

Nai Natwarlal Motiram vs State Of Gujarat on 22 April, 2019

Author: A. P. Thaker

Bench: A. P. Thaker

R/CR.A/195/2019

ORDER

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 195 of 2019

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NAI NATWARLAL MOTIRAM

Versus

STATE OF GUJARAT

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Appearance:

MR PRAVIN GONDALIYA(1974) for the Appellant(s) No. 1

MS RATNA VORA(2251) for the Opponent(s)/Respondent(s) No. 2

MS MONALI BHATT, APP (2) for the Opponent(s)/Respondent(s) No. 1

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CORAM: HONOURABLE DR.JUSTICE A. P. THAKER

Date : 22/04/2019

ORAL ORDER

1. This is an appeal under Section 14(A)(2) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 (hereinafter referred to as "the Atrocity Act"

for short) at the instance of the appellant - original accused for the anticipatory bail in connection with the FIR being C.R.No. I - 114/2018 registered with Talod Police Station, District:

Sabarkantha for the offences punishable under Sections 120B, 167, 192, 193, 217, 218, 219, 465, 466, 467, 468, 471 of the Indian Penal Code, under Section 135 of the Gujarat Police Act and Section 3(1)(f), 3(1)(g), 3(1)(p), 3(2)(v), 3(2)(v-a) of the Atrocity Act.

2. The short fact of the prosecution is that the FIR has been lodged by one Mr.Chandubhai Motibhai Nadiya on 12.12.2018 on the allegation that there was land which was of their ancestral and there were 23 sharers thereof. That accused No.1 and 2, initially, purchased certain portion of the land and at the instance of the revenue authority, the land was mutated in their names and names of the

complainant as well as co-sharers have been removed from R/CR.A/195/2019 ORDER the revenue record and, thereafter, the said land was sold to respondents No.3 and 4. That the revenue entry was challenged before the higher authority and, thereafter, the same was quashed and set aside and the matter was remanded back to the Mamlatdar concerned and, thereafter, the Mamlatdar re-certified the same and created false documents. It is alleged that due to action of the Mamlatdar and Talati, false record has been created to defeat their rights and ownership of the disputed land.

2.1 It is contended by the present accused that at the relevant time, he was Mamlatdar and he had retired in the year 2008. According to him, he has made certain entries as per the record available at that time and he has not involved in any case. That the civil litigation is filed and revenue matter is also going on. It is contended that there was consent decree passed in the suit. He has also contended that he has not committed any offence and he is innocent and there is no prima facie material for the offence under the Atrocity Act.

2.2 It is also contended by the appellant that he has approached the Sessions Court by filing anticipatory bail application being Criminal Misc. Application No.1152 of 2018, which was rejected by the learned Special (Atrocity) Judge and 3rd Additional Sessions Judge, Sabarkantha at Himmatnagar vide order dated 02.01.2019. He has contended that considering the nature of the litigation being civil litigation and he has already retired from the services and he has not committed any offence whatsoever and there is no prima facie offence committed under the Atrocity Act, he may be enlarged on anticipatory bail.

3. The original complainant - respondent No.2 has filed affidavit- in-reply wherein he has stated that the present accused, at the relevant time, was Mamlatdar and he has tampered with the relevant revenue record and with collusion of other accused R/CR.A/195/2019 ORDER suppressed the details of past revenue record, moreover twisted it and permitted the other accused to prepare false record and accepted it as true record and considering the prima facie material, custodial interrogation is required and the offence under the Atrocity Act is made out and, therefore, the present appeal may be dismissed.

4. Heard Mr.Pravin Gondaliya, learned advocate for the appellant, Ms.Monali Bhatt, learned Additional Public Prosecutor for respondent No.1 and Ms.Ratna Vora, learned advocate for respondent No.2. Perused the papers made available by the prosecution as well as annexed with the memo of appeal.

5. Mr.Pravin Gondaliya, learned advocate for the appellant has submitted the same facts which are narrated in the appeal memo and he has read the entire FIR and material produced herewith and has stated that the co-accused have been granted anticipatory bail by this Court in Criminal Appeal No.42 of 2019 with Criminal Appeal No.43 of 2019 with Criminal Appeal No.56 of 2019 vide order dated 17.01.2019. He has contended that the entire case is based on documentary evidence and no custodial interrogation is required and essentially, the dispute is civil in nature and, therefore, the present accused may also be enlarged on anticipatory bail as there is no prima facie material to show that the offence under the Atrocity Act is committed. He has relied upon the order dated 05.04.2019 in the case of Becharbhai Jivabhai Dhandhal (Rabari) Vs. State of Gujarat rendered in Criminal

Appeal No.448 of 2019.

6. Per contra, Ms.Monali Bhatt, learned Additional Public Prosecutor for respondent No.1 has vehemently opposed the present appeal. While referring to the FIR, she has submitted that there is clear cut allegation of commission of the offence under the Atrocity Act. She has submitted that this is a fit case of tempering R/CR.A/195/2019 ORDER with the government record and Section 18(A) of the Atrocity Act would be applicable and, therefore, the present appeal may be dismissed.

7. Ms.Ratna Vora, learned advocate for respondent No.2 has supported the arguments of the learned Additional Public Prosecutor and has submitted that the addition of offence under the Atrocity Act could also be added at any time and the present accused are known as the scheduled caste and scheduled tribe community and there is prima facie role of the present accused in preparing the revenue record and he has made false entry in the revenue record. She has submitted that during the course of investigation, further statement can be recorded. She has submitted that considering the role of the present accused in preparing the false record, the present appeal may be dismissed as Section 18(A) of the Atrocity Act would be applicable and no anticipatory bail could be granted. She has, therefore, prayed to dismiss the present appeal.

8. On perusal of the FIR, it appears that there is civil dispute between the parties and the civil suit was also filed earlier. It appears that the present appellant was in service during the year 2004 to 2008 only. On perusal of the material on record, it appears that earlier record was prepared prior to that period. On perusal of the material placed coupled with the FIR, it appears that there is doubt as to the ingredients of the offence under the Atrocity Act, as such, without discussing the evidence in detail and when there is no prima facie case under the Atrocity Act then the power under Section 438 of the Criminal Procedure Code is available to this Court and considering the factual aspects of the present case, the appeal is required to be allowed. Of course, for interrogation of the appellant by the concerned police, necessary direction can be issued.

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9. This Court has taken into consideration the law laid down by the Apex Court in the case of Ashabai Machindra Adhagale Vs. State of Maharashtra and others reported in (2009) 3 SCC 789, Dr.Subhash Kashinath Mahajan Vs. State of Maharashtra and another reported in AIR 2018 SC 1498 and Gorige Pentaiah Vs. State of Andhra Pradesh and others reported in (2008) 12 SCC 531.

10. Learned advocate for the complainant has heavily relied upon the amended Section 18(A) of the Atrocity Act, which has been added by the legislature by Amendment Act of 2018. The said Section 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."

10.1 For inserting this new provision of Section 18(A), the statement of objects and reasons thereof is necessary to be carved out. The statement of objects and reasons, which has been appended with the said Bill No.140 of 2018, is as under:-

STATEMENT OF OBJECTS AND REASONS The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (said Act) was enacted with a view to prevent the commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes and to provide for Special Courts and exclusive Special Courts for the trial of such offences R/CR.A/195/2019 ORDER and for the relief and rehabilitation of the victims of such offences. The said Act was amended in 2015 with an objective to deliver greater justice to members of the Scheduled Castes and the Scheduled Tribes.

2. In a recent judgment, the Supreme Court has held that a preliminary enquiry shall be conducted by a Deputy Superintendent of Police to find out whether allegations make out a case under the said Act before registering a First Information Report relating to commission of an offence and the approval of an appropriate authority shall be obtained before arrest of any person in connection with such offence.

3. However, the provisions of the Code of Criminal Procedure, 1973 provide that every information relating to commission of an offence, if given, shall be recorded and where the investigating officer has reason to suspect the commission of an offence, he can arrest a person and there is no requirement of conducting a preliminary enquiry before recording of any such information or obtaining of an approval from any authority before arresting any person.

Moreover, such preliminary enquiry and approval would only delay the filing of a charge sheet.

4. The principles of criminal jurisprudence and section 41 of the Code of Criminal Procedure, 1973 as interpreted in several judgments, implies that once the investigating officer has reasons to suspect that an offence has been committed, he can arrest an accused. This decision to arrest or not to arrest cannot be taken away from the investigating officer.

5. In view of the above, it is expedient in the public interest that the provisions of the Code of Criminal Procedure, 1973 be made applicable in respect of registration of First Information Report relating to commission of an offence or arrest of any person without any preliminary enquiry or

approval of any authority, as the case may be.

6. The Bill seeks to achieve the above objects.

10.2 In view of the statement of objects and reasons for the amendment of the Atrocity Act, it appears that due to the recent judgment of the Supreme Court holding that preliminary inquiry shall be conducted by Deputy Superintendent of Police to find out R/CR.A/195/2019 ORDER whether the allegations made out a case under the said Act before registering an FIR relating to the commission of an offence and approval of appropriate authority shall be obtained before arrest of any person in connection with such offence, this amendment is carried out in the Atrocity Act by inserting Section 18A thereof. It also appears from the statement of objects and reasons coupled with the provisions made in sub-Section (2) of Section 18(A), that this provision of sub-section (2) has been inserted only with a view counter to the directions issued by the Supreme Court in the case of Dr. Subhash Kashinath Mahajan Vs. The State of Maharashtra (supra), wherein in conclusion at para 83, the Apex Court has held as under:-

83. Our conclusions are as follows:

i) Proceedings in the present case are clear abuse of process of court and are quashed.

ii) 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 (supra) and Dr. N.T. Desai (supra) and clarify the judgments of this Court in Balothia (supra) and Manju Devi (supra);

Iii) 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 S.S.P. 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.

iv) 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 that the allegations are not frivolous or motivated.

v) Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt.

R/CR.A/195/2019 ORDER The above directions are prospective.

10.4 Thus, so far as the conclusion of para 83(i) and (ii) is concerned, there is no object and reason given for nullifying those observations.

10.5 It is also pertinent to note that the Union of India has also preferred review petition against the aforesaid judgment, being Review Petition (Criminal) of 2018 (Diary No.12243 of 2018) in Criminal Appeal No.416 of 2018, wherein, review has been sought for the conclusion at para 83(i) to (v). But, during the course of argument, the Supreme Court has considered only the directions at para (iii) to (v) of the original decision. Thus, even on reading of the amended provision of Section 18(A) coupled with the statement of objects and reasons for such amendment, it is apparent that the legislature has only made this amendment regarding nullifying the conclusion of the Apex Court in para 83(iii) to (v). Therefore, in a given case, no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide, then in that case, there is no absolute bar against grant of anticipatory bail in cases under the Atrocity Act.

11. On perusal of the FIR, it appears that there is no any prima facie ingredients of the provision of the Atrocity Act. Therefore, the present appellant has not used any weapon in the commission of the offence. Of course, there is allegation that at his instigation, the other two accused have assaulted the present complainant. It also appears from the medical certificate that the present appellant is unable to walk without walker and physically handicapped due to traumatic para paresis. Thus, without discussing the evidence in detail and when there is no prima facie case under the Atrocity Act then the power under Section 438 of the Criminal Procedure Code is available to this Court and considering the factual aspects of the present case, the appeal is required to be allowed. Of course, for R/CR.A/195/2019 ORDER interrogation of the appellant by the concerned police, necessary direction can be issued.

12. In the result, the present appeal is allowed. The impugned order dated 02.01.2019 passed by the learned Special (Atrocity) Judge and 3rd Additional Sessions Judge, Sabarkantha at Himmatnagar in Criminal Misc. Application No.1152 of 2018 is hereby quashed and set aside. It is ordered that in the event of appellant herein being arrested pursuant to FIR registered as C.R.No. I - 114/2018 registered with Talod Police Station, District: Sabarkantha, the appellant shall be released on bail on furnishing a personal bond of Rs. 15,000/- (Rupees Fifteen Thousand only) with one surety of like amount on the following conditions that the appellant shall :

(a) cooperate with the investigation and make available for interrogation whenever required;

(b) remain present at concerned Police Station on 29.04.2019 between 11.00 a.m. and 2.00 p.m.;

(c) not directly or indirectly make any inducement, threat or promise to any person acquainted with the fact of the case so as to dissuade from disclosing such facts to the court or to any police officer;

(d) not obstruct or hamper the police investigation and not to play mischief with the evidence collected or yet to be collected by the police;

(e) at the time of execution of bond, furnish his address to the investigating officer and the court concerned and shall not change residence till the final disposal of the case till further orders;

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(f) not leave India without the permission of the Court and if

having passports shall deposit the same before the Trial Court within a week; and

(g) it would be open to the Investigating Officer to file an application for remand if he considers it proper and just and the learned Magistrate would decide it on merits;

13. Despite this order, it would be open for the Investigating Agency to apply to the competent Magistrate, for police remand of the appellant. The appellant shall remain present before the learned Magistrate on the first date of hearing of such application and on all subsequent occasions, as may be directed by the learned Magistrate. This would be sufficient to treat the accused in the judicial custody for the purpose of entertaining application of the prosecution for police remand. This is, however, without prejudice to the right of the accused to seek stay against an order of remand, if, ultimately, granted and the power of the learned Magistrate to consider such a request in accordance with law. It is clarified that the appellants, even if, remanded to the police custody, upon completion of such period of police remand, shall be set free immediately, subject to other conditions of this anticipatory bail order.

14. At the trial, the Trial Court shall not be influenced by the prima facie observations made by this Court while enlarging the appellants on bail.

15. The appeal stands disposed of, accordingly. Direct service is permitted.

(A. P. THAKER, J) R.S. MALEK