motivated and thoroughly unjustified and there is, therefore, considerable substance in the grievance projected by Mr. Jadhav when he points out to the Court that merely because one small category of cases should not qualify for the grant of anticipatory bail that the Courts should not go overboard and refuse to even examine the grievance in the large majority of cases where the abuse is rampant.

6. Mr. Jadhav drew our attention to a few decisions to which we shall refer very briefly. In the case reported in 2001 Cri LJ 4587, the Delhi High Court did have occasion in passing to point out that the High Court cannot overlook situations in which the provisions of the Atrocities Act have been misused. In the decision reported in (1999) 1 Crimes 636, the Madhya Pradesh High Court had occasion to observe that where there is no prima facie material to justify the invocation of these provisions that the entertainment of a petition would be justified. In the decision reported in 1998 Cri LJ 157, the Punjab and Haryana High Court had occasion to come down rather strongly and point out that where total mala fide and vexatious allegations are made and a misuse of the process of law is apparent that an anticipatory bail application cannot be barred. In another decision reported in (1997) 2 Crimes 684, the Madras High Court held that where there is absolutely no material to justify the commission of an offence under the Act, it would not be permissible to debar the accused from applying for anticipatory bail. The Andhra Pradesh High Court in the decision reported in 1999 Cri LJ 324, had occasion to do a deeper analysis of the issue and very rightly laid down that the mere mention of the provisions of the Atrocities Act is not sufficient unless it is supported by sufficient reliable material to establish charges under the Atrocities Act, obviously taking note of the situation referred to by us wherein even in petty disputes or non-existent disputes the provisions of the Act are virtually dragged in for purposes of securing an unfair advantage. The Orissa High Court reported in 1996 Cri LJ 2743, has laid down that the mere registration of an offence under the Act is not the criteria but the real test would be as to whether on a prima facie evaluation the Court is satisfied that the case has been made out. Much reliance was placed on a very well considered decision of the Rajasthan High Court reported in 2000 Cri LJ 2899, wherein the Full Bench of the Rajasthan High Court after doing an indepth analysis of the law has held that it would still be permissible to prefer an application for anticipatory bail under Section 438, Cr.P.C. within the parameters that we have had occasion to refer to. In this regard, we need to mention that the learned S.P.P. did submit, with perhaps considerable justification, that the real consideration in such situations would be as to whether on a responsible analysis of the material before the Court the invocation of the provisions of the Act can be prima facie justified and that it would not require or permit any deep probe or evaluation of evidence at that stage. The Supreme Court in the earlier decision reported in AIR 1993 SC 1028 (sic) had occasion to deal with the constitutional angles of these provisions which we have already referred to but we reiterate those principles once again for purposes of emphasising that there was very valid justification for the provisions in Section 18 of the Act which presupposes that it is dealing with cases of barbaric atrocities such as those which are defined in Section 3 of the Act but we are here, more concerned with the day-to-day problem that the Courts are facing in the large number of situations where the provisions are wrongly and unjustifiably invoked and where the accused are shut out from a remedy that Section 18 prescribes an absolute bar to the grant of anticipatory bail. Perhaps the ultimate test would be the one that the Supreme Court applied in the decision reported in (2000) 1 Supreme 584, wherein the Supreme Court summarised the position that the Atrocities Act would not be applicable unless it is

demonstrated that it is a castist attack. That in our considered view is the real essence of the distinction because the offence changes complexion and assumes grave seriousness when this particular ingredient is demonstrated to have coloured the incident. Again, we need to point out with a note of caution that is for very good reasons that the Andhra Pradesh High Court had reiterated the position that merely by mentioning something along these lines the Court would not be misled into believing that an ordinary incident had changed complexion into a castist attack unless the facts and circumstances of the case justified this.

7. In the light of what we have pointed out above, it is necessary for us to answer the points that have been referred to the Division Bench. Firstly, as far as the question as to whether there is a total bar to the entertainment of an anticipatory bail application under Section 438 of the Code of Criminal Procedure in cases where the provisions of the Atrocities Act have been attracted, our answer is in the negative. We have already clarified that it is not merely the invocation of the provisions that is the test but that it is necessary for the Court to embark upon a degree of scrutiny and we Can only draw a parallel from the action under the Companies Act where the Supreme Court uses the phrase lifting the veil of the company or in other words the examination which the Court would have to do is to ascertain what is the true nature of the complexion and contents of the charge, not merely going by empty words or sections. While we do concede that the bar would apply as consistently laid down by the Supreme Court and various other High Courts in genuine cases which fall under Section 3 of the Act, it would certainly not apply to situations in which the provisions of the Act have wrongly been invoked or where the facts do not justify it.

8. With regard to the second question that has been posed to us as to whether it is obligatory upon the Court to meticulously examine the material on record and attempt to find out whether a prima facie case has been made out under the provisions of the Act which we have already observed that at the stage of grant of an anticipatory bail the Court would necessarily have very limited material before it and the examination, therefore, cannot be of the gravity, depth and level of what the Court would do while hearing a hotly contested bail application or more importantly the level of consideration that emanate at a trial. The Court is required to address itself to the simple question as to whether on a responsible judicial examination the material before the Court justified the invocation of the charge bearing in mind the possibility of wrongful invocation of the Act which is very prevalent and the Courts would, therefore, necessarily have to be on guard to ensure that the bar is restricted only to the small category of cases where an offence under the Act could justifiably be spelt out.

9. With regard to the last question that has been addressed to us, namely, as to whether such an anticipatory bail application should be restricted to the High Court or whether as provided for under Section 438, Cr.P.C. the Court of Session and the High Court should have concurrent jurisdiction. Our answer is that the provisions of Section 438, Cr.P.C. cannot be abridged or watered down and where the law prescribes that the Court of Session and the High Court shall have concurrent jurisdiction under Section 438, Cr.P.C. the provisions of that Section will have to be respected. It is true that procedurally there are times when a party approaches the High Court directly and the High Court may justifiably redirect a party to exhaust the remedy of approaching the Court of Session and if aggrieved then come to the High Court but again there may be a few special situations in which

the High Court may entertain an anticipatory bail application even in the first instance. We cannot lose sight of the fact that Section 438, Cr. P.C, if one reads the Law Commission recommendations and the Parliamentary discussions, it will be found that it is an emergency provision intended to safeguard the infringements of the citizens' sacred right of liberty. Obviously, every State has only one High Court and experience has shown that cases of this type emanates not only in the cities and towns but more importantly in the villages and rural areas and if the power of anticipatory bail is limited in these instances only to the High Court then that provision would become illusory; for which reason the Legislature has put on the statute book the dual concurrency jurisdiction provision for good purpose. The Courts have got to facilitate the availability of that provision to all sections of the community who may require its protection and it was for this reason that the jurisdiction under Section 438 was extended to the Court of Session. We are conscious of the fact that the learned single Judge Bannurmath, J. took the view that the power should be restricted to the High Court and we assume that what was working in the mind of the learned single Judge was the very large number of situations in which subordinate Courts indiscriminately and unjustifiably grant bail in those of the cases where the grant of bail is contra-indicated. Secondly, it has been the sad experience of the High Court that the bail powers even at the level of the Sessions Court are used indiscriminately at times irresponsibly and having regard to the seriousness of this class of offences obviously the learned single Judge felt that if the powers were to be restricted to the High Court the situations in which such applications are entertained and more importantly the considerations on which bail may be granted or refused would be properly and judiciously dealt with. We have no hesitation in endorsing these considerations but as indicated by us we cannot lose sight of the fact that this is not the remedy because it would then shut the facility off from the larger class of persons who genuinely require the relief. In cases of anticipatory bail the relief has to be speedily obtained which means that the closest judicial authority namely the Court of Session should be accessible and this would not be the case if the applications are restricted to the High Court. The real remedy would be to ensure that when such an application is filed before the Court of Session that the Court is put on caution and that the Court applies its mind very carefully and judiciously realising the fact that it is a superior Court in a sense and that the consideration has to proceed on an extremely responsible and judicious basis. We, therefore, hold that the powers of consideration of these applications would be available to the Court of Session, as also to the High Court in keeping with the provisions of Section 438, Cr.P.C.

10. Having answered the points on which the reference has been made to the Division Bench as indicated by us above, we dispose of this Criminal Reference Petition. In the light of the law laid down by this Court the office shall now list the Criminal Petition before the learned single Judge for disposal through an appropriate order.

11. Having regard to the number of cases that arise under the provisions of this Act and the necessity of acquainting the judicial officers with the correct position in law, we direct the Registrar General to circulate copies of this judgment to all the District Judges in the State who in turn shall ensure that it is circulated to all the Courts of Session in the State of Karnataka.