IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 6369 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MR. VIKRAM NATH Sd/
and
HONOURABLE MR. JUSTICE J.B.PARDIWALA Sd/

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	YES
	CIRCULATE THIS JUDGMENT IN THE SUBORDINATE COURTS	

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HEMAL ASHWIN JAIN (SHETH)
Versus
UNION OF INDIA

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Appearance:
MR VIRAT G POPAT, ADVOCATE, for the Petitioner.
MR DEVANG VYAS, ASST. SOLICITOR GENERAL OF INDIA, for the Respondent.

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. VIKRAM NATH**
and
HONOURABLE MR. JUSTICE J.B.PARDIWALA

Date : 06/08/2020

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ-application under Article 226 of the Constitution of India, the writ-applicant has prayed for the following reliefs :

“(a) To allow this application;

(b) To hold and declare that the provisions of Section 15A(3) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 being violative of Article 14 and Article 21 of the Constitution of India;

(c) To issue appropriate Writ, Order or Direction quashing and setting aside provisions of Section 15A(3) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 being ultra vires to Article 14 and Article 21 of the Constitution of India;

(d) To direct that the provisions of Section 15A(3) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 be read down as directory and not mandatory so as to empower the concerned court to consider application of bail without issuing formal Notice to the complainant;

(e) Pending admission, hearing and final disposal of this application, to stay the implementation and operation of provisions of Section 15A(3) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989;

(f) To pass any other and further orders as may be deemed fit and proper to this Hon'ble Court.”

2. The facts giving rise to this litigation may be summarised as under :

3. The writ-applicant is serving as a Manager in a company running in the name of the Western Auto-spares situated at Ahmedabad. It appears from the materials on record that one of the employees of the factory got a First Information Report registered against the writ-applicant for the offences punishable under the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 (1 of 2016). In connection with the said FIR, the writ-applicant was arrested by the police and later was ordered to be released on bail.

4. It is the case of the writ-applicant that the registration of the FIR against him by the employee of the factory is nothing but gross misuse of the provisions of the Atrocities Act. It is his case that he is a victim of malicious, vexatious and frivolous prosecution.

5. It appears that in view of Section 15A of the Amendment Act, 2015, falling within Chapter IVA, the first informant, in his capacity as the so-called victim, was also heard by the Special Court before granting bail to the writ-applicant.

6. It is the case of the writ-applicant that the amended provisions in the form of Section 15A(3) and (5) are ultra vires Article 14 of the Constitution of India being manifestly arbitrary.

7. According to the writ-applicant, Section 15A(3) and (5) should be construed as directory and not mandatory. According to the writ-applicant, the impugned provisions of law infringe the

right of an accused to seek bail from the competent court in connection with a particular offence as it is now mandatory for the Special Court, while considering the plea of bail in connection with the offences under the Atrocities Act, to hear the victim. This, according to the writ-applicant, could be termed as a very drastic and draconian provision of law.

8. It is the case of the writ-applicant that except in cases under the Atrocities Act, for no other offence, it is mandatory for any court to hear the victim/complainant while considering the plea of bail put forward by any accused. According to the writ-applicant, no exception should be carved out when it comes to considering the plea of bail. To put it in other words, it is the case of the writ-applicant that even while hearing a bail application of an accused charged with an offence of murder or any other serious offence, if it is not mandatory for the court to hear the victim/complainant, then why the provision like Section 15A(3) and (5) of the Amendment Act should be introduced by the Legislature.

9. In such circumstances referred to above, the writ-applicant prays that Section 15A(3) of the Amendment Act, 2015 (1 of 2016) be declared as violative of Article 14 and 21 respectively of the Constitution of India, or in the alternative, the provisions of Section 15A(3) of the Amendment Act, 2015, be construed as directory and not mandatory so as to confer discretion upon the competent court to consider the bail application with or without issuing any notice to the victim.

SUBMISSIONS ON BEHALF OF THE WRIT-APPLICANT :

10. The grounds of challenge to the constitutional validity of Section 15A(3) of the Amendment Act, 2015, as raised in the memorandum of writ-application are as under :

> *"(A) That, the provision is violative of Article 14 and 21 of the Constitution of India. The provision imposes arbitrary restriction on bail as a mandatory procedure which violates right to liberty enshrined under Article 21 of the Constitution of India. It is settled law that procedural discrimination also can condemn Article 14 of the Constitution of India. That regard the petitioner begs to rely upon the ratio laid down by the Hon'ble Apex Court in case of Budhan Choudhry and Other v. The State Of Bihar [1955 AIR 191]*
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> *(B) That the provision has no nexus with the object to be achieved by the Act. That imposing of such condition and/or restriction on bail would not serve any purpose and would in fact render the provision susceptible to misuse as no exception is provided for grant of bail in case the court finds that no offence under provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is made out.*
>
> *(C) That the provision deprives accused for his Fundamental Rights of liberty in the sense that the accused would not be entitled to bail at the time of his production before the court.*

(D) That the provision is violative of Section 437 of the Code of Criminal Procedure, 1973 compelling the accused to remain in custody even if offence is punishable with imprisonment with less than seven years. In other words the parent statue for bail is the Code of Criminal Procedure, 1973. The procedure for bail is provided under the said Code. There is nothing in the provisions of Section 15A(3) which would override provisions of Section 5 of the Code of Criminal Procedure, 1973. In fact, Section 5 of the Code of Criminal Procedure, 1973 provides that if there is specific provision to the contrary then provision of Section 5 will save the provision of the Code of Criminal Procedure, 1973 even if there is overriding effect.

(E) That the debate - discussion concerning the present amendment does not contain any specific discussion and/or requirement on introducing such restrictions. The object of the Act is not to keep person charged with offence under the Act in custody but is to bring justice to the victim by conducting expeditious trial in this process the present amendment is not going to yield any result.

(F) It is stated that all the courts across the State considers bail application only after Notice is issued to the complainant even if the cases where there are no reasonable grounds for believing that the offence under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is made out. This is on account of the reason that the provision is absolute

and drastic which does not leave any exception to balance individuals liberty. This

ultimately will result into a pre-condition for grant of bail impeaching Article 21 of the Constitution of India.

(G) The provision is drastic, arbitrary and unreasonable which is susceptible to misuse as no exception is carved out.

(H) That even otherwise the impugned provision is bad in law and same be quashed and set aside."

SUBMISSIONS ON BEHALF OF THE UNION OF INDIA :

11. Mr.Devang Vyas, the learned Assistant Solicitor General of India appearing for the Union, has vehemently opposed this writ-application. Mr.Vyas would submit that the challenge to the constitutional validity of Section 15A(3) of the Amendment Act, 2015, is without any basis or foundation. Mr.Vyas would submit that Section 15A falling in Chapter IVA of the Amendment Act, 2015, is with a definite object and purpose. He would submit that the complaint/allegation of atrocities, despite the provisions of the enabling Act against the members of the Scheduled Castes and Scheduled Tribes is a matter of concern. The Act has accordingly been strengthen to make the relevant provisions of the Act more effective. Mr.Vyas would submit that based on the consultation process with all the stakeholders, the amendments in the Atrocities Act were proposed to broadly cover five areas, namely (i) Amendments to Chapter II (Offences of

Atrocities) to include new definitions, new offences, to re-phrase existing sections and expand the scope of presumptions, (ii) Institutional Strengthening, (iii) Appeals (a new section), (iv) Establishing

Rights of Victims and Witnesses (a new chapter) and

(v) Strengthening Preventive Measures.

12. Mr.Vyas would submit that the objective of all the above-referred amendments in the Atrocities Act is to deliver to the members of the Scheduled Castes and Scheduled Tribes a greater justice as well as an enhanced deterrent to the offenders.

13. Mr.Vyas would submit that by any stretch of imagination it cannot be said that the impugned provisions of the Amendment Act is manifestly arbitrary. He would submit that mere apprehension that such amended provisions in the Act are likely to be misused cannot be a ground to strike down such provisions as ultra vires Article 14 of the Constitution of India on the ground of arbitrariness.

14. Mr.Vyas would submit that there is no scope to read down the impugned provisions of law as directory. Having regard to the language employed by the Legislature and also having regard to the objects and reasons for the amendment, Section 15A(3) of the Amendment Act has to be construed as mandatory and there is no discretion with the competent court in this regard.

15. Mr.Vyas would submit that having regard to the provisions of law, a victim or dependent has a right to be heard by the court enabling the victim or dependent to

participate in any proceeding in respect of not only bail proceedings but also in the proceedings of discharge, release, parole, conviction or sentence of an accused or any connected proceedings or arguments and

file written submissions on the conviction, acquittal or sentencing.

16. Mr.Vyas would submit that the reliance placed by the learned counsel appearing for the writ-applicant on a recent decision of the Supreme Court in the case of Nikesh Tarachjand Shah v. Union of India, reported in (2018)11 SCC 1, is completely misplaced. Mr.Vyas would submit that in Nikesh Tarachand Shah (supra), the Supreme Court struck down Section 45(1) of the PMLA Act on the ground of being arbitrary and discriminatory. The twin conditions under Section 45(1) for the offences classified thereunder in Part-A of the Schedule to the PMLA Act were held to be arbitrary and discriminatory because the Supreme Court found the same to be violative of Articles 14 and 21 of the Constitution of India. Mr.Vyas pointed out that what weighed with the Supreme Court in saying so was the condition stipulated in Section 45 that where the Public Prosecutor opposes the application the court should be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that he was not likely to commit offence while on bail. Such a provision of law was found by the Supreme Court to be manifestly arbitrary and was accordingly declared as ultra vires Articles 14 and 21 of the Constitution of India.

17. In such circumstances referred to above, Mr.Vyas prays that there being no merit in this writ-application, the same be rejected.

ANALYSIS :

18. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions of pivotal importance fall for our consideration :

(1) Whether Section 15A(3) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 (1 of 2016) is ultra vires Articles 14 and 21 respectively of the Constitution of India being manifestly arbitrary ?

(2) Whether Section 15A(3) of the Amendment Act, 2015, is mandatory or directory ?

(3) Whether Section 15A(3) of the Amendment Act, 2015, imposes any restrictions upon the competent court while considering the plea of bail in connection with the offences under the Atrocities Act ? In other words, whether Section 15A(3) of the Amendment Act could be said to be, in any manner, placing unreasonable restrictions when it comes to exercising discretion in favour of an accused while considering the plea of bail ?

19. Before adverting to the rival submissions canvassed on either side, we must look into the impugned provisions of the Amendment Act, 2015. We quote the entire Chapter IVA of the Amendment Act, 2015, which

is with regard to the rights of the victims and witnesses as under :

“CHAPTER IVA

RIGHTS OF VICTIMS AND WITNESSES

15A. (1) It shall be the duty and responsibility of the State to make arrangements for the protection of victims, their dependents, and witnesses against any kind of intimidation or coercion or inducement or violence or threats of violence.

(2) A victim shall be treated with fairness, respect and dignity and with due regard to any special need that arises because of the victim’s age or gender or educational disadvantage or poverty.

(3) A victim or his dependent shall have the right to reasonable, accurate, and timely notice of any Court proceeding including any bail proceeding and the Special Public Prosecutor or the State Government shall inform the victim about any proceedings under this Act.

(4) A victim or his dependent shall have the right to apply to the Special Court or the Exclusive Special Court, as the case may be, to summon parties for production of any documents or material, witnesses or examine the persons present.

(5) A victim or his dependent shall be entitled to be heard at any proceeding under this Act in respect of bail, discharge, release, parole, conviction or sentence of an

accused or any connected proceedings or arguments and file written submission on conviction, acquittal or sentencing.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Special Court or the Exclusive Special Court trying a case under this Act shall provide to a victim, his dependent, informant or witnesses—

(a) the complete protection to secure the ends of justice;

(b) the travelling and maintenance expenses during investigation, inquiry and trial;

(c) the social-economic rehabilitation during investigation, inquiry and trial; and

(d) relocation.

(7) The State shall inform the concerned Special Court or the Exclusive Special Court about the protection provided to any victim or his dependent, informant or witnesses and such Court shall periodically review the protection being offered and pass appropriate orders.

(8) Without prejudice to the generality of the provisions of sub-section (6), the concerned Special Court or the Exclusive Special Court may, on an application made by a victim or his dependent, informant or witness in any

proceedings before it or by the Special Public Prosecutor in relation to

such victim, informant or witness or on its own motion, take such measures including––

(a) concealing the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to the public;

(b) issuing directions for non-disclosure of the identity and addresses of the witnesses;

(c) take immediate action in respect of any complaint relating to harassment of a victim, informant or witness and on the same day, if necessary, pass appropriate orders for protection:

Provided that inquiry or investigation into the complaint received under clause (c) shall be tried separately from the main case by such Court and concluded within a period of two months from the date of receipt of the complaint:

Provided further that where the complaint under clause (c) is against any public servant, the Court shall restrain such public servant from interfering with the victim, informant or witness, as the case may be, in any matter related or unrelated to the pending case, except with the permission of the Court.

(9) It shall be the duty of the Investigating Officer and the Station House Officer to record the complaint of victim,

informant or witnesses against any kind of intimidation, coercion or inducement or violence or threats of violence, whether given orally or in writing, and a photocopy of the First Information Report shall be immediately given to them at free of cost.

(10) All proceedings relating to offences under this Act shall be video recorded.

(11) It shall be the duty of the concerned State to specify an appropriate scheme to ensure implementation of the following rights and entitlements of victims and witnesses in accessing justice so as––

(a) to provide a copy of the recorded First Information Report at free of cost;

(b) to provide immediate relief in cash or in kind to atrocity victims or their dependents;

(c) to provide necessary protection to the atrocity victims or their dependents, and witnesses;

(d) to provide relief in respect of death or injury or damage to property;

(e) to arrange food or water or clothing or shelter or medical aid or transport facilities or daily allowances to victims;

(f) to provide the maintenance expenses to the atrocity victims and their dependents;

(g) to provide the information about the rights of atrocity victims at the time of making complaints and registering the First Information Report;

(h) to provide the protection to atrocity victims or their dependents and witnesses from intimidation and harassment;

(i) to provide the information to atrocity victims or their dependents or associated organisations or individuals, on the status of investigation and charge sheet and to provide copy of the charge sheet at free of cost;

(j) to take necessary precautions at the time of medical examination;

(k) to provide information to atrocity victims or their dependents or associated organisations or individuals, regarding the relief amount;

(l) to provide information to atrocity victims or their dependents or associated organisations or individuals, in advance about the dates and place of investigation and trial;

(m) to give adequate briefing on the case and preparation for trial to atrocity victims or their

dependents or associated organisations or individuals and to provide the legal aid for the said purpose;

(n) to execute the rights of atrocity victims or their dependents or associated organisations or individuals at every stage of the proceedings under this Act and to provide the necessary assistance for the execution of the rights.

(12) It shall be the right of the atrocity victims or their dependents, to take assistance from the Non-Government Organisations, social workers or advocates."

20. We take notice of the fact that the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) (Amendment) Act, 2018, was made a subject matter of challenge before the Supreme Court in the case of Prathvi Raj Chauhan v. Union of India and others [Writ Petition (C) No.1015 of 2018, decided on 10th February 2020]. The main challenge before the Supreme Court was to the legality and validity of the provisions inserted by way of carving out Section 18A of the Act, 1989. Their Lordships Arun Mishra and Vineet Saran, JJ. disposed of the petition holding as under :

"9. The section 18A(i) was inserted owing to the decision of this Court in Dr. Subhash Kashinath (supra), which made it necessary to obtain the approval of the appointing authority concerning a public servant and the

SSP in the case of arrest of accused persons. This Court has also

recalled that direction on Review Petition (Crl.) No.228 of 2018 decided on 1.10.2019. Thus, the provisions which have been made in section 18A are rendered of academic use as they were enacted to take care of mandate issued in Dr. Subhash Kashinath (supra) which no more prevails. The provisions were already in section 18 of the Act with respect to anticipatory bail.

10. Concerning the applicability of provisions of section 438 Cr.PC, it shall not apply to the cases under Act of 1989. However, if the complaint does not make out a prima facie case for applicability of the provisions of the Act of 1989, the bar created by section 18 and 18A(2) shall not apply. We have clarified this aspect while deciding the review petitions.

11. The court can, in exceptional cases, exercise power under section 482 Cr.PC for quashing the cases to prevent misuse of provisions on settled parameters, as already observed while deciding the review petitions. The legal position is clear, and no argument to the contrary has been raised.

12. The challenge to the provisions has been rendered academic. In view of the aforesaid clarifications, we dispose of the petitions."

21. We take notice of a separate judgment, though concurring, of His Lordship Justice S.Ravindra Bhat. As the observations

made by His Lordship are helpful to this Court to decide the present matter, we quote the observations of His Lordship Justice S.Ravindra Bhat thus :

"1. I am in agreement with the judgment proposed by Justice Arun Mishra as well as its conclusions that the challenge to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) (Amendment) Act, 2018 must fail, with the qualifications proposed in the judgment with respect to the inherent power of the court in granting anticipatory bail in cases where prima facie an offence is not made out. I would however, supplement the judgment with my opinion.

2. The Constitution of India is described variously as a charter of governance of the republic, as a delineation of the powers of the state in its various manifestations vis-à-vis inalienable liberties and a document delimiting the rights and responsibilities of the Union and its constituent states. It is more: it is also a pact between people, about the relationships that they guarantee to each other (apart from the guarantee of liberties vis-à-vis the state) in what was a society riven along caste and sectarian divisions. That is why the preambular assurance that the republic would be one which guarantees to its people liberties, dignity, equality of status and opportunity and fraternity.

3. It is this idea of India, - a promise of oneness of and for, all people, regardless of caste, gender, place of birth,

religion and other divisions that Part III articulates in four

salient provisions: Article 15, Article 17, Article 23 and Article 24. The idea of fraternity occupying as crucial a place in the scheme of our nation's consciousness and polity, is one of the lesser explored areas in the constitutional discourse of this court. The fraternity assured by the Preamble is not merely a declaration of a ritual handshake or cordiality between communities that are diverse and have occupied different spaces: it is far more. This idea finds articulation in Article 15. That provision, perhaps even more than Article 14, fleshes out the concept of equality by prohibiting discrimination and discriminatory practices peculiar to Indian society. At the center of this idea, is that all people, regardless of caste backgrounds, should have access to certain amenities, services and goods so necessary for every individual. Article 15 is an important guarantee against discrimination. What is immediately noticeable is that whereas Article 15 (1) enjoins the State (with all its various manifestations, per Article 12) not to discriminate on the proscribed grounds (religion, race, caste, sex (i.e. gender), place of birth or any of them), Article 15 (2) is a wider injunction: it prohibits discrimination or subjection to any disability of anyone on the grounds of religion, caste, race, sex or place of birth in regard to access to shops, places of public entertainment, or public restaurants. The relevant parts of Article 15 are extracted below:

> *"15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth*

(1) The State shall not discriminate against any

citizen on grounds only of religion, race, caste, sex, place of birth or any of them .

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public…"

(3) Nothing in this article shall prevent the State from making any special provision for women and children"

Article 15(2)(b) prescribes the subjection of anyone to any disability on the prescribed grounds (i.e. discrimination on grounds of religion, caste, race, sex or place of birth) with regard to "the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

4. The making of this provision and others, in my view, is impelled by the trinity of the preambular vision that

the Constitution makers gave to this country. Paeans have been

sung about the importance of liberty as a constitutional value: its manifest articulation in the (original) seven "lamps" i.e. freedoms under Article 19 of the Constitution; the other rights to religion, those of religious denominations, etc. Likewise, the centrality of equality as an important constitutional provision has been emphasized, and its many dimensions have been commented upon. However, the articulation of fraternity as a constitutional value, has lamentably been largely undeveloped. In my opinion, all the three - Liberty, Equality and Fraternity, are intimately linked. The right to equality, sans liberty or fraternity, would be chimerical - as the concept presently known would be reduced to equality among equals, in every manner- a mere husk of the grand vision of the Constitution. Likewise, liberty without equality or fraternity, can well result in the perpetuation of existing inequalities and worse, result in license to indulge in society's basest practices. It is fraternity, poignantly embedded through the provisions of Part III, which assures true equality, where the state treats all alike, assures the benefits of growth and prosperity to all, with equal liberties to all, and what is more, which guarantees that every citizen treats every other citizen alike.

5. When the framers of the Constitution began their daunting task, they had before them a formidable duty and a stupendous opportunity: of forging a nation, out of several splintered sovereign states and city states, with the blueprint of an idea of India. What they envisioned

was a common charter of governance and equally a charter for the people. The placement of the concept of fraternity, in this

context was neither an accident, nor an idealized emulation of the western notion of fraternity, which finds vision in the French and American constitutions and charters of independence. It was a unique and poignant reminder of a society riven with acute inequalities: more specifically, the practice of caste discrimination in its virulent form, where the essential humanity of a large mass of people was denied by society- i.e. untouchability.

6. The resolve to rid society of these millennial practices, consigning a large segment of humanity to the eternal bondage of the most menial avocations creating inflexible social barriers, was criticized by many sages and saints. Kabir, the great saint poet, for instance, in his composition, remarked:

> *"If thou thinkest the maker distinguished castes: Birth is according to these penalties for deeds. Born a Sudra, you die a Sudra;*
>
> *It is only in this world of illusion that you assume the sacred thread. If birth from a Brahmin makes you a Brahmin, Why did you not come by another way?*
>
> *If birth from a Turk makes you a Turk, Why were you not circumcised in the womb?*
>
> *... Saint Kabir, renounce family, caste, religion, and nation, And live as one."*

7. There were several others who spoke, protested, or spoke against the pernicious grip of social inequity due to caste oppression of the weakest and vulnerable segments of society. Guru Nanak, for instance, stated :

> *"Caste and dynastic pride are condemnable notions, the one master shelters all existence.*
>
> *Anyone arrogating superiority to himself halt be disillusioned. Saith Nanak:*
>
> *superiority shall be determined by God"*

The Guru Granth Saheb also states that

> *"All creatures are noble, none low,*
>
> *One sole maker has all vessels fashioned;*
>
> *In all three worlds is manifest the same light..."*

8. The preamble to the Constitution did not originally contain the expression "fraternity"; it was inserted later by the Drafting Committee under the chairmanship of Dr.Ambedkar. While submitting the draft Constitution, he stated, on 21 February, 1948, that the Drafting Committee had added a clause about fraternity in the Preamble even though it was not part of the Objectives Resolution because it felt that "the need for fraternal concord and goodwill in India was never greater than now, and that this particular aim of the new Constitution

should be emphasized by special mention in the Preamble" [B.Shiva Rao : Framing of

India's Constitution Vol.III, page 510 (1968)]. Pandit Thakur Das Bhargava expressed a "sense of gratitude to Dr. Ambedkar for having added the word "fraternity" to the Preamble". Acharya Kripalani also emphasized on this understanding, in his speech on 17 October, 1949:

> *"Again, I come to the great doctrine of fraternity, which is allied with democracy. It means that we are all sons of the same God, as the religious would say, but as the mystic would say, there is one life pulsating through all of us, or as the Bible says, "We are one of another". There can be no fraternity without this."*

9. This court too, has recognized and stressed upon the need to recognize fraternity as one of the beacons which light up the entire Constitution. Justice Thommen, in Indira Sawhney v Union of India, 1992 Supp (3) SCR 454 said this:

> *"The makers of the Constitution were fully conscious of the unfortunate position of the Scheduled Castes and Scheduled Tribes. To them equality, liberty and fraternity are but a dream; an ideal guaranteed by the law, but far too distant to reach; far too illusory to touch. These backward people and others in like positions of helplessness are the favoured children of the Constitution. It is for them that ameliorative and remedial measures are*

adopted to achieve the end of equality. To permit those who are not

intended to be so specially protected to compete for reservation is to dilute the protection and defeat the very constitutional aim."

10. In Raghunathrao Ganpatrao v. Union of India, 1993(1) SCR 480, this court held:

"In our considered opinion this argument is misconceived and has no relevance to the facts of the present case. One of the objectives of the Preamble of our Constitution is 'fraternity assuring the dignity of the individual and the unity and integrity of the nation.' It will be relevant to cite the explanation given by Dr. Ambedkar for the word 'fraternity' explaining that 'fraternity means a sense of common brotherhood of all Indians.' In a country like ours with so many disruptive forces of regionalism, communalism and linguism, it is necessary to emphasise and re-emphasise that the unity and integrity of India can be preserved only by a spirit of brotherhood. India has one common citizenship and every citizen should feel that he is Indian first irrespective of other basis. In this view, any measure at bringing about equality should be welcome."

11. In a similar vein, the court in Nandini Sundar v. State

of Chhatisgarh, 2011(7) SCC 457, again commented on this aspect and said that "The Constitution itself, in no uncertain terms, demands that the State shall strive, incessantly and consistently, to promote fraternity amongst all citizens such that dignity of every citizen is protected, nourished and promoted."

12. It was to achieve this ideal of fraternity, that the three provisions - Articles 15, 17 and 24 were engrafted. Though Article 17 proscribes the practice of untouchability and pernicious practices associated with it, the Constitution expected Parliament and the legislatures to enact effective measures to root it out, as well as all other direct and indirect, (but virulent nevertheless) forms of caste discrimination. Therefore, in my opinion, fraternity is as important a facet of the promise of our freedoms as personal liberty and equality is. The first attempt by Parliament to achieve that end was the enactment of the Untouchability (Offences) Act, 1955. The Act contained a significant provision that where any of the forbidden practices "is committed in relation to a member of a Scheduled Caste" the Court shall presume, unless the contrary is proved, that such act was committed on the ground of "Untouchability". This implied that the burden of proof lies on the accused and not on the prosecution. The Protection of Civil Rights Act, 1955, followed. This too made provision for prescribing "punishment for the preaching and practice of - "Untouchability" for the enforcement of any disability arising therefrom". The enforcement of social practices

associated with untouchability and disabilities was outlawed and

made the subject matter of penalties. After nearly 35 years' experience, it was felt that the 1955 Act (which was amended in 1976) did not provide sufficient deterrence to social practices, which continued unabated and in a widespread manner, treating members of the scheduled caste and tribe communities in the most discriminatory manner, in most instances, stigmatizing them in public places, virtually denying them the essential humanity which all members of Society are entitled to.

13. It was to address this gulf between the rights which the Constitution guaranteed to all people, particularly those who continued to remain victims of ostracism and discrimination, that the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereafter "the Act") was enacted. Rules under the Act were framed in 1995 to prevent the commission of atrocities against members of Schedules Castes and Tribes, to provide for special courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto. The Statement of Objects and Reasons appended to the Bill, when moved in the Parliament, observed that despite various measures to improve the socio-economic conditions of Scheduled Castes and Scheduled Tribes, they remained vulnerable. They are denied a number of civil rights and are subjected to various offences, indignities, humiliation and harassment. They have been, in several brutal instances,

deprived of their life and property. Serious atrocities were committed against them for various historical, social and economic reasons.

The Act, for the first time, puts down the contours of 'atrocity' so as to cover the multiple ways through which members of scheduled castes and scheduled tribes have been for centuries humiliated, brutally oppressed, degraded, denied their economic and social rights and relegated to perform the most menial jobs.

14. The Report on the Prevention of Atrocities against Scheduled Castes vividly described that despite enacting stringent penal measures, atrocities against scheduled caste and scheduled tribe communities continued; even law enforcement mechanisms had shown a lackadaisical approach in the investigation and prosecution of such offences. The report observed that in rural areas, various forms of discrimination and practices stigmatizing members of these communities continued. Parliament too enacted an amendment to the Act in 2015, strengthening its provisions in the light of the instances of socially reprehensive practices that members of scheduled caste and scheduled tribe communities were subjected to. In this background, this court observed in the decision in National Campaign on Dalit Human Rights v. Union of India, (2017)2 SCC 432, that:

> *"The ever-increasing number of cases is also an indication to show that there is a total failure on the part of the authorities in complying with the provisions of the Act and the Rules. Placing reliance on the NHRC Report*

and other reports, the Petitioners sought a mandamus from this

Court for effective implementation of the Act and the Rules.

12. We have carefully examined the material on record and we are of the opinion that there has been a failure on the part of the concerned authorities in complying with the provisions of the Act and Rules. The laudable object with which the Act had been made is defeated by the indifferent attitude of the authorities. It is true that the State Governments are responsible for carrying out the provisions of the Act as contended by the counsel for the Union of India. At the same time, the Central Government has an important role to play in ensuring the compliance of the provisions of the Act. Section 21(4) of the Act provides for a report on the measures taken by the Central Government and State Governments for the effective implementation of the Act to be placed before the Parliament every year. The constitutional goal of equality for all the citizens of this country can be achieved only when the rights of the Scheduled Castes and Scheduled Tribes are protected. The abundant material on record proves that the authorities concerned are guilty of not enforcing the provisions of the Act. The travails of the members of the Scheduled Castes and the Scheduled Tribes continue unabated. We are satisfied that the Central Government and

State Governments should be directed to strictly enforce the provisions of the Act and we do so."

15. In Subhash Kashinath Mahajan v. State of Maharashtra & Ors, 2018(4) SCC 454, a two judge bench of this court held that the exclusion of anticipatory bail provisions of the Code of Criminal Procedure (by Section 18 of the Act) did not constitute an absolute bar for the grant of bail, where it was discernable to the court that the allegations about atrocities or violation of the provisions of the Act were false. It was also held, more crucially, that public servants could be arrested only after approval by the appointing authority (of such public servant) and in other cases, after approval by the Senior Superintendent of Police. It was also directed that cases under the Act could be registered only after a preliminary enquiry into the complaint. These directions were seen to be contrary to the spirit of the Act and received considerable comment in the public domain; the Union of India too moved this court for their review. In the review proceedings, a three judge bench of this court, in Union of India v. State of Maharastra, 2019(13) SCALE 280, recalled and overruled those directions.

16. In the meanwhile, Parliament enacted the amendment of 2018 (by Act No. 27 of 2019), which is the subject matter of challenge in these proceedings. The clear intention of Parliament was to undo the effect of this court's declaration in Subhash Kashinath Mahajan (supra). The provisions of the amendment expressly override the directions in Subhash Kashinath Mahajan,

that a preliminary inquiry within seven days by the Deputy Superintendent of Police concerned, to

find out whether the allegations make out a case under the Act, and that arrest in appropriate cases may be made only after approval by the Senior Superintendent of Police. The Parliamentary intent was to allay the concern that this would delay registration of First Information Report (FIR) and would impede strict enforcement of the provision of the Act.

17. The judgment of Mishra, J has recounted much of the discussion and reiterated the reasoning which led to the recall and review of the decision in Subhash Kashinath Mahajan (supra); I respectfully adopt them. I would only add that any interference with the provisions of the Act, particularly with respect to the amendments precluding preliminary enquiry, or provisions which remove the bar against arrest of public servants accused of offences punishable under the Act, would not be a positive step. The various reports, recommendations and official data, including those released by the National Crime Records Bureau, paint a dismal picture. The figures reflected were that for 2014, instances of crimes recorded were 40401; for 2015, the crime instances recorded were 38670 and for 2016, the registered crime incidents were 40801. According to one analysis of the said 2016 report, 422,799 crimes against scheduled caste communities' members and 81,332 crimes against scheduled tribe communities' members were reported between 2006 and 2016.

18. These facts, in my opinion ought to be kept in mind by

courts which have to try and deal with offences under the Act. It is important to keep oneself reminded that while sometimes (perhaps mostly in urban areas) false accusations are made, those are not necessarily reflective of the prevailing and wide spread social prejudices against members of these oppressed classes. Significantly, the amendment of 2016, in the expanded definition of 'atrocity', also lists pernicious practices (under Section 3) including forcing the eating of inedible matter, dumping of excreta near the homes or in the neighbourhood of members of such communities and several other forms of humiliation, which members of such scheduled caste communities are subjected to. All these considerations far outweigh the petitioners' concern that innocent individuals would be subjected to what are described as arbitrary processes of investigation and legal proceedings, without adequate safeguards. The right to a trial with all attendant safeguards are available to those accused of committing offences under the Act; they remain unchanged by the enactment of the amendment.

19. As far as the provision of Section 18A 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.

20. I would only add a caveat with the observation and emphasize that while considering any application

seeking pre-arrest bail, the High Court has to balance the two

interests: i.e. that the power is not so used as to convert the jurisdiction into that under Section 438 of the Criminal Procedure Code, but that it is used sparingly and such orders made in very exceptional cases where no prima facie offence is made out as shown in the FIR, and further also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law. I consider such stringent terms, otherwise contrary to the philosophy of bail, absolutely essential, because a liberal use of the power to grant pre-arrest bail would defeat the intention of Parliament.

21. It is important to reiterate and emphasize that unless provisions of the Act are enforced in their true letter and spirit, with utmost earnestness and dispatch, the dream and ideal of a casteless society will remain only a dream, a mirage. The marginalization of scheduled caste and scheduled tribe communities is an enduring exclusion and is based almost solely on caste identities. It is to address problems of a segmented society, that express provisions of the Constitution which give effect to the idea of fraternity, or bandhutva (referred to in the Preamble, and statutes like the Act, have been framed. These underline the social – rather collective resolve – of ensuring that all humans are treated as humans, that their innate genius is allowed outlets through equal opportunities and each of them is fearless in the pursuit of her or his dreams. The question which each of us has to address, in everyday life, is can

the prevailing situation of exclusion based on caste identity be allowed to persist in a democracy which is committed to equality and

the rule of law? If so, till when? And, most importantly, what each one of us can do to foster this feeling of fraternity amongst all sections of the community without reducing the concept (of fraternity) to a ritualistic formality, a tacit acknowledgment, of the "otherness" of each one's identity."

22. We now proceed to consider, whether Section 15A(3) of the Amendment Act, 2015, could be termed as manifestly arbitrary.

23. The point of law required to be decided merits enunciation of settled principles of interpretation of statutes for reading a clear provision as per its own terms, reading it along with every other provision in the chapter in which it appears, reading the statute as a whole and deciphering the intention of the legislature that propelled the enactment given the state of affairs that prevailed before the enactment, the mischief that was apparent and the mode in which the legislature sought to remedy it. The 'Heyden's rule' or the 'Mischief rule', which is the well settled principle of law, must be present to the mind of any interpretor of such enactment.

24. "The crime problem is the overdue debt a society pays for tolerating for years the conditions that breed lawlessness."
- Earl Warren.

25. An aspect of victimology, the doctrine of victim protection, victim representation and victim rehabilitation, is the subject matter of the litigation on hand.

26. The criminal justice system has been designed with the State at the center-stage. Law and order is the prime duty of the State. It fosters peace and prosperity. The rule of law is to prevail for a welfare State to prosper. The citizens in a welfare State are expected to have their basic human rights. These rights are often violated. The law and order is breached. A citizen is harmed, injured or even killed as a result of the crime. He/she is a victim of an act termed an 'offence' in the criminal justice system. He/she seeks recourse to law and justice. Justice is given to him/her upon upholding the rule of law. It is denied to him/her upon any breach by the perpetrator of the violation or even by the defender of his rights - the State. [See : Balasaheb Rangnath Khade vs. The State of Maharashtra and others, Criminal Appeal No.991 of 2011 decided on 27th April 2012]

27. A thin difference between the victim and the complainant may first be noted.

1. Oxford English Dictionary, 11th Edition at page 1610 defines the victim as a person harmed, injured or killed as a result of a crime, accident etc. Section 2 (wa) of the Code of Criminal Procedure which was incorporated by the Amending Act, 5 of 2009 defines a victim as :

> *"a person who has suffered any loss or injury caused by reason of the act or omission for*

which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir;

2. Black's Law Dictionary, Eighth Edition at page 302 defines the complainant as the party who brings a legal complaint against another.

3. Advanced Law Lexicon by P. Ramanatha Aiyar at page 926 defines (4) Cr. Appeals 991, 992, 331 & 854/11 the complainant as a person or authority making a complaint to the council regarding something.

28. Section 377 (1) of the United States Code is in respect of Crime Victims' Rights Act (CVRA). The Rights of Crime Victims are set out thus :

(a) Rights of Crime Victims.- A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would

be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

29. The Victims of Crime Act in Canada sets out in Section 2 the statement of principles upon which the human rights are granted to the victims for the victims' access to justice. Section 2 of the Victims of Crime Act runs thus:

PART I STATEMENT OF PRINCIPLES

2. The following principles are adopted for the guidance of persons in Declaration providing justice for victims of crime: treatment (a) victims should be treated with courtesy and compassion of victims and with respect for their dignity, privacy and convenience;

redress (b) victims should receive prompt and fair financial redress for the harm that they have suffered;

access to (c) victims should be informed of and should

have access to services services including social, medical, legal and mental health and assistance;

assistance information (d) victims should be informed about the progress of the investigation and prosecution of the offence, court procedures, court the role of the victim in court proceedings and the ultimate procedures, etc. disposition of the proceedings;

victim (e) victims are entitled, where their personal interests are concerns affected, to have their views and concerns brought to the attention of the court where consistent with criminal law and procedure;

safety (f) victims and their families should be protected from intimidation, retaliation and harassment;

property (g) victims should have their stolen property returned to them as soon as possible after recovery by law enforcement authorities victim (h) victims are entitled to prepare a victim impact statement impact and have it considered by the court at sentencing; statement information (i) victims are entitled to be informed about the offender's n on status, including release dates, parole eligibility, and offender probation terms.

status, etc.

30. The General Assembly of the United Nations in its 96th plenary meeting held on 29th November, 1985 set out the

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which recognizes and grants to the victims, their families, witnesses and others who aid them the rights in the area of access to justice and fair treatment, Restitution and Compensation as basic human rights.

31. In India in the past the Judges have attempted to accord and confer the victim their rights in the criminal justice system. In the case of Vijay Valia Vs. State of Maharashtra, 1987 Mh.L.J.
49 whilst considering the question of appointment of Special Public Prosecutors, a Division Bench of the Bombay High Court sounded the requirement of the Courts accepting the right of the victim to partake in the criminal prosecution for doing the victim justice. The Court in various paras observed thus :

> *"Both the State and the private party have a right to prosecute the offender whether the offence is cognizable or non-cognizable, and the prosecution, whether launched by the private party or the State, is a prosecution on behalf of the State.*
>
> *The right to be heard includes the right to be represented by an able spokesman of one's confidence. This right belongs both to the accused and the complainant. It is not only the accused who is in need of assistance and protection of his rights but also the complainant. In fact, it is to vindicate the*

rights and grievances of the complainant and through him, of the State, that the prosecution is launched- whether by the State or the

private party.

.....whenever there is a request made by a private party to engage an advocate of his choice to be paid for by him, the request should be granted as a rule. The complainant in such cases is either a victim of the offence or is related to the victim or otherwise an aggrieved (11) Cr. Appeals 991, 992, 331 & 854/11 person. He has a right to be heard and vindicated. As stated earlier, the right to be heard implies a right to be effectively represented at the hearing of the case. He has therefore a right to engage an advocate of his choice. There is therefore no reason why the State should refuse him the permission to conduct the prosecution with the help of his advocate. If there are any reasons for refusal, they should be stated and communicated to him in writing."

32. In the case of Nilabati Behera (Smt) alias Lalita Behera Vs. State of Orissa & Ors. (1993) 2 SCC 746 the Supreme Court enjoined the courts to 'evolve' new tools and mould the remedies for harm done variously.

33. In that case the death of a son of 22 years in police custody entitled a mother to compensation as an heir of the "victim" by way of monetary amends and redressal by the State since the death constituted violation of the Fundamental Right to Life by the State's instrumentalities or servants.

34. The Code of Criminal Procedure was sought to be wholly amended in tune with the reforms suggested by the well known Malimath Committee constituted by the Ministry of Home Affairs, Govt. of India on 24th November, 2000 which submitted its Report popularly called the Malimath Committee Report to the Ministry of Home Affairs in March, 2003. Though the Report sought to make more than the usual cosmetic changes and indeed suggested recommendations in the areas of victims participation in trial and investigation and victim compensation by way of the grant of Rights of Victims of Crimes, even that committee's recommendations fell far short of the depth that the victim's place in the Indian criminal justice system merited.

35. The excerpts of the Report may be a guide to understanding the course of action that the legislature was to undertake :

> (1) The victim not, being a party, have no role to play in the trial except giving evidence as a witness.
>
> (2) The committee suggests that among the related parties in crime, the victim has the deepest interest in the 'vindication of justice'. Question remains how far the victim could co-operate with the prosecution when he/she is in

a traumatic stage of his/her life and his/her interest is threatened by people behind the actual culprit.

(3) Active participation of the victim during investigation would be helpful in discovering the truth and if the victim participates in the trial, the judge can maintain a neutral position and need not become part of investigation Machinery as in the Inquisitorial System.

36. An attempt at protecting the victim's rights and allowing their prosecution has been made for the first time under the proviso to Section 372 in Chapter XXIX dealing with appeals.

The noble principle :

"*Hear those who cannot shout;*

Listen to those who cannot speak"

for the first time found a foothold in our Criminal Justice System in which all but the most affected were heard.

37. The victims, even today, have no semblance of rights at the investigation stage and a feeble position at the trial stage of a criminal prosecution.

38. As far back as in the year 1996, this Court, in the case of Umaben W/o. Girish Namdar and another v. State of Gujarat and others, reported in (1996)1 GLR 703, had the occasion to consider, whether the complainant/informant should be permitted to oppose

the bail application preferred by the accused. The court observed thus :

"Thus, taking into consideration the overall picture, ordinarily it is indeed not necessary that the accused should make the complainant/informant a party in his bail application, however, if at the time of hearing the bail application, the complainant side comes to know that such bail application is filed and it desires to say something special to bring it to the special notice of the Court then in that case, it is always open to appear as a party in person or engage a lawyer for that purpose to appraise the concerned learned P.P. in charge of the case with whatever latest instructions they want to pass on to the Court for consideration but that is altogether a different thing. So far, the picture is not that bad wherein the Court has lost confidence in the Investigating Agency. If in future, if the Court feels that the desired assistance is not forthcoming and something is kept back from coming on the record from the prosecuting agency, then in that case, the Court may either on the request being made by the complainant/prosecution witnesses or of its own join the informant as a party to bail proceeding."

39. We are not impressed by the submissions of Mr.Popat, the learned counsel appearing for the writ-applicant, that Section 15A(3) of the Amendment Act, 2015, deserves to be struck down as ultra vires Articles 14 and 21 of the Constitution of India being manifestly arbitrary.

40. The issue, whether a law can be declared unconstitutional on the ground of arbitrariness, has received the attention of the

Supreme Court in a Constitution Bench Judgment in the case of Shayara Bano v. Union of India and others. R.F. Nariman and

U.U. Lalit, JJ. discredited the ratio of the following judgments, i.e., (i) State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312; (ii) Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 122, (1996) 3 SCC 709, (2016) 2 SCC 445, (2017) 9 SCC 1). In the above referred judgments of the Supreme Court, it was held that a law cannot be declared unconstitutional on the ground that it is arbitrary. The Judges pointed out a Larger Bench judgment in the case of Dr. K.R. Lakshmanan v. State of T.N. & another and Maneka Gandhi v. Union of India & another, where manifest arbitrariness is recognized as the third ground on which the legislative Act can be invalidated. The following discussion in this behalf is worthy of note:

> *"87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three Judge Bench decision in McDowell (State of A.P. v. McDowell and Co., (1996) 3 SCC 709) when it is said that a constitutional challenge can succeed on the ground that a law is disproportionate, excessive or unreasonable, yet such challenge would fail on the very ground of the law being unreasonable, unnecessary or unwarranted. The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but*

would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate

between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

88. We only need to point out that even after McDowell (State of A.P. v. McDowell and Co., (1996) 3 SCC 709), this Court has in fact negated statutory law on the ground of it being arbitrary and therefore violative of Article 14 of the Constitution of India. In Malpe Vishwanath Acharya, this Court held that after passage of time, a law can become arbitrary, and, 25 (1996) 2 SCC 226 26 (1978) 1 SCC 248 therefore, the freezing of rents at a 1940 market value under the Bombay Rent Act would be arbitrary and violative of Article 14 of the Constitution of India (see paras 8 to 15 and 31).

xx xx xx

99. However, in State of Bihar v. Bihar Distillery Ltd. (State of Bihar v. Bihar Distillery Ltd., (1997) 2 SCC 453), SCC at para 22, in State of M.P. v. Rakesh Kohli (State of M.P. v. Rakesh Kohli, (2012) 6 SCC 312 : (2012) 3 SCC (Civ) 481), SCC at paras 17 to 19, in Rajbala v. State of Haryana (Rajbala v. State of Haryana, (2016) 2 SCC 445), SCC at paras 53 to 65 and in Binoy Viswam v. Union of India (Binoy Viswam v. Union of India, (2017) 7 SCC 59), SCC at paras 80 to 82, McDowell (State of A.P. v. McDowell and Co., (1996) 3 SCC 709) was read as being absolute bar to the use of arbitrariness as a tool to strike down legislation

under Article 14. As has been noted by us earlier in this judgment, McDowell (State of A.P. v. McDowell and Co., (1996) 3 SCC 709) itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following McDowell (State of A.P. v. McDowell and Co., (1996) 3 SCC 709) are, therefore, no longer good law."

41. The historical development of the doctrine of arbitrariness has been noticed by the Hon'ble Judges in Shayara Bano's case (supra) in detail. It would suffice to reproduce paragraphs 67 to 69 respectively of the said judgment as the discussion in these paragraphs provide a sufficient guide as to how a doctrine of arbitrariness is to be applied while adjudging the constitutional validity of a legislation.

"67. We now come to the development of the doctrine of arbitrariness and its application to State action as a distinct doctrine on which Sate action may be struck down as being violative of the rule of law contained in Article 14. In a significant passage, Bhagwati, J., in E.P. Royappa v. State of T.N. stated:

> *"The last two grounds of challenge may be taken up together for consideration. Though we have formulated the third ground of challenge as a distinct and separate ground, it is really in substance and effect merely an aspect of the second ground based on violation of Articles 14 and*

16. Article 16 embodies the fundamental guarantee that there shall be equality

of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution, Article 16 is only an instance of the application of the concept of equality enshrined in Article 14. In other words, Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is founding faith, to use the words of Bose, J., a way of life, and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute

monarch. Where an act is arbitrary, it is implicit in it that it is unequal both

according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Article 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant consideration because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducting from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16. Mala fide exercise of power and arbitrariness are different lethal radiations emanating from the same vice: in fact the letter comprehends the former. Both are inhibited by Articles 14 and 16."

68. This was further flashed out in Maneka Gandhi v. Union of India, where after stating that various fundamental rights must be read together and must overlap and fertilise each other, Bhagwati, J., further amplified this doctrine as follows:

"7. Now, the question immediately arises as to what is the requirement of Article 14: what is the content and reach of the great equalising principle

enunciated in this article? There can be no doubt that it is a

founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made truncate its all-embracing scope and meaning, for to do so would to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. We must reiterate here what was pointed out by the majority in E.P.Royappa v. State of T.N., namely that: (SCC p. 38, para 85)

"85. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.

Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non- arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of

reasonableness in order to be in conformity with Article 14. It must be

right and just and fair and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.""

69. This was further clarified in A.L.Kalra v. Project and Equipment Corpn., following Royappa and holding that arbitrariness is a doctrine distinct from discrimination. It was held: (A.L.Kalra case SCC p. 328, para 19)

"19. It thus appears well settled that Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of (sic) protection by law. The Constitution Bench pertinently observed in Ajay Hasia case and put the matter beyond controversy when it said: (SCC p. 741, para 16)

"16. Wherever therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an authority under Article 12, Article 14 immediately springs into action and strikes down such State action.

This view was further elaborated and affirmed in D.S.Nakara v. Union of India. In Maneka Gandhi v.

Union of India it was observed that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It is thus too late in the day to contend that an executive action shown to be arbitrary is not either judicially reviewable or within the reach of Article 14. The same view was reiterated in Babita Prasad v. State of Bihar, SCC at p. 285, para 3."

42. The aforenoted doctrine is, thus, treated as one of the facets of both the Articles 14 and 21 respectively of the Constitution of India.

43. In the case of State of Jammu & Kashmir v. Triloki Nath Khosa and others, reported in AIR 1974 SC 1, the Constitution Bench of the Supreme Court upheld the legislation classifying the Assistant Engineers into Degree-holders and Diploma- holders respectively for the purpose of promotion. It was observed that the classification on the basis of the educational qualifications made with a view to achieving the administrative efficiency cannot be said to rest on any fortuitous circumstance and one has always to bear in mind the facts and circumstances in order to judge the validity of a classification. It was observed that there is a presumption of constitutionality of a statute. The burden is on one, who canvasses that certain statute is unconstitutional, to set out facts necessary to sustain the plea of discrimination and to adduce cogent and convincing evidence to prove those facts. In order to establish that the protection of the equal opportunity

clause has been denied to them, it is not enough for the petitioners to say that they have been treated

differently from others, not even enough that a differential treatment has been accorded to them in comparison with the other similarly circumstanced. Discrimination is the essence of classification and does violation to the constitutional guarantee of equality only if it rests on an unreasonable basis.

44. On the question of grounds on which a law is framed by the Legislation, i.e. the Parliament or the State Assembly, the decision of a three-Judge Bench of the Supreme Court in the case of State of A.P. and others vs. McDowell and Co. and others, reported in (1996)3 SCC 709, hold the field and was often referred to and relied upon. In the said judgment, the Supreme Court had opined that the grounds for striking down a statute framed by the Legislature are only two, viz. (i) lack of legislative competence, or (ii) violation of fundamental rights or any other constitutional provision. If the enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause or the equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6). No enactment can be struck down by just saying that it is arbitrary or unreasonable. 'Arbitrariness' is an expression used widely and rather indiscriminately - an expression of inherently imprecise import. Hence, some or the other constitutional infirmities have to be found before

invalidating an Act. An enactment cannot be struck down on the ground that the court thinks it unjustified. The Parliament and the Legislatures, composed as they are of the representatives of the people and

supposed to know and be aware of the need of the people and every aspect of what is good and bad for them. The court cannot sit on the judgment over their wisdom.

45. In the recent judgment of the Supreme Court in the case of Shayra Bano (supra), His Lordship Rohinton Fali Nariman, J., however, expressed a somewhat different view. It was observed that a statute can also be struck down if it is manifestly arbitrary. It was observed as under :

> *"101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers v. Union of India, (1985) SCC 641, stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by*

us above would apply to negate legislation as well under Article 14."

46. It is well settled that as long as the legislation has the necessary competence to frame a law and the law so framed is not violative of the fundamental rights enshrined in the Constitution or any of the constitutional provision, the court would not strike down the statute merely on the perception that the same is harsh or unjust.

47. Thus, as held by the Supreme Court, manifest arbitrariness must be something done by the Legislature capriciously, irrationally and/or without adequate determining principle. When something is done, which is excessive and disproportionate, such legislation would be manifestly arbitrary.

48. As discussed above, Section 15A(3) could be said to have been introduced with a definite object and the object is to prevent atrocities upon the members of the Scheduled Castes and Scheduled Tribes. Just because a provision of law in the Amendment Act enables the victim to appear before the competent court at all the stages of the proceedings by itself does not render the same arbitrary. We are saying so, because the impugned provision is not laying any fetters or unreasonable restrictions upon the court when it comes to exercising discretion as regards the grant of bail, etc.

49. The principles of law with regard to grant of bail remain the same. We reiterate the settled principles of law as regards the grant of bail thus :

(a) Whether there is or is not a reasonable ground for

believing that the applicant has committed the offence with which he is charged;

(b) the nature and gravity of the charge;

(c) severity of degree of the punishment which might fall in the particular circumstances in case of a conviction;

(d) the danger of the applicant's absconding if he is released on bail;

(e) the character and means and standing of the applicant;

(f) the danger of the alleged offence being continued or repeated, assuming that the accused is guilty of having committed that offence in the past;

(g) the danger of witnesses being tampered with;

(h) opportunity of the applicant to prepare his defence; and

(i) the fact that the applicant has already been some months in jail and that the trial is not likely to conclude for several months at least.

(j) The court must evaluate the entire available material against the accused very carefully. The

court must also clearly comprehend the exact role of the accused in the

case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern.

(k) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

50. The aforesaid general principles of law with regard to the grant of bail shall, in no manner, affect by virtue of the provisions incorporated under Chapter IVA of the Amendment Act, 2015.

51. It is true that the accused may not find the presence of the victim before the court very convenient, more particularly, when the accused is seeking bail. However, as stated above, the principles of law with regard to the grant of bail will remain the same, whether the accused is seeking bail in connection with an offence of murder or any offence under the Atrocities Act.

52. We are trying to answer the vociferous argument of Mr.Popat that Section 15A(3) of the Amendment Act

unnecessarily enforce or places restrictions as regards the discretion of the court. We are afraid, we are not in a position to accept this argument. All that Section 15A(3) provides is a right

to the victim to appear before the court and oppose the bail plea of the accused.

53. We are also not impressed by the argument of Mr.Popat that Section 15A(3) of the Amendment Act should be construed as directory and not mandatory. As is evident from a plain reading of the section quoted above, the victim must be served with notice of the bail application and must be provided an opportunity to be heard and advance argument. When a statute specifically provides a right to the victim/dependent to be heard at any proceedings in respect of bail, and if the court fails to provide such opportunity, then there is an inherent failure of justice. This procedure, in our opinion, cannot be bypassed. The non-compliance of the provision of Section 15A(3) of the Amendment Act would render an order null and void. If Section 15A(3) of the Amendment Act is to be construed as directory, then the very object and purpose with which such provision is enacted would got frustrated. In the aforesaid context, we may refer to and rely upon the Karnatake High Court decision in the case of Marenna @ Mareppa v. State [Criminal Petition No.200315 of 2020, decided on 21st July 2020]. We quote the relevant observations thus :

> *"Therefore, where a right of Audi Alterm Partem is conferred on the victim or his dependents, then the court has to give an opportunity/right of audience to the victim or his/her dependent to hear them as to enable them to participate in the proceedings including bail proceedings*

also. Therefore, a victim or dependent has a right to be heard by the Court

enabling the victim or dependents to participate in any proceedings in respect of not only bail proceedings but also in the proceedings of discharge, release, parole, conviction or sentence of an accused or any connected proceedings or arguments and file written submission on conviction, acquittal or sentencing of a case. The court is able to hear the victim or dependent in respect of a proceedings as enumerated in Sub-section (5) of Section 15-A of the SC/ST Act only when the victim or dependent are made as parties in the proceedings, otherwise it cannot be possible for the court to hear the victim/dependents and to receive any written submission as stated in the said provision. The victim or dependent may participate either personally or through an Advocate or through Public Prosecutor or Special Public Prosecutor or appear himself/herself. As per Section 15 of the SC/ST Act, the Special Public Prosecutor or exclusive Special Public Prosecutor are assigned the duties to represent the State in genre but in specie on behalf of the victim or dependent/complainant/first informant to prosecute the case.

But the parliament in its wisdom by inserting Chapter IV-A and Section 15-A of the SC/ST Act confers right of victims and witnesses and more expressly provided the victim or dependent to participate in any proceedings. Therefore, Sub-section (3) of Section 15-A of the SC/ST Act only enumerates giving such information to the victim or dependents through Special Public Prosecutor or State Government about any proceedings pending in

the court. But Sub-section (5) of Section 15-A of the SC/ST Act confers

a right on the victim or dependents to make them to participate in a proceedings and to hear their submissions and also to file written submissions in this regard in the proceedings pending before the court. Therefore, unless the victim or dependent as enumerated in Section 2(ec) of the SC/ST Act is made a party in the proceedings in the case pending before any court, it is not possible for the court to hear whatever submission to be put forth by the victim or dependents in the proceedings before the court. Therefore, under these circumstances, making the victim or dependent as party in the proceedings pending before any court is necessary and mandatory."

54. In LT.Col. Prithi Pal Singh Bedi v. Union of India, reported in 1983(3) SCC 140, the Supreme Court held as follows :

"8. The dominant purpose in construing a statute is to ascertain the intention of the Parliament. One of the well recognised canons of construction is that the legislature speaks its mind by use of correct expression and unless there is any ambiguity in the language of the provision the Court should adopt literal construction if it does not lead to an absurdity. ....If the literal construction leads to an absurdity, external aids to construction can be resorted to. To ascertain the literal meaning it is equally necessary first to ascertain the juxtaposition in which the rule is placed, the purpose for which it is enacted and the object which it is required to subserve and the authority

by which the rule is framed. This necessitates examination of the broad features of the Act."

55. In Nathi Devi v. Radha Devi Gupta, reported in AIR 2005 SC 648, the Supreme Court held that :

> *"The interpretation function of the Court is to discover the true legislative intent, it is trite that in interpreting a statute the Court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. When a language is plain and unambiguous and admits of only one meaning no question of construction of statute arises, for the Act speaks for itself. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the Court must look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness which may render the statute unconstitutional."*

56. In Nathi Devi (supra), it is further held that :

“It is equally well-settled that in interpreting a statute, effort should be made to give effect to each and every word used

by the Legislature. The Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting errors."

57. Crawford on 'Statutory Construction' (Ed.1940, Art.261, p.516) sets out the following passage from an American case approvingly as follows :

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other."

58. In State of U.P. v. Baburam Upadhya, reported in AIR 1961 SC 751, the Hon'ble Mr.Justice Subbarao has observed that :

"The Court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a

contingency of the non-compliance with the provisions; the fact that the

non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered."

59. In the same judgment, the Hon'ble Judge has further held that when a statute uses the word 'shall', prima facie it is mandatory but the court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute.

60. In May George v. Tahsildar, reported in (2010)13 SCC 98, the Supreme Court stated the precepts, which can be summed up and usefully applied by this Court, as follows :

"(a) While determining whether a provision is mandatory or directory, somewhat on similar lines as afore-noticed, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve;

(b) To find out the intent of the legislature, it may also be necessary to examine serious general inconveniences or injustices which may be caused to persons affected by the application of such provision;

(c) Whether the provisions are enabling the State to do some things and/or whether they prescribe the methodology or formalities for doing certain things;

(d) As a factor to determine legislative intent, the court may also consider, inter alia, the nature and design of the statute and the consequences which would flow from construing it, one way or the other;

(e) It is also permissible to examine the impact of other provisions in the same statute and the consequences of non-compliance of such provisions;

(f) Physiology of the provisions is not by itself a determinative factor. The use of the words `shall' or `may', respectively would ordinarily indicate imperative or directory character, but not always.

(g)The test to be applied is whether non-compliance with the provision would render the entire proceedings invalid or not.

(h) The Court has to give due weightage to whether the interpretation intended to be given by the Court would further the purpose of law or if this purpose could be defeated by terming it mandatory or otherwise."

61. In such circumstances referred to above, we hold that Section 15A(3) of the Amendment Act is mandatory and not directory.

62. Mr.Popat has placed strong reliance on the decision of the Supreme Court in the case of Nikesh Tarachand

Shah (supra). However, we are afraid, this decision is of no assistance to the

writ-applicant.

63. The twin conditions under Section 45(1) for the offences classified thereunder in Part-A of the Schedule was held arbitrary and discriminatory and invalid in Nikesh Tarachand Shah (supra). Insofar as the twin conditions for release of accused on bail under Section 45 of the Act, the Supreme Court held the same to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. Subsequently, Section 45 has been amended by Amendment Act 13 of 2008. The words "imprisonment for a term of imprisonment of more than three years under Part A of the Schedule" has been substituted with "accused of an offence under this Act.....".

64. Although there has been an amendment to Section 45 of the PMLA Act after the decision in the case of Nikesh Tarachand Shah (supra), there is no subsequent decision of the Supreme Court holding the said two conditions to be constitutionally valid even when brought back by way of an amendment. However, we are not concerned with the same having regard to the subject matter of the present litigation. We may only say that Section 45 of the Act was declared unconstitutional as it placed unreasonable restrictions upon the court for the purpose of considering the plea of bail. The Supreme Court noticed that there was manifest arbitrariness in the provision as the Public Prosecutor had to be given an opportunity to oppose the application for release on bail and where the Public Prosecutor would oppose the

bail application, the court would have to reach to the satisfaction that there are reasonable grounds for believing that the accused is not guilty of such offence and was

not likely to commit any offence while on bail. It is this unreasonableness which weighed with the Supreme Court in striking it down being violative of Articles 14 and 21 of the Constitution of India.

65. Our final conclusions may be summarised as under :

(1) Section 15A(3) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 (1 of 2016) is not ultra vires Articles 14 and 21 of the Constitution of India.

(2) Section 15A(3) of the Amendment Act, 2015, cannot be termed as manifestly arbitrary.

(3) Section 15A(3) of the Amendment Act, 2015, has to be construed as mandatory and not directory. The non-compliance of the said provision would render the order null and void.

(4) Section 15A(3) of the Amendment Act, 2015, in no manner imposes any unreasonable restrictions or fetters on the discretion of the competent court, for the purpose of considering the plea of bail. The general principles with regard to grant of bail would continue to apply even in cases under the Atrocities Act.

(5) The right of a person, who is accused of committing only bailable offence or offences, if any,

under the Act, to be released on bail, is absolute in view of the provisions

contained in Section 436(1) of the Code of Criminal Procedure. There is no provision in the Act which curtails the right of an accused to get bail in a case of bailable offence. The provisions contained in Section 15A(5) does not, in any manner, affect the absolute right of a person, who is accused of only bailable offence or offences, to be released on bail.

(6) When a person is accused of committing only bailable offence or offences under the Act, it is not mandatory to grant opportunity of hearing to the victim or the dependent as provided under Section 15A(5) of the Act in a proceeding relating to granting bail to such accused. However, before the court decides to decline such opportunity to the victim or the dependent, the court shall thoroughly verify and ascertain that the allegations against the accused disclose commission of only bailable offence or offences under the Act, by him.

66. In view of the aforesaid discussion, this writ-application fails and is hereby rejected.

(VIKRAM NATH, CJ.)

(J. B. PARDIWALA, J.)

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