15 26.02.2019
rkd Ct. No.28
&PA (Allowed)

C.R.M. 10431 of 2018

In Re: - An application for anticipatory bail under Section 438 of the Code of Criminal Procedure filed on **22/11/2018** in connection with **Lalgarh** P.S. Case No. **72 of 2018** dated **14/11/2018** under Sections **500/501/34** of the Indian Penal Code and under Sections **3(1)(r)(u)** of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

And

PRADIPTA BISWAS

....Petitioner

VERSUS

STATE OF WEST BENGAL

....Opposite Party

Mr. Pradip Ghosh, Sr. Adv.,
Mr. Sandipan Ganguly, Sr. Adv.

...for the petitioner.

Mr. Saswata Gopal Mukherjee, ld. P.P.,
Mr. Gautam Banerjee, Adv.

...for the State.

Journalistic endeavour of the petitioner to expose the agonies and deprivations of the members of a scheduled caste community is the subject matter of the instant criminal case. Petitioner being the publisher of a Bengali newspaper where the news item was published seeks protection from arrest in the instant case. Subject matter of the First Information Report (for short 'FIR') is a complaint lodged by a member of the Sabar community alleging that the publication of a news item titled *"Mrittu Noi Sabarpallir Chinta Bhat"*. It is not death, but denial of food which troubles Sabar community has assaulted the members of the said community and has unsettled the peace and tranquility in the area and adversely affected developmental work

amongst the community. The contents of the aforesaid news item refer to a number of deaths in the Lodha Sabar Community which had caused consternation in the area. Enquiries by way of investigative journalism revealed not only lack of medical facilities but denial of basic amenities like drinking water, housing, lack of job cards and voters cards etc. amongst the members of the community. It was also noted in the said report while the local administration blamed the members of the Sabar Community with regard to their unwillingness to avail modern medical facilities, the Secretary of Lodha Sabar Community, however, blamed indifference and lack of initiative on the part of the administration to provide such facilities. We are at a loss as to how the aforesaid publication which has essentially brought to light the agonies and difficulties faced by the members of the aforesaid community in the face of the State apathy could be conceived of as an insult or intimidation or an act to promote feelings of enmity, hatred or ill-will against the members of the said community disclosing offences under section 3(1)(r) (u) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to 'Act of 1989').

Learned Public Prosecutor has argued that the FIR was registered by a member of the aforesaid community expressing his anguish with regard to the contents of the news report. Number of statements of other members of the Sabar Community expressing similar sentiments were also relied upon. That apart, learned Public Prosecutor vehemently contended that the application for anticipatory bail was not maintainable. In

view of Section 18 A incorporated in the Act of 1989 after the judgment of the Apex Court in ***Dr. Subhash Kashinath Mahajan vs. State of Maharashtra & Anr.*** reported in ***(2018) 6 SCC 454***. In view of the directions given in the aforesaid judgment relating to registration of FIR and arrest of accused persons under the Act of 1989, the legislature to the Act introduced section 18A which expressly obviated the requirement of preliminary enquiry prior to registration of FIR, or approval for arrest if any, save and except the procedure under the Act or the Code. It is also engrafted a bar to the applicability of Section 438 of the Code to a case under this Act notwithstanding any judgment or order or direction of any Court. Comparing the words used in Section 18A, namely, 'case under this Act' with that Sections 18 thereof, namely, "a case involving accusation of having committed an offence under this Act", it is argued that there is no scope of any scrutiny relating to the applicability of the Act once a F.I.R. has been registered under the said Act. Hence, limited enquiry with regard to disclosure of prima facie case as held in various judgments is not permissible in view of the aforesaid amendment. It is also brought to our notice though the constitutional validity of the aforesaid amendment is a subject matter of challenge before the Apex Court, the said court has not passed any order restraining the operation of Section 18A of the Act.

We have given anxious considerations to the objections raised by the State both to the maintainability of this petitioner as also on merits of the case. The Act of 1989 was promulgated,

inter alia, to prevent commission of offence of atrocities against the members of the Scheduled Caste and Scheduled Tribe committees, to provide for special courts for trial of such offences and for relief and rehabilitation to victims of such offences and other matters connected or incidental thereto. Section 3 of the Act defined various offences of atrocities and punishment thereof. Section 14 provided for exclusive special courts to be set up by the State in concurrence to the Chief Justice of the High Court to try such offences on a day to day basis and to complete such trial within two months. Section 15 provided for appointment of special public prosecutors from amongst advocates having experience of not less than seven years. Sections 15A provided for protection of victims and witnesses. Section 18 laid down a bar to the applicability of Section 438 of the Code in a case involving arrest of any person on an accusation having committed offences under the Act. Section 19 provided that section 360 of the Code or the provisions of the Prohibition of Offences Act shall not apply to persons guilty of an offence under the Act. Section 20 provided for overriding effect of the provisions of the Act over any law for the time being in force or any custom or usage or instrument arising from such law. The scheme of the Act, therefore, was to create substantive offences of atrocities against the members of the Scheduled Caste and Scheduled Tribe community and for an expeditious and effective procedure for trial of such offences. The Act was a legislative endeavour on the part of the Parliament to give expression to the constitutional mandate of abolition of untouchability under

Article 17 of the Constitution and to provide special protection to members of Scheduled Caste and Scheduled Tribe community for acts of atrocities and other crimes. These constitutional imperatives and the acknowledged backwardness of members of the Scheduled Caste and Scheduled Tribe and the continual torture, atrocities and discrimination suffered by its members down the ages must be borne in mind when one embargoes to interpret any provision of the Act. The vice of discrimination, ostracism and neglect which the legislator sought to ameliorate by introduction of penal provisions must be given its fullest expression in implementation of the Act. One must keep this legislative intent in mind while examining the statutory restrictions imposed on the applicability of Section 438 of the Code of Criminal Procedure. Such restriction was initially engrafted in section 18 of the Act of 1989, 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 this Act."*

Constitutional validity of the aforesaid provision was upheld in ***State of M.P. vs. Ram Krishna Balothia, (1998) 3 SCC 221***.

Interpreting the aforesaid provision of law the Apex Court in ***Vilas Pandurang Pawar and Anr. vs. State of***

Maharashtra and Ors., (2012) 8 SCC 795 held as follows:-

> ***"9. 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.***
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> ***10. 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 persons under the provisions of the SC/ST Act, no court shall entertain an 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. The 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."***

In the light of the aforesaid judicial authority, condition precedent for applicability of the statutory bar engrafted in Section 18 is the existence of a prima facie case made out from

the averments in the complaint/FIR against the accused. The bar under Section 18 of the Act does not preclude the Code from examining the allegations in the first information report on its face value and determine whether a prima facie case is made out or not. In a subsequent decision, that is **Dr. Subhas Kashinath Mahajan** (supra) the Apex Court noting instances of abuse of the Act by vested interest groups against political opponents, to settle civil disputes etc. observed as follows:

> ***"64. Innocent citizens are termed as accused, which is not intended by the legislature. The legislature never intended to use the Atrocities as an instrument to blackmail or to wreak person vengeance. The Act is also not intended to deter public servants from performing their bona fide duties. Thus, unless exclusion of anticipatory bail is limited to genuine cases and inapplicable to cases where there is no prima facie case was made out, there will be no protection available to innocent citizens. Thus, limiting the exclusion of anticipatory bail in such cases is essential for protection of fundamental right of life and liberty under Article 21 of the Constitution.***
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> ***"65. Accordingly, we have no hesitation in holding that exclusion of provision for anticipatory bail will not apply when no prima facie case is made out or the case is patently false or mala fide. This may have to be determined by the Court concerned in facts and circumstances of each case in exercise of its judicial discretion. In doing so, we are reiterating a well-established principle of law that protection of innocent against abuse of law is part of inherent jurisdiction of the court***

being part of access to justice and protection of liberty against any oppressive action such as mala fide arrest. In doing so, we are not diluting the efficacy of Section 18 in deserving cases where court finds a case to be prima facie genuine warranting custodial interrogation and pre-trial arrest and detention."

and passed following directions:

"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 appropriated cases if considered necessary for reasons recorded. Such reasons must be scrutinised 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 that 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 aforesaid directions passed in ***Dr. Subhash Kashinath Mahajan (Supra)*** were the subject-matters of much public debate in society as well as in Parliament. It resulted in the amendment of the Act of 1989 and incorporating of Section 18A which reads as follows:

*"**Section 18A.** 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 or any person, against whom an accusation of having committed an offence under this Act has been made an 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".

We are informed the constitutional validity of the aforesaid provision is the subject matter of scrutiny before the Apex Court. Hence, we have not addressed the said issue and have chosen to deal with the present case within the statutory ambit of the Act as amended in terms of Section 18A.

Learned Public Prosecutor has strenuously argued that the words 'case under this Act' in Section (2) of Section 18A completely obviates any judicial enquiry with regard to "prima facie" case once F.I.R. is registered under the Act. We are unable to read the aforesaid provision in that manner. Statement of

objects and reasons appended to the amendment bill presented in Parliament is as follows:-

"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 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"

Scrutiny of the said objects and reasons would show that section 18A was incorporated as a clarificatory amendment emphasizing the provisions of the Code which require a police officer to register FIR without holding a preliminary enquiry and the right of the investigating officer to arrest if he has reasons to suspect the commission of offence in terms of section 41 of the Code (as interpreted in various judgments) without obtaining approval from any authority. Legislative intendment to incorporate section 18A was to underline the overriding impact of the scheme of the Code and the Act of 1989 in the matters of registration of FIR and arrest in terms of section 41 of the Code [as interpreted in various judgments over the directives given in ***Dr. Subhash Kashinath Mahajan (supra)***]. Section 18A was not incorporated to intoduce any higher bar in the matter of applicability of section 438 Cr.P.C. than what was envisaged in section 18 thereof. While incorporating the aforesaid provision, that is section 18A to the section the legislator did not consider it necessary to repeal Section 18. Hence, both the provisions must be read harmoniously as they operate in the same field. No doubt, sub-section (2) of section 18A provides that inapplicability of section 438 Cr.P.C. shall apply in a case under the Act. It is trite law that the binding effect of a judgment of a Court of Law cannot be negated by a subsequent legislative exercise, unless the substratum or foundation of the said judgment is altered [see ***K. Sankaran Nair vs. Devaki Amma Malathy Amma, (1996) 11 SCC 428 (para-5***]. So long as section 18 remains unaltered in the statute book, interpretation of the exclusionary

clause contained therein in ***Vilas Pandurang Pawar and Anr. Vs. State of Maharashtra and Ors., (2012) 8 SCC 795***, cannot be rendered inoperative by reference to the non-obstante clause in section 18A. On the contrary, sub-section (2) of section 18A appears to be a clarificatory amendment reiterating the statutory bar to the applicability of section 438 Cr.P.C. in cases under the Act notwithstanding directions gives in ***Dr. Subhash Kashinath Mahajan (supra)*** relating to holding of preliminary enquiry prior to registration of FIR or obtaining approval from another authority prior to arresting the accused. Difference in the wordings of both the provisions, as argued on behalf of the State, are essentially of form and not of substance. Both the provisions provide for inapplicability of section 438 Cr.P.C. in cases involving offences under the Act of 1989. While in Section 18, the legislator used the words, “cases involving the arrest of any person of an accusation of having committed an offence under this Act", an abbreviated version of the same expression is stated in section 18A, namely, “case under this Act”. Hence, operation of section 18A of the Act cannot take away the limited jurisdiction of the Court to examine whether the uncontroverted averments in the F.I.R. disclose the ingredients of any offence under the Act. It may not be out of place to refer to the objects and reasons for introducing the aforesaid amendment, namely, to ensure the preservation of the right of the investigating officer to arrest an accused in appropriate cases where he has reasons to suspect in terms of section 41 of the Code that the accused has committed an offence under the Act. Condition precedent under section 41 Cr.P.C. (as interpreted in various

judgments) must be satisfied before the police officer exercises his power of arrest. Such power, though not circumscribed by the directions in ***Dr. Subhash Kashinath Mahajan (supra)***, must not be exercised arbitrarily dehors the scheme of the Code and the Act of 1989 is the legislative intent of the amendment. Similar view was taken by this Court in ***Debnarayan Sen @ Tilak Sen and Ors. vs. The State of West Bengal, 2017 (1) CHN (CAL) 444***. Judged from this perspective, "case under this Act" in section 18A cannot mean a case where the police officer mechanically or erroneously quotes an offence under the Act in the formal FIR although the uncontroverted allegations in the written complaint do not disclose ingredients of such offence.

No doubt, a deeper scrutiny with regard to probability or improbability of the truthfulness of the allegations may not be within the domain of the Court under the scheme of the Act of 1989 in view of the exclusionary clause, however, to insist that the Court should shut its eyes and mechanically accept the *ipse dixit* of a police officer with regard to registration of an FIR under the Act without examining whether uncontroverted allegations disclose ingredients of such offence – a *sine qua non* for registration of FIR – is not the purpose of the said amendment.

For these reasons, we are of the opinion, notwithstanding incorporation of section18A into the statute limited jurisdiction of the Court to examine the uncontroverted allegations in the FIR to see whether such allegations when taken at their face value disclose ingredients of such offence is not taken away. Hence, we have exercised such limited jurisdiction in the facts of the instant case.

Having examined the first information report and the contents of the news item which is the subject matter of the alleged offences, we are of the opinion no man of reasonable prudence could have come to the conclusion that the said news item was published to insult, humiliate or promote feelings of enmity, hatred or ill-will amongst the members of the Sabar Community. Allegation of the *de facto* complainant that such publication hurt the sentiments of the Sabar community or caused breach of peace or ill-will amongst them are so patently absurd and inherently improbable that no case under the Act could have been registered. Contents of the publication do not disclose any insult, intimidation, enmity, hatred or ill-will towards the community and any fanciful inference in the FIR dehors the primary facts cannot constitute the ingredients of the alleged offences justifying the applicability of the exclusionary bar under sections 18/18A of the Act.

Hence, we are of the opinion no case under the Act, 1989 is made out against the petitioners. On the other hand, the petitioner has sought to publish an account of the agonies and miseries suffered by members of the Sabar community who, according to the petitioner, are deprived of basic necessities of life. *De facto* complainant of this case, a member of the said community, may entertain a different point of view but the contrarian opinion of the petitioner per se cannot be a ground to infer any insult, enmity, hatred or ill-will towards the said community.

Divergence of opinion is the heart and soul of any dialogue in a democratic polity. Freedom to express independent views is

most essential for a vibrant and informed democracy and liberty of the members of the press like the petitioner who are in the profession of dissemination of such views in society needs to zealously guarded so that they are not cowered to silence by the scepter of criminal prosecution and arbitrary arrest. 'Freedom of speech' is best protected by ensuring 'freedom after speech' of its maker.

As we are of the opinion that the uncontroverted facts in the instant case do not disclose the ingredients of any offence under the Act, refusal to deny the petitioner an order of pre-arrest bail under the perceived restriction under Section 18/18A of the Act of 1989 would be a denial of protection of personal liberty of the petitioner against frivolous and unjustified arrest. Hence, we are inclined to extent the privilege of pre-arrest bail to the petitioner.

In the event of arrest, the petitioner shall be released on bail upon furnishing a Bond of Rs. 2,000/- with two sureties of like amount each to the satisfaction of the Arresting Officer and also be subject to the conditions as laid down under Section 438(2) of the Code of Criminal Procedure, 1973 and on further condition that he shall appear before the court below and pray for regular bail within a fortnight from date.

The application for anticipatory bail is, thus, disposed of.

(Manojit Mandal, J.) **(Joymalya Bagchi, J.)**