IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.M.P(M) No. 1116 of 2020 along with Cr.M.P.M Nos. 1138-1144, 1184, 1268-1270, 1301, 1333, 1444, 1445, 1563, & 1592 of 2020

Date of Decision: Sep 14, 2020

Ami Chand ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Coram:
Hon'ble Mr. Justice Anoop Chitkara, Judge.

Whether approved for reporting?[1] ***YES***

For petitioners: Mr. Suresh Kumar Thakur, Mr. H.S.Rana, Mr. Peeyush Verma, Mr. I.N.Mehta, Mr. Deepak Kaushal, Mr. Neel Kamal Sharma, Mr. Mandeep Chandel, Mr. A.S.Rana, and Mr. Aditya Thakur, Advocates.

For State: Mr. Ashok Sharma, Ld. Advocate General, assisted by Mr. Nand Lal Thakur and Mr. Ashwani Sharma, Additional Advocates General, Mr. Ram Lal Thakur, Ms. Divya Sood, and Mr. Manoj Bagga, Deputy Advocates General, and Mr. Rajat Chauhan, Law Officer.

For Complainant: Mr. Anand Sharma, Advocate in CrMPM 1116 of 2020.

Amici Curiae:
Sr. Advocates Mr. Bipin Negi, Mr. Sanjeev Bhushan, and Mr. Virender Singh Chauhan; Advocates Mr. Chander Narayan Singh and Mr. Ishan Kashyap, assisted by Advocates Ms. Kiran Dhiman, Ms. Tim Saran, Ms. Babita, Ms. Megha Kapoor Gautam, and Ms. Shradha Karol.

PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

Anoop Chitkara, Judge:

1. All the petitions mentioned above raise interlinked propositions of law and are taken up together. The petitioners on being arraigned as accused of commission of offences punishable under the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989, after now called as '**SCSTPOA**,' have come up under section 439 of the Code of Criminal Procedure, 1973, in short '**CrPC**,' seeking permission to surrender before this Court, and simultaneously seeking release on ad-interim bail. Given the propositions of law involved, instead of accepting surrender, in the interim, the Court stayed the arrests subject to their joining the investigation.

Introduction:

2. Within 895 days of Independence, We, the people of India, abolished the millennia-old evil practice of untouchability through fundamental right guaranteed under Article 17 of India's Constitution by declaring that "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with the law. Consequently, the Parliament enacted the Protection of Civil Rights Act, 1955. Later on, vide Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, the Parliament passed a more stringent law, wherein Sections 18 & 18-A state that nothing in Section 438 of the CrPC shall apply concerning any case involving the arrest of any person on an accusation of having committed an offence under this Act. In State of M.P. v. Ram Kishna Balothia (1995) 3 SCC 221, (Para 9), Supreme Court declared that S. 18 of SCSTPOA does not violate Article 21 of the Constitution of India. However, in **Prathvi Raj v. Union of India**, AIR 2020 SC 1036, a three-judge bench of Supreme Court read down S. 18 by declaring as follows,

> (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 (i) shall not apply.

3. There will be no issue whatsoever when the investigating agency has already arrested a person accused of committing an offence under SCSTPOA. Such a person is eligible to move for bail under S. 439 CrPC. The proposition of law that crops up is the person against whom there are accusations of committing an offence under SCSTPOA and is not yet arrested. Furthermore, if such an accused cannot or does not want to opt for anticipatory bail under S. 438 CrPC and instead, voluntarily appears before Sessions Court or High Court by applying S. 439 CrPC and surrendering for such Court's disposal, and after deemed acceptance of such surrender, seeking interim bail till the disposal of bail application.

General provisions of bails:

4. Chapter XXXIII of CrPC codifies the provisions for bail and bonds. Following S. 436 CrPC, the arresting officer shall release the accused on bail in all bailable offences. However, in all Non Bailable offences, only the concerned Courts have the jurisdiction to grant bail and not the arresting officer.

5. Anticipatory bail provides that when a person apprehends her likely arrest in a FIR in a Non-Bailable offence, she may apply to the Court of Sessions or High Court, under S. 438 CrPC. Such Court may direct that in the event of her arrest, she shall be released on bail by the arresting officer. However, suppose she stands arrested before getting anticipatory bail or opts to surrender and thus taken into custody. In that case, she cannot file a petition for anticipatory bail because such a stage gets over. In such an event, the only remedy available to her is to file a regular bail petition in the Sessions Court or the High Court under Section 439 CrPC. Furthermore, when the offence is triable by Magistrate, she can also file a bail petition under Section 437 CrPC.

6. S. 437 CrPC states that when any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session; she may be released on bail. However, it is engraved with further restrictions and conditions detailed in the provision itself.

Subject to exceptions contained in S. 437 CrPC, usually, the Judicial Magistrates consider bails only in the offences triable before them. In **Prahlad Singh Bhati v. NCT, Delhi,** (2001) 4 SCC 280, Supreme Court holds,

> (6). Even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a Court of Session yet it would be proper and appropriate that in such a case the Magistrate directs the accused person to approach the Court of Session for the purposes of getting the relief of bail…
> (7). Powers of the Magistrate, while dealing with the applications for grant of bail, are regulated by the punishment prescribed for the offence in which the bail is sought. Generally speaking if punishment prescribed is for imprisonment for life and death penalty and the offence is exclusively triable by the Court of Session, Magistrate has no jurisdiction to grant bail unless the matter is covered by the provisos attached to S. 437 of the Code. The limitations circumscribing the jurisdiction of the Magistrate are evident and apparent. Assumption of jurisdiction to entertain the application is distinguishable from the exercise of the jurisdiction.

7. In **Ishan Vasant Deshmukh v. State of Maharashtra**, 2010 (7) RCR (Criminal) 332, Bombay High Court observed,

> (23). The observations of the Supreme Court [*In Prahlad Singh Bhati v. NCT, Delhi, (2001) 4 SCC 280*] that generally speaking if the punishment prescribed is that of imprisonment for life or death penalty, and the offence is exclusively triable by the Court of Sessions, the Magistrate has no jurisdiction to grant bail, unless the matter is covered by the provisos attached to section 437 of the Code. Thus, merely because an offence is punishable when imprisonment for life, it does not follow a Magistrate would have no jurisdiction to grant bail, unless offence is also exclusively triable by the Court of Sessions. This, implies that the Magistrate would be entitled to grant bail in cases triable by him even though punishment prescribed may extend to imprisonment for life.

8. When the person accused of committing a Non-bailable offence is in custody, then the only option available to her is to apply for regular bail under S. 439 CrPC, and when the offences are exclusively triable by Judicial Magistrates, then also under S. 437 CrPC. The filing of such an application is a legal right and cannot be

refused under any pretext. To grant or deny the bail is purely a Judicial function. The concerned Court may direct that any person accused of an offence and in custody be released on bail, subject to conditions and stipulations in S. 437 and 439 CrPC. However, neither the Parliament nor the Himachal Pradesh Legislative Assembly placed any restrictions on S. 437 or 439 CrPC in SCSTPOA.

History of interim bail on surrender:

9. Before the insertion of the provision of anticipatory bail in the Code of Criminal Procedure of 1973, the previous Code of Criminal Procedure of 1898 did not provide for anticipatory bail.

10. In **Emperor v. Mahammed Panah**, AIR 1934 Sind 131, Para 3, [CrPC 1898], Sindh High Court observed that the first step which must be taken by any person who wishes to be admitted to bail is to appear before the Court and to surrender.

11. In **Haidayat Ullah Khan v. The Crown**, AIR 1949 Lah 77, [CrPC 1898], full bench of Lahore High Court observed,

> (4). Whether the High Court can grant any relief, and if so what, to a person seeking an order for bail, in anticipation of his arrest for an offence?
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> (19). For the reasons given above, the reply which I would give to the question referred to us is that, in a proper case, the High Court has power under Section 498, Criminal P.C., to make an order that a person who is suspected of an offence for which he may be arrested by a police-officer or a Court, shall be admitted to bail.
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> (20). The exercise of this power should, however, be confined to cases in which, not only is good prima face ground made out for the grant of bail in respect of the offence alleged, but also, it should be shown that if the petitioner were to be arrested and refused bail, such an order would, in all probability, be made not from motives of furthering the ends of justice in relation to the case, but from some ulterior motive, and with the object of injuring the petitioner, or that the petitioner would in such an eventuality suffer irreparable harm.

12. In **Amir Chand v. Crown**, 1950 CrLJ 480, [CrPC 1898], Full Bench of High Court of East Punjab holds,

> (26). My conclusions may now be briefly summarised. The very notion of bail presupposes some form of previous restraint. Therefore, bail cannot be granted to a person who has not been arrested and for whose arrest no warrants have been issued. Section 498, Criminal Procedure Code, does not permit the High Court or the Court of Session to grant bail to anyone whose case is not covered by S.496 and S.497, Criminal Procedure Code. It follows, therefore, that bail can only be allowed to a person who has been arrested or detained without warrant or appears or is brought before a Court. Such person must be liable to arrest and must surrender himself before the question of bail can be considered. In the case of a person who is not under arrest, but for whose arrest warrants have been issued, bail can be allowed if he appears in Court and surrenders himself. No bail can be allowed to a person at liberty for whose arrest no warrants have been issued. The petitioners in the present case are, therefore, not entitled to bail. The question referred to the Full Bench is, therefore, answered in the negative.

13. In **Juhar Mal v. State**, AIR 1954 Raj 279, [CrPC 1898], a Division Bench of Rajasthan High Court observed,

> (1). The following question has been referred to by a learned Single Judge of this Court to a larger Bench for decision-- .
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> "Whether the High Court or the subordinate courts have power under the Code of Criminal Procedure to grant bail to a person seeking bail even though he may not have been arrested or detained in custody and no warrant of arrest has been issued against him, but prays that a case has been registered against him by the police and he will be arrested and thereby-disgraced if bail is not granted to him?"
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> (13). We are, therefore, of opinion that the question referred to us should be answered as follows--"Neither the High Court nor the subordinate courts have power under the Code of Criminal Procedure to grant bail to a person seeking bail if he has not been arrested or detained in custody or brought before them, or no warrant of arrest or even an order in writing for his arrest under Section 56, Cr. P. C. has been issued against him. The mere fact that a report of a cognizable offence has been made against him to the police and is under investigation, and he may be arrested by the officer-in-charge of the police station without a warrant and perhaps disgraced does not empower the court to grant him bail, as, in these circumstances, there is no actual danger of restraint to the person concerned.

14. Even under the new code of 1973, the State of Uttar Pradesh has not enforced the provision of S. 438 CrPC, and thus the anticipatory bail is not permissible in the FIRs registered in its territorial jurisdiction. However, In **Lal Kamlendra Pratap Singh v. State of U.P.**, (2009) 4 SCC 437, Supreme Court holds,

> (6). Learned counsel for the appellant apprehends that the appellant will be arrested as there is no provision for anticipatory bail in the State of U.P. He placed reliance on a decision of the Allahabad High Court in the case of Amaravati v. State of U.P., [2005 Crl.L.J 755] in which a Seven Judge Full Bench of the Allahabad High Court held that the Court, if it deems fit in the facts and circumstances of the case, may grant interim bail pending final disposal of the bail application. The Full Bench also observed that arrest is not a must whenever an F.I.R. of a cognizable offence is lodged. The Full Bench placed reliance on the decision of this Court in Joginder Kumar v. State of U.P., [1994 Cr.L.J. 1981].
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> (7). We fully agree with the view of the High Court in Amaravati's case and we direct that the said decision be followed by all Courts in U.P. in letter and spirit, particularly since the provision for anticipatory bail does not exist in U.P.
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> (8). In appropriate cases interim bail should be granted pending disposal of the final bail application, since arrest and detention of a person can cause irreparable loss to a person's reputation, as held by this Court in Joginder Kumar's case (supra). Also, arrest is not a must in all cases of cognizable offences, and in deciding whether to arrest or not the police officer must be guided and act according to the principles laid down in Joginder Kumar's case (supra).

15. In **Hema Mishra v. State of Uttar Pradesh**, (2014) 4 SCC 453, Supreme Court of India holds,

> (21). I may, however, point out that there is unanimity in the view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application.

16. Thus, the Supreme Court read down the effect of repealing the provision of anticipatory bail by the Legislature of Uttar Pradesh.

Arrest is not mandatory in non-bailable offences because it depends upon the nature of the crime, gravity of the offence, criminal history of the offender, and other attending circumstances:

17. When a person is arraigned as an accused under SCSTPOA, then in appropriate cases, the SHO need not get custody of the accused, and can file a police report without arresting the accused, just intimating her to appear before the concerned Court.

18. In **Joginder Kumar v. State of U.P.**, 1994 4 SCC 260, a three-Judge bench of Supreme Court holds,

> (20). ...No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the Officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police Officer issues notice to person to attend the Station House and not to leave Station without permission would do.

19. In **Bharat Chaudhary v. State of Bihar**, (2003) 8 SCC 77, Supreme Court holds,

> (7). …In our opinion, the courts i.e. the Court of Sessions, High Court or this Court has the necessary power vested in them to grant anticipatory bail in non-bailable offences under Section 438 of the CrPC even when cognizance is taken or charge sheet is filed provided the facts of the case require the Court to do so.

20. In **Arnesh Kumar v. State of Bihar**, (2014) 8 SCC 273, Supreme Court holds,

> (11). Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:
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> 1). All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.P.C.;
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> 2). All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);
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> 3). The police officer shall forward the check list duly filled and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;
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> 4). The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;
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> 5). The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;
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> 6). Notice of appearance in terms of Section 41A of Cr.P.C. be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;
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> 7). Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.
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> 8). Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned

> shall be liable for departmental action by the appropriate High Court.
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> (12). We hasten to add that the directions aforesaid shall not only apply to the cases under Section 498A of the I.P.C. or Section 4 of the Dowry Prohibition Act, the case in hand, but also such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

Scope to file a petition under section 439 CrPC for offences of SCSTPOA offering surrender in the Court seeking interim bail:

21. Every person in custody has a statutory right to apply for bail, and denial of such a request would directly conflict with Article 21 of India's Constitution. However, any person applying for bail under S. 439 CrPC must fulfill twin conditions, (i) Having been accused of some non-bailable offence, and (ii) In custody impliedly for the said offence. In the absence of any restrictions imposed by the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 on the powers of Courts under S. 439 CrPC, any person against whom accusations have been made of committing an offence under SCSTPOA would be entitled to seek bail under S. 439 CrPC provided she is in custody or offers to do so.

22. In **P.S.R. Sadhanantham v. Arunachalam**, (1980) 3 SCC 141, Constitutional Bench of Supreme Court holds,

> (3). Article 21, in its sublime brevity, guardians human liberty by insisting on the prescription of procedure established by law, not fiat as sine qua non for deprivation of personal freedom. And those procedures so established must be fair, not fanciful, nor formal nor flimsy, as laid down in Maneka Gandhi's case, [(1978) 1 SCC 248]. So, it is axiomatic that our constitutional jurisprudence mandates the State not to deprive a person of his personal liberty without adherence to fair procedure laid down by law.

23. Unlike Section 37 of the Narcotics Drugs and Psychotropic Substances Act, 1985, neither the Legislature has carved out any exceptions from general provisions of S. 437 & 439 CrPC relating to the grant of bail by enactment in the Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act, 1989, nor does it impose

any fetters in exercising powers under Section 439 CrPC. Thus, Sessions Court and High Court's powers, relating to SCSTPOA, remain untrammeled under section 439 CrPC.

24. When a person seeks surrender and simultaneously pray for interim bail, under SCSTPOA, she cannot pray for interim bail by appearing before a Magistrate under S. 437 CrPC. The reason being that under S. 14 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, the offences are exclusively triable by Special Courts, which shall be the Court of Sessions. However, while exercising powers under sections 438 & 439 CrPC, the Sessions and High Court import the relevant provisions of S. 437 CrPC.

25. In **Basanta Sahu v. Padma Charan Sahu**, 1990 LawSuit(Ori) 78, a Division bench of Orissa High Court observed,

> (3). … We deprecate the practice which is developing in some quarters of seeking bail Under Section 439, Cr.P.C from the learned Sessions Judge in proceedings Under Section 438, Cr. P.C. by-passing the Magistrate who should ordinarily deal with the matter as the Court of first instance. Since under the procedure, the Magistrate is to be approached first, by-passing him should not be encouraged.

26. However, Supreme Court in **Sundeep Kumar Bafna v. State of Maharashtra**, AIR 2014 SC 1745, Supreme Court holds,

> (26). In conclusion, therefore, we are of the opinion that the learned Single Judge erred in law in holding that he was devoid of jurisdiction so far as the application presented to him by the appellant before us was concerned. Conceptually, he could have declined to accept the prayer to surrender to the Courts' custody, although, we are presently not aware of any reason for this option to be exercised. Once the prayer for surrender is accepted, the Appellant before us would come into the custody of the Court within the contemplation of Section 439 CrPC. The Sessions Court as well as the High Court, both of which exercised concurrent powers under Section 439, would then have to venture to the merits of the matter so as to decide whether the applicant/appellant had shown sufficient reason or grounds for being enlarged on bail.

27. In **Rajendra Kishore Kanungo v. State of Orissa**, 1999 SCC OnLine Ori 175, Orissa High Court observed,

> (12). …An accused may be brought before a Magistrate by the police, or an accused may, surrender voluntarily before the Magistrate having jurisdiction. The question of accepting or not accepting such surrender can arise only when there is doubt in the mind of the Magistrate regarding the status of the person proffering to surrender before the Court. If from the records available, the Magistrate is in doubt as to whether the person appearing before the Magistrate is an accused or not, the Magistrate may not accept such surrender. Where, however, there is no such doubt in this regard, there is no occasion for a Magistrate to refuse surrender.

28. In **State v. Jagan Singh**, 1953 CrLJ 74, Madhya Pradesh High Court observed,

> (2). In all these cases certain persons directly appeared before the magistrate, stating that the police had not yet arrested them, but might arrest them in connection with some cognizable cases. The applicants feared that the arrest by the Police and their being marched to the Magistrate might cause them inconvenience of a serious nature. Accordingly, they themselves surrendered with a request that the magistrate might ascertain whether they were wanted by the police, and take bail and release them. The magistrate accordingly sent for the Public Prosecutor and asked him whether there was any process against these, and whether they were going to be arrested, The Public Prosecutor reported that no doubt the cases they were referring to were being investigated but till then no steps had been taken to arrest them; but it was not unlikely these men would be arrested in future though he could not be definite. Thereupon, the magistrate took bail for their appearance when and if wanted.
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> (3). I am unable to understand what else the Magistrate could have done. He could not put them into lock-up because Police have not shown any desire to arrest them till now; and certainly there was no warrant outstanding. The magistrate could certainly let them go, but then they themselves wanted to be on bail, so that they might come directly to the magistrate if and when the police wanted them in connection with the case concerned. It is certainly a restriction of the liberties of these persons, but they were voluntarily seeking it.

29. Before accepting surrender, the concerned Court must satisfy the existence of the accused's involvement in the commission of a non-bailable offence. When the

Court is in doubt, it can ask the Public Prosecutor to confirm the prima facie facts through internet, phone, WhatsApp, e-mail, or any other fast-medium. Based on such input, the Court can form a prima facie opinion to accept, reject, or postpone the surrender. In the hiatus, when the accused on her own has appeared before the Court, and such Court is yet to make up its mind to accept surrender or not, the status of such accused is that of a free person. One of the solutions to come out of the suspended animation is to get the Prosecutor's input at the earliest and expedite consideration of interim relief, preferably on the same day.

Surrender:

30. In **Dr. N.T. Desai v. State of Gujarat**, 1996 SCC Online Guj 428, Gujrat High Court observed,

> (14). This takes us now to yet another important contention of learned A.P.P. that the petitioner even if he surrenders to the custody of this Court, the same should not be accepted and instead be asked to go before the Special Court for the needful reliefs as provided ordinarily under the law. This contention of the learned A.P.P. cannot be accepted, as it is quite unfair, harsh and unjust. If this Court has jurisdiction to take accused in its custody, why should he be denied bail? Merely because he is an accused of offence/s under the Atrocity Act? Does such pre-trial prejudice against the accused enhance the image of the Court doing justice? If on the allegation of having committed a non-bailable offence under the Atrocities Act accused instead of approaching High Court surrenders to the custody of the Special Court, depending upon the facts and circumstances of the case, even the Special Court ought too and must accept the custody of the accused and release him on bail, why indeed the High Court which is undoubtedly superior Court cannot take the accused in its custody and order bail. This has already been discussed and done by this Court in the case of Jashubhai Majdan Gadhvi v. State of Gujarat [(1992 (2) GLH 405] and accordingly, there is indeed no reason for this Court to disagree with the said decision.

31. In **Sundeep Kumar Bafna v. State of Maharashtra**, (2014) 16 SCC 623, Supreme Court holds,

(2). In the impugned Judgment, the learned Single Judge has opined that when the Appellant's plea to surrender before the Court is accepted and he is assumed to be in its custody, the police would be deprived of getting his custody, which is not contemplated by law, and thus, the Appellant "is required to be arrested or otherwise he has to surrender before the Court which can send him to remand either to the police custody or to the Magisterial custody and this can only be done under Section 167 of CrPC by the Magistrate and that order cannot be passed at the High Court level.

(16). If the third sentence of para 48 is discordant to Niranjan Singh, the view of the coordinate Bench of earlier vintage must prevail, and this discipline demands and constrains us also to adhere to Niranjan Singh; ergo, we reiterate that a person is in custody no sooner he surrenders before the police or before the appropriate Court...

(24). In this analysis, the opinion in the impugned Judgment incorrectly concludes that the High Court is bereft or devoid of power to jurisdiction upon a petition which firstly pleads surrender and, thereafter, prays for bail. The High Court could have perfunctorily taken the Appellant into its custody and then proceeded with the perusal of the prayer for bail; in the event of its coming to the conclusion that sufficient grounds had not been disclosed for enlargement on bail, necessary orders for judicial or police custody could have been ordained. A Judge is expected to perform his onerous calling impervious of any public pressure that may be brought to bear on him.

(27). On behalf of the State, the submission is that the prosecution should be afforded a free and fair opportunity of subjecting the accused to custody for interrogation as provided under Section 167 CrPC. This power rests with the Magistrate and not with the High Court, which is the Court of revision and appeal; therefore, the High Court under Section 482 CrPC can only correct or rectify an order passed without jurisdiction by a subordinate Court. Learned State counsel submits that the High Court in exercise of powers under Section 482 can convert the nature of custody from police custody to judicial custody and vice versa, but cannot pass an order of first remanding to custody. Therefore, the only avenue open to the accused is to appear before the Magistrate who is empowered under Section 167 CrPC. Thereupon, the Magistrate can order for police custody or judicial custody or enlarge him on bail. On behalf of the State, it is contended that if accused persons are permitted to surrender to the High Court, it is capable of having, if not a disastrous, certainly a deleterious effect on investigations and shall open up the flood gates for accused persons to make

> strategies by keeping themselves away from the investigating agencies for months on end. The argument continues that in this manner absconding accused in several sensitive cases, affecting the security of the nation or the economy of the country, would take advantage of such an interpretation of law and get away from the clutches of the investigating officer. We are not impressed by the arguments articulated by learned Senior Counsel for the complainant or informant because it is axiomatic that any infraction or inroad to the freedom of an individual is possible only by some clear unequivocal and unambiguous procedure known to law.

32. Under CrPC, it is always open to the Investigating Officer to apply for remand, subject to the absolute ceiling of 15 days. On this, the Magistrate would take a judicial decision. Thus, the Sessions and High Court are under a legal obligation to accept the accused's surrender in an FIR disclosing Non-bailable offences, who has volunteered to do so by applying 439 CrPC and simultaneously seeking interim bail. This right is not just confined to the FIR under the Scheduled Castes, and Scheduled Tribes (Prevention of Atrocities) Act, 1989, but can be resorted to for any penal offence.

Refusal to accept surrender:

33. In **Manubhai Ratilal Patel v. State of Gujarat**, (2013) 1 SCC 314, Supreme Court holds,

> (24). The act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary.

34. In **Bhura Lal v. State Rajasthan**, 1994 (4) R.C.R. (Criminal) 199, Full Bench of Rajasthan High Court observed,

> (34.3) The Magistrate having jurisdiction over the area in which offences under SC/ST Act are alleged to be committed, empowered to deal with the cases under Section 190 of the Code will also have the jurisdiction to deal with cases during the "inquiry" i.e. pre-trial stages including exercise of power under Section 156(3) of the Code and thereafter he shall transmit all such cases to the special Court situated within that jurisdiction.

35. While considering plea of surrender and interim bail, when the Court gets information of FIR disclosing only bailable offences, then such Court has to set her free and let her go. On the contrary, when upon surrender, the accused neither pleads nor orally contends for interim bail, then it amounts to subverting S. 437 CrPC and bypassing the Courts of Judicial Magistrate. In such matters, the Court need not accept surrender and leave it to the Public Prosecutor to take a call, or the concerned SHO/I.O., if present in Court.

On surrender seeking interim bail, in an FIR disclosing Non-Bailable offences, the accused would be in deemed custody of such Court:

36. In **Bishnu Mallick v. State of Orissa**, 1993 CrLJ 3817, Orissa High Court observed,

> (3). … 'Custody' always involves a concept of two parties, one who takes into custody or the other whose custody has been taken of. To effect a custody, the first one must act, though the other may either be active or be passive. It is true that when a petition is made by an accused surrendering before a Court, he offers his own custody to the Court. The Court if it accepts the application and assumes custody, it has accepted the custody of the accused and thereafter is bound to deal with him on his application for bail either to refuse or allow the same. In the event it is refused, the Court has to remand him to either police or judicial custody. It is however another thing to say that on the filing of the surrender application the Court must of necessity be deemed to have taken custody. There is no warrant for such proposition….

37. In Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440, Supreme Court holds,

> (48). Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice-versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomally resulting in serious consequences, vide Roshan Beevi (1984 Cri Li 134 (FB) (Mad)) (supra).

Custody is sine qua non to consider application under S. 439 CrPC:

38. Bail implies release from restraint. -**Public Prosecutor, Andhra Pradesh v. G Manikya Rao**, AIR 1959 AP 639, DB, Para 7.

39. In **Niranjan Singh v. Prabhakar Rajaram Kharote**, 1980 (2) SCC 559, Supreme Court holds,

> (6). ... We agree that no person accused of an offence can move the court for bail under Section 439 Criminal Procedure Code unless he is in custody.
>
> (7). When is a person in custody, within the meaning of Section 439 Criminal Procedure Code? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439.
>
> (8). Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is

> physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.
>
> (9). He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can, be stated to be in judicial custody when he surrenders before the court and submits to its directions. In the present case, the police officers applied for bail before a Magistrate who refused bail and still the accused, without surrendering before the Magistrate, obtained an order for stay to move the Sessions Court. This direction of the Magistrate was wholly irregular and may be, enabled the accused persons to circumvent the principle of Section 439 CrPC. We might have taken a serious view of such a course, indifferent to mandatory provisions by the subordinate magistracy but for the fact that in the present case the accused made up for it by surrender before the Sessions Court. Thus, the Sessions Court acquired jurisdiction to consider the bail application. It could have refused bail and remanded the accused to custody, but, in the circumstances and for the reasons mentioned by it, exercised its jurisdiction in favour of grant of bail. The High Court added to the conditions subject to which bail was to be granted and mentioned that the accused had submitted to the custody of the court. We, therefore, do not proceed to upset the order on this ground. Had the circumstances been different we would have demolished the order for bail. We may frankly state that had we been left to ourselves we might not have granted bail but sitting under Article 136 do not feel that we should interfere with a discretion exercised by the two courts below.

40. In **Nirmal Jeet Kaur v. State of Madhya Pradesh**, (2004) 7 SCC 558, Supreme Court held that for making an application under Section 439 the fundamental requirement is that the accused should be in custody.

41. In **State of Haryana v. Dinesh Kumar**, (2008) 3 SCC 222, Supreme Court holds,

> (25). We also agree with Mr. Anoop Chaudhary"s submission that unless a person accused of an offence is in custody, he cannot move the Court for bail under Section 439 of the Code, which provides for release on bail of any person accused of an offence and in custody (Emphasis supplied). The pre-condition, therefore, for applying the provisions of Section 439 of the Code is that a person who is an accused must be in custody and his movements must have been restricted before he can move

> for bail. This aspect of the matter was considered in Niranjan Singh's case where it was held that a person can be stated to be in judicial custody when he surrenders before the Court and submits to its directions.

42. In **Karam Das v. State of Himachal Pradesh**, 1995 CrLJ 2995, a co-ordinate bench of this Court holds,

> (6). It is well established that no person accused of an offence can move the Court for bail under Section 439 Cr. P. C. unless he is in custody. As already stated, the accused persons appeared and surrendered themselves before this Court as is apparent from the previous order dated 22-7-1994. In the circumstances, the petitioners can be stated to be in judicial custody when each one of them surrendered before this Court and submitted to its directions. I am fortified in taking this view by the case of Niranjan Singh v. Prabhakar Rajaram Kharote. In this view of the matter, the instant petition is maintainable.

43. In **Baldev Singh Bhardwaj v. State of Himachal Pradesh**, 2003 (2) ShimLC 55, Himachal High Court holds,

> (10). In the present case the accused surrendered in the Court on 7th April. 2003 and is present in the Court even today submitting himself to the jurisdiction of the Court. Therefore, he would be deemed to be in custody for the purpose of Section 439 of the Code.

44. Keeping pace with the changes in the law, the meaning of bail is no more confined to the dictionary but has become multifaceted. Bail comes into play only when a person apprehends arrest or is under arrest or custody**.**

In unavoidable circumstances, personal presence of accused can be dispensed with, who shall be considered in deemed custody:

45. In **Muzafaruddin v. State of Hyderabad**, AIR 1953 Hyd 219, the full bench observed,

> (a) that since the accused was not arrested, he cannot be granted bail, and
> (b) that an application presented by an advocate on his behalf without his appearing personally in Court cannot be entertained.
>
> (3). The Bench referred these questions to the Full Bench
>
> (17). The only question which remains is whether his physical presence in Court is necessary before he can be granted bail.

> The learned Advocate-General submits that bail cannot be given to a person who has not appeared in Court personally or has not surrendered himself to the Court, while the Advocate for the applicant contends that this is not necessary. No authorities, however, have been cited which deal with this aspect of the case. In our view, where a person against whom an arrest warrant has been issued by the Court or who has been ordered to be arrested, is physically in a position to appear before the Court and does not so appear or surrender himself, he will not be entitled to bail. But, there may be instances where a person, in spite of his being desirous of appearing and surrendering himself to the Court is physically incapable of coming to Court or being brought to Court, except by exposing himself to danger of his life, applies for bail disclosing the place or abode in which he is staying, the condition in which he is and the reason, for his non-appearance personally, he may be deemed to have surrendered himself as being within reach of Court, if the Court after directing its mind to this question comes to the conclusion in the circumstances stated in the petition that his personal appearance is not possible except by exposing his life to risk or danger.

46. In **Sunder Singh v. State**, AIR 1954 Hyd 55, High Court observed,

> (2). The point of law argued before us by the learned Government Advocate, Shri Gopalrao Murumkar, is that the accused is neither present in the court nor has he been arrested nor is he under detention; therefore, under Section 497 CrPC, he cannot be released on bail. With regard to the question of the presence of the accused in the court, it is submitted in the petition that he is seriously ill, very weak, suffering from dysentery and is unable to move about from his place and make himself bodily present in the court premises. At the time of submitting the petition, he was lying ill within the jurisdiction of the court. In - 'Muzafaruddin v. State of Hyderabad' AIR 1953 Hyd 219 (FB)'(A), it has been held that if the accused is not in a position on account of the illness to make himself bodily present in the court premises, he is entitled to be represented by the Counsel and he will be considered to have appeared in the court for the purposes of Section 497 if he submits a petition through his Counsel in such cases. In view of that ruling we are of the opinion that the petition filed through his Counsel is sufficient under Section 497.

47. In **Niranjan Singh v. Prabhakar Rajaram Kharote**, 1980 (2) SCC 559, Supreme Court holds

> (8). Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.

48. Thus, the Court still can have physical control over such a person who in distress seeks surrender through her Counsel, due to the factors beyond her control.

Procedure when after taking custody, the Court denies the interim bail or withdraws interim protection:

49. Article 22(2) of the Constitution provides that every person arrested and detained in custody shall be produced before the nearest Magistrate within 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of Magistrate. Its further mandate is that no such person shall be detained in custody beyond the said period without the Magistrate's authority.

50. S. 57 CrPC states that no police officer shall detain in custody a person arrested without a warrant for a more extended period than under all the case circumstances is reasonable. Such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from arrest to the Magistrates Court.

51. In **Central Bureau of Investigation v. Anupam J. Kulkarni**, (1992) 3 SCC 141, Supreme Court holds,

> (13). Whenever any person is arrested under Section 57 Cr. P.C. he should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. If Judicial magistrate is not available, the police officer may transmit the arrested accused to the nearest Executive Magistrate on whom the judicial powers have been conferred. The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody i.e. either police or judicial from time to time but the

> total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice versa.

52. In case, after accepting surrender, the Court denies interim bail or withdraws the protection, then the custody of the accused be handed over to the Judicial Magistrate, (Executive Magistrate in case no Judicial Magistrate is assigned), under whose jurisdiction the said Court falls. It is for the Investigator to seek police custody from the concerned Magistrate and seek transit remand. It is for the Transit Officer to hand over the custody to the Judicial Magistrate would be the SHO/I.O., or any Police official present in the said FIR, and otherwise through the Public Prosecutor.

Interim bail:

53. In all bail applications filed before Judicial Magistrates under Section 437 CrPC, including for petty offences, the accused presents her custody to the concerned Magistrate, who, after consideration, may grant bail. However, when the reference material like a Police report is not available, sometimes because the application filed at the fag-end of the day, the Magistrate, after considering the prima facie material available at that stage, releases the accused from its custody by giving interim bail.

54. In **Mukesh Kishanpuria v. State of West Bengal**, (2010) 15 SCC 154, Supreme Court holds,

> (2). This petition has been filed against the impugned judgment and order dated 26.03.2010 of the High Court of Calcutta whereby the petition under Section 438 CrPC for grant of anticipatory bail to the petitioner herein has been rejected.
> (3). We have gone through the impugned judgment and order and also perused the record. We also see no reason to grant anticipatory bail to the petitioner.
> (4). However, the petitioner may apply for regular bail before the Court concerned and alongwith the said application, he may file an application for interim bail pending disposal of the regular bail application. We have made it clear on a number of occasions that the power to grant regular bail includes the

power to grant interim bail pending final disposal of the regular bail application.

This power is inherent in the power to grant bail, particularly in view of Article 21 of the Constitution of India. We are of the opinion that in view of Article 21 of the Constitution, a person should not be compelled to go to jail if he can establish *prima facie* that in the facts of the case he is innocent.

(5). Hence, if the present petitioner applies for regular bail before the Court concerned, he may also file an application for interim bail alongwith the same, which application shall be decided on the same day on which it is filed, pending final disposal of the regular bail application.

55. In **Sukhwant Singh v. State of Punjab**, (2009) 7 SCC 559, Supreme Court holds,

This petition has been filed challenging the judgment and order dated 24.03.2009 of a learned Single Judge of the High Court of Punjab & Haryana at Chandigarh whereby the Application under Section 438 of the Cr.P.C. for grant of anticipatory bail has been dismissed.

(1). We are not inclined to interfere with the impugned judgment and order.

(2). However, following the decision of this Court in the case of Kamlendra Pratap Singh v. State of U.P. and Ors., we reiterate that a Court hearing a regular bail application has got inherent power to grant interim bail pending final disposal of the bail application. In our opinion, this is the proper view in view of Article 21 of the Constitution of India which protects the life and liberty of every person.

(3). When a person applies for regular bail then the court concerned ordinarily lists that application after a few days so that it can look into the case diary which has to be obtained from the police authorities and in the meantime the applicant has to go to jail. Even if the applicant is released on bail thereafter, his reputation may be tarnished irreparably in society. The reputation of a person is his valuable asset, and is a facet of his right under Article 21 of the Constitution vide Deepak Bajaj v. State of Maharashtra and Anr. JT 2008 (11) SC 609. Hence, we are of the opinion that in the power to grant bail there is inherent power in the court concerned to grant interim bail to a person pending final disposal of the bail application. Of course, it is in the discretion of the court concerned to grant interim bail or not but the power is certainly there.

(4). In the present case, if the petitioners surrender before the Court concerned and makes a prayer for grant of interim bail

> pending final disposal of the bail application, the same shall be considered and decided on the same day.

56. In **Haji Peer Bux v. State of Uttar Pradesh**, 1993 CrLJ 3574, a division bench of Allahabad High Court, while dealing with scope of bail in the absence of application of S. 438 CrPC in the State of UP, observed,

> (14). Unfortunately there are still some supporters of the outmoded concept that the accused must be put in prison before their bail applications are considered. The word 'custody' occurring in Section 439 of the Code simply implies that the person seeking bail should not be a fugitive…

57. When persons stand arraigned as accused in SCSTPOA, the Investigators might not arrest them in every case. Probably despite being aware of this legal position, they prefer to surrender before the Courts handing over their custody voluntarily. It demonstrates strong belief in the Courts' majesty that they willingly put their liberty at stake. Only the overzealous Investigators would be disappointed, depriving them of marching with arrested accused to the Police station with paparazzi shooting with their cameras and reporting live on social media, forgetting in the process the uncountable social repercussions.

58. In **Issma v. State of U.P.**, 1993 CrLJ 2432, Allahabad High Court observed,

> (5). It is matter of common knowledge that the professional criminals falsely implicate innocent persons who dare to stand as witness against them in any case. To add to the above, cases have come to light where police officers have been found to have framed up false cases and did not spare even the respectable citizens of our society. There has been spurt in such incidents in the recent past. A warning signal came when a false case was framed up against the Chief Judicial Magistrate, Nadiad for having consumed liquor. In (1991) 4 SCC 406 the Supreme Court characterises the same as a "horrendous incident". The incident sent shock waves throughout the country. This was the plight of a person who held a high judicial office what then is the plight of an ordinary citizen? Can the Courts afford to take an insular attitude to the changing currents of time.
>
> (7). Putting an innocent person behind the jail bars even for a short period disfigures his honour and prestige in the society. Even if such a person is acquitted; none has time to read and go

through the reasons of his acquittal. The incarceration of a woman in jail affects her entire life. If unmarried, such a woman would not even get a suitable match. In a civilised society the honour of oneself is one's most precious possession. In Bhagwat Gita the Lord told to Arjun :

> "Akirlinchapi Bhutani Kathaishyanti te-a vyayam Sambhavitasua Chakirtir Maranadatirichayate." (234) (Men will recount why perpetual dishonour, and to one highly esteemed, dishonour exceeded death.)

(10). The question which remains to be considered is whether the Subordinate Courts i.e. the Courts of Sessions and the Courts of Magistrates can release an accused on personal bond for a short period pending the disposal of a bail application. It is well settled that when a court has jurisdiction to grant a relief, such jurisdiction includes the power of granting incidental ancillary or limited relief short of the ultimate and final relief. In *Income-tax Officer v. M.K. Mohd. Kunhi, AIR 1969 Supreme Court 430*, the question arose whether the Income-Tax Appellate Tribunal had the power to grant stay in the absence of a specific provision regarding the same. The Supreme Court observed :-

> "In our opinion, the Appellate Tribunal must be held to have power to grant stay as incidental or ancillary relief to its appellate jurisdiction."

(11). Since the Courts of Magistrates and the Courts of Sessions have jurisdiction to grant the ultimate relief of bail, they also have jurisdiction to grant limited relief short of grant of bail in suitable cases by way of releasing an accused on personal bond for a short period as an ancillary or incidental relief. The argument that if the accused is released on personal bonds it affects the statutory right of the police to arrest the accused, is fallacious. As soon as an accused surrenders before a Court he submits to the jurisdiction of the Court and the right of the police to arrest him does not exist thereafter. When an accused surrenders and is released on personal bond, he remains in the custody of the Court. Release on personal bond is nothing but a release on temporarily bail, pending the final disposal of the bail application in order to make the remedy effective and efficacious.

(12). Courts in a free nation cannot remain by standers to injustice being perpetrated and shut their eyes to the incarceration of innocent persons in jail, on false and frivolous accusations. The Court has to step in and safeguard an innocent person, by releasing him on personal bond pending the disposal

of the bail application. An accused who has been so released on personal bond still remains in the custody of the Court.

(20). To sum up, my conclusions are :

1). When an accused surrenders in the court and applies for bail, the subordinate courts have jurisdiction to release him on personal bond and there is nothing in the case of Dr. Hidayat Hussain Khan (supra) which lays down to the contrary.

2). The courts should be liberal in this matter, but the facts and the circumstances of each case should be considered and taken into account.

3). In cases of women and children courts should prefer to release them on personal bonds pending the disposal of their bail applications as there is always a fear of sex abuse and child abuse in jail as well as police custody and no one likes to report such outrages to the authorities out of shame or other reasons.

4). The bail applications should be decided as expeditiously as possible and should not be allowed to remain pending for long. If practicable the bail applications should be considered the same day.

59. In **Jones v. State**, 2004 Cr.LJ 2755, Madras High Court, observed:-

(16). This Court recently has brought to light the misuse of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 against people of other community. This is another example of misuse of the Act. The purpose of bringing SC & ST Act is to put down the atrocities committed on the members of the scheduled castes and scheduled tribes. The law enforcing authorities must bear in mind that it cannot be misused to settle other disputes between the parties, which is alien to the provisions contemplated under the Act. An Act enacted for laudable purpose can also become unreasonable, when it is exercised overzealously by the enforcing authorities for extraneous reasons. It is for the authorities to guard against such misuse of power conferred on them.

60. In **Subhash Kashinath Mahajan v. State of Maharashtra**, (2018) 6 SCC 454, Supreme Court holds,

(38). In the light of submissions made, it is necessary to express concern that working of the Atrocities Act should not result in perpetuating casteism which can have an adverse impact on integration of the society and the constitutional values. Such concern has also been expressed by this Court on several

> occasions. Secularism is a basic feature of the Constitution. Irrespective of caste or religion, the Constitution guarantees equality in its preamble as well as other provisions including Articles 14 to 16. The Constitution envisages a cohesive, unified and casteless society.
> (43). We are thus of the view that interpretation of the Atrocities Act should promote constitutional values of fraternity and integration of the society. This may require check on false implications of innocent citizens on caste lines.
> (71). Law laid down by this Court in Joginder Kumar (1994) 4 SCC 260); Arnesh Kumar (2014) 8 SCC 273; Rini Johar (2016) 11 SCC 703; Siddharam Satlingappa, (2011) 1 SCC 694, to check uncalled for arrest cannot be ignored and clearly applies to arrests under the Atrocities Act. Protection of innocent is as important as punishing the guilty.

61. In **Rini Johar v. State of M.P.**, (2016) 11 SCC 703, Supreme Court holds,

> (24). We are compelled to say so as liberty which is basically the splendor of beauty of life and bliss of growth, cannot be allowed to be frozen in such a contrived winter. That would tantamount to comatosing of liberty which is the strongest pillar of democracy.

62. In **Juli C J v. State of Kerala**, 2020 SCC Online Ker 2504, Kerala High Court observed,

> (20). ...The bar under Sections 18 and 18A of the Act will not apply at the stage of consideration of a bail application by the Special Court under Section 437 Cr.P.C.

Conclusion- The above analysis gleans that post surrender the grant of interim bail does not subvert the barred provision of anticipatory bail:

63. Bail is the antithesis of custody. In the absence of any riders or restrictions under S. 439 CrPC, any person accused of a non-bailable offence, under any penal law, including the violations under the Scheduled Caste & Scheduled Tribes (Prevention of Atrocities) Act, 1989, can apply under section 439 CrPC, offering to surrender and simultaneously seeking interim bail. On receipt of such application, the Court is to satisfy that the applicant stands arraigned as an accused in a FIR disclosing Non-Bailable offences. If all these parameters are complete, then the Courts are under an obligation to accept surrender. Since custody is a sine qua non

for considering a bail application, the Court is under an obligation to consider the prayer for interim bail after this deemed custody. All such pleas fall under the scope of S. 439 CrPC itself, and there is no need to invoke S. 482 CrPC. After that, granting or refusing interim bail is a Judicial function.

64. While granting interim bail, the rights of the victims, their families, the oppressed communities, the existence of reasonable grounds for believing that a person has committed an offence punishable with death or transportation for life, the gravity and heinous nature of the crime, the criminal history of the accused, as well as of the possibility of false implication, should always be gone into. Bail cannot be withheld merely as a punishment. One of the most significant considerations is the accused's conduct, which was not to abscond but voluntarily to surrender and submit herself to the majesty of Justice. Each case will have to be decided on the cumulative effect of all events put before the Court. However, there would be no justification in entering into a roving inquiry on either party's allegations.

65. The offences committed against the persons extend to their family members, stigmatize them, affect their dignity, demotivate them, and make them unequal. To eliminate casteism, we need social re-engineering by developing herd immunity, ensuring that perpetrators of casteism run out of hosts. Thus, the prudent condition while granting interim bail in SCSTPOA is an assurance from the accused of not terrorizing the victim, with a rider that interim bail's order shall ipso facto vacate if the accused attempts to browbeat the victim or repeats any such act. Subject to the seriousness of allegations, the accused may also be directed to stay away from the victim's residence and workplace.

66. The Court must decide the prayer for interim bail on that day itself when it takes the accused in its custody. Such interim bail can extend till the bail application's final disposal, on the police file's production, or the status report. However, powers to grant interim bail should be exercised in a judicial and not in an arbitrary manner, and if given, then for the purpose of interim bail, personal bonds alone would suffice. If the allegations are serious, keeping in view the object of the

SCSTPOA and the purpose for which this stringent provision in SCSTPOA was enacted, then indeed, such interim protection either be rejected or, if granted, can always be withdrawn on the next hearings.

67. The interim bail is neither in contradiction to the judicial precedents nor obstructs Justice's path. Thus, resorting to S. 439 CrPC and surrendering before Sessions Court or High Court and simultaneously obtaining ad-interim bail does not amount to bypassing the restrictions placed in S. 18 and 18-A of SCSTPOA. This practice of the accused surrendering and getting interim bail cannot be said to override the legislative intention of restraining the anticipatory bail to the violators of the SCSTPOA.

I express my gratitude to counsel for the petitioners, Mr. Ashok Sharma, Ld. Advocate General and his team, Mr. Anand Sharma, Ld. Counsel for the complainant, Ld. Amici Curiae, namely Sr. Advocates Mr. Bipin Negi, Mr. Sanjeev Bhushan, Mr. Virender Singh Chauhan, Advocates Mr. Chander Narayan Singh and Mr. Ishan Kashyap, assisted by Advocates Ms. Kiran Dhiman, Ms. Tim Saran, Ms. Babita, Ms. Megha Kapoor Gautam, and Ms. Shradha Karol, for excellent assistance, and Mr. Soham Krishan Luthra, student of Jindal Global Law School for quality research, and my Research Assistant Ms. Kalyani Acharya for outstanding contribution.

14 Sep 2020

Anoop Chitkara
Judge