PRE-ARREST BAIL: A COMMENT ON *PRATHVI RAJ CHAUHAN* V. *UNION OF INDIA*

Sparsh Sharma[*]

I. Introduction

PRESIDENT ABRAHAM Lincoln's letter on January 1, 1863 addressed to Albert G. Hodges said, *"If slavery is not wrong, nothing is wrong"*[1] leading to Emancipation Proclamation, which declared "that all persons held as slaves" within the rebellious states (the states that had seceded from the United States) "are, and henceforward shall be free."[2] Drawing analogy with the civil rights movement, which ended slavery, the Indian Constitution served as a powerful emancipation proclamation that ended centuries of discrimination and social exclusion for millions of people when enacted. The concern for Scheduled categories can be found in article 17 of the Indian Constitution, which originated in an India-specific context not found in other Constitutions worldwide. The article is a form of a commitment and an instruction to the parliament that constituent assembly members made to abolish the age-old caste-based discrimination of the worst form. The article 'punishes' the practice of 'untouchability'. The parliament later implemented The Untouchability (Offences) Act, 1955, that acts as a deterrent against the practice of untouchability. Article 35 of the Indian Constitution empowers the parliament to make laws

[*] Final year LL.B. (Hons), Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur, West Bengal.

[1] Edited by Roy P. Basler, *et. al*., *Letter to Albert G. Hodges*, Washington, April 4, 1864, *available at*: http://www.abrahamlincolnonline.org/lincoln/speeches/hodges.htm (last visited on Nov 4, 2021)

[2] *The Emancipation Proclamation*, January 1, 1863, *available at*: https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation#:~:text=President%20Abraham%20Lincoln%20issued%20the,and%20henceforward%20shall%20be%20free.%22 (last visited on Nov 4, 2021).

regarding acts that are declared to be offences in Part-III of the Indian Constitution. The Committee on Untouchability, Economic and Educational Development, 1965, gave its report leading to the amendment of the Protection of Civil Rights Act, 1955 in 1976.

Further, finding that the practice in the society is still prevalent[3], another legislation, namely, The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989[4] (*hereinafter* referred to as the '1989 Act') was enacted by the government led by Prime Minister Rajiv Gandhi and operationalised by the successive V.P. Singh government. This Act was further strengthened through an amendment in 2015 under the Narendra Modi government.[5] All these legislations and amendments also supplement the mandate in article 46, which is a directive principle of state policy, to protect the Scheduled Castes and the Scheduled Tribes from social injustice and all forms of exploitation. The 1989 Act, aims to prevent acts of 'atrocities' against SCs and STs which is defined as an offence under section 3 of the 1989 Act. With time, there was a discussion pertaining to misuse of certain provisions of this Act due to its strict language and intent with which it was enacted and few members of the community used it as a tool to harass individuals by setting the law in motion.[6] In this case comment, the jurisprudence developed surrounding the pre-arrest bail and ancillary aspects have been discussed at length and the position of law as it stands today with a focus on the judgement delivered by the bench in *Prathvi Raj Chauhan* v. *Union of India*[7].

II. Background

At the outset, the notion of bail is an antithesis to custody. The former ensures liberty of an individual whereas the latter restricts it. Pre-arrest bail (or) anticipatory bail, *per se*, is not bail in the true sense as the concept of bail arises practically when one is in custody. Section 438 of the

[3] *Prathvi Raj Chauhan* v. *Union of India*, AIR 2020 SC 1036, para 12 -

> 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.

[4] The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (No. 33 of 1989).

[5] The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 (No.1 of 2016).

[6] Earlier case laws pertaining to rampant misuse of 1989 Act were discussed in *Subhash Kashinath Mahajan* v. *State of Maharashtra* (2018) 6 SCC 454. They are - *Jones* v. *State*, 2004 Cri.L.J 2755; *Dr. N.T. Desai* v. *State of Gujarat*, (1997) 2 GLR 942; *Dhiren Prafulbhai Shah* v. *State of Gujarat*, 2016 Cri.L.J 2217; *Pankaj D. Suthar* v. *State of Gujarat* (1992) 1 GLR 405; *Sharad* v. *State of Maharashtra*, 2015 (4) Bom CR (Crl) 545.

[7] *Supra* note 3.

Code of Criminal Procedure, 1973 (*hereinafter* referred to as 'the Code'/'Cr.P.C') allows the person to apply for bail prior to the arrest at the court's discretion. Section 18 of the 1989 Act took away this very right of anticipatory bail in offences against the Scheduled caste and Scheduled Tribes. The logical corollary to this is that the Damocles sword of arrest hung over the offender's neck. Such a bar is substantiated because the basic dignity of the SC/ST complainant who belongs to a marginalised community outweighs the liberty of the offender who seeks anticipatory bail. In the *State of M.P.* v. *Ram Kishna Balothia*[8], section 18 of the 1989 Act was held valid on the touchstone of article 14 and article 21 of the Indian Constitution. However, in the case of *Vilas Pandurang Pawar* v. *State of Maharashtra*[9], the court considered that section 18 may be bypassed if at all *prima facie* it appears to the court that there lies no substance, insult or atrocity in conformity with section 3 of the 1989 Act. This position was reiterated even in *SK Mahajan case*[10] where the court in para 51 stated that, *"...grain has to be separated from the chaff, by an independent mechanism."* wherein it justified considering *prima facie* anticipatory bail plea. Therefore, these precedents paved a way for consideration of anticipatory bail plea under section 438 of Cr.P.C notwithstanding section 18 of the 1989 Act.

But it is worth mentioning that in concluding paragraph of *SK Mahajan case*, the court while quashing the proceedings in that impugned case on a *prima facie* basis, issued 5 guidelines (essentially (iii), (iv), (v) were controversial in nature)[11] which were immensely criticized and

[8] (1995) 3 SCC 221.
[9] (2012) 8 SCC 795.
[10] *Subhash Kashinath Mahajan* v. *State of Maharashtra* (2018) 6 SCC 454.
[11] *Id.*, at para 83 of the judgement:

> 83. Our conclusions are as follows:
> (i) Proceedings in the present case are clear abuse of process of court and are quashed.
> (ii) There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. We approve the view taken and approach of the Gujarat High Court in Pankaj D. Suthar (supra) and Dr. N.T. Desai (supra) and clarify the judgments of this Court in Balothia (supra) and Manju Devi (supra);
> **(iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinised by the Magistrate for permitting further detention.**
> **(iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated.**
> **(v) Any violation of directions (iii) and (iv) will be actionable by way of disciplinary action as well as contempt.** The above directions are prospective. *(emphasis supplied)*

resulted in nationwide protests and opposition.[12] The division bench of the court considered the misuse too seriously and even did away with mandatory F.I.R by mandating time bound preliminary inquiry by DSP rank officer before institution of F.I.R. This was in a stark deviation from the constitutional bench position in *Lalita Kumari case*[13] that had laid down the category of cases clearly which needed a preliminary inquiry.[14] Further, the court even inserted an extra embargo to prevent misuse by requiring approval from the S.S.P of police (*i.e,* in the case of a public servant, sanction of the appointing authority) before such arrest. The Magistrate ought to scrutinize the reasons recorded for permitting further detention. And finally, in case of derogation of the guidelines mentioned above, disciplinary action and contempt could be instituted against the erring officer.[15]

Finally, the controversial guidelines which diluted the 1989 Act were done away with in *Union of India* v. *State of Maharashtra*[16], a 3-judge bench decision that reviewed *SK Mahajan case* and reiterated the mandate of *Lalita Kumari case*. The bench comprising Arun Mishra, M.R. Shah and B.R Gavai, JJ. held that the earlier decision of *S.K Mahajan case* was an impermissible use of article 142 of the Indian Constitution by the court in going against the spirit of the Act and hence bad in law. When challenging the *SK Mahajan decision,* the government also incorporated section 18A into the 1989 Act[17], which ruled out any preliminary inquiry preceding any arrest and nullified guidelines in the *SK Mahajan case*.

[12] Shalini Nair, "Supreme Court verdict on SC/ST Act: RPI(A) to file review petition, says Athawale", *The Indian Express* (March 24, 2018), *available at:* https://indianexpress.com/article/india/supreme-court-verdict-on-sc-st-act-rpia-to-file-review-petition-says-ramdas-athawale-5109319/ (last visited on Dec 29, 2021).

[13] *Lalita Kumari* v. *Govt. of U.P*, AIR 2014 SC 187 (held limited preliminary inquiry only in exceptional cases).

[14] *Id.*, at para 111 (vi)

> The category of cases in which preliminary inquiry may be made are as under:
> (a) Matrimonial disputes/family disputes
> (b) Commercial offences
> (c) Medical negligence cases
> (d) Corruption cases
> (e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

[15] *Supra* note 10.

[16] (2020) 4 SCC 761.

[17] S. 18A (inserted on Aug. 17, 2018 *vide* The Scheduled Castes And The Scheduled Tribes Prevention of Atrocities Amendment Act, 2018).

III. Facts and Issues

In *Prathvi Raj Chauhan* v. *Union of India*[18], lawyers Prathvi Raj Chauhan and others challenged the *vires* of section 18A of the 1989 Act[19] (introduced *via* amendment), which laid down that, no preliminary enquiry for FIR registration is required and no approval for arrest required by investigating officer and section 438 of the Code not applicable in the 1989 Act. The petitioners argued for providing anticipatory bail for offences under the 1989 Act and essentially shifting back to the *status quo* as per *SK Mahajan case.* The issue again came before the 3-judge bench of Arun Mishra, Vineet Saran and S. Ravindra Bhat, J.J. where the question was whether the justification of *SK Mahajan case* concerning anticipatory bail, its misuse and the aspect of preliminary inquiry was satisfactory or not.

IV. Case discussion

In its unanimous decision recently delivered on February 10, 2020, Mishra, J. authored the opinion for himself and Saran, J. whereas Bhat, J. wrote a separate but concurring opinion. The court held that the SC/ST (Prevention of Atrocities) Amendment Act, 2018, which inserted section 18A as *intra vires* the Indian Constitution, meaning that *SK Mahajan case* guidelines are nullified, and its review[20] is validated (the same is justified in discussion hereunder). It was observed that there is no need for preliminary inquiry by D.S.P as a rider due to time constraints with the police.[21] In the part penned by Arun Mishra, J. the court took note of National Commission for SC Annual Report 2015-16, which highlighted the fact that preliminary inquiry results in undue delay and therefore, the victim resorts to section 156(3) of the Code to register an F.I.R. In this regard, 'right to life' was discussed at length pertaining to social ostracism of Dalits and it spelt, "The provisions of the Act of 1989 are, in essence, concomitants covering various facets of article 21 of the Constitution of India."[22]

Subsequently, it held that there has to be mandatory F.I.R (as all offences under 1989 Act are cognizable) and power of arrest as the court noted that sanction of appointing authority at the stage

[18] *Supra* note 3.
[19] *Supra* note 17.
[20] *Supra* note 16.
[21] *Supra* note 13 (in-depth details of offence is not supposed to be known while registering an F.I.R and forms part of post F.I.R process).
[22] *Supra* note 3 (Arun Mishra, J. in para 45).

of arrest as laid in *SK Mahajan case* is extra-statutory and against the spirit of section 197 of the Code which lays down that in case of a public servant this has to be resorted to- at the time/after the 'cognizance' stage. Moreover, section 41 of the Code, read with section 2(c) of the Code enables police to arrest without warrant in case of cognizable offences.[23] Also, in case the appointing officer disapproves the arrest of a public servant, it would take away the function of the court since the 1989 Act omits provision of anticipatory bail. Similarly, approval of arrest of a non-public servant (accused) cannot be left at the discretion of SSP, at the behest of his senior rank.

It was also observed that notwithstanding the fact that section 438 of the Code is barred as per section 18A of 1989 Act, the court might invoke anticipatory bail under section 438 if *prima facie* the allegations do not meet the criteria laid down in 1989 Act and if it looks baseless or *malafide*. In a nutshell, *prima facie* consideration also takes into account establishing a nexus between the knowledge that the victim belongs to a Scheduled Caste or Scheduled Tribe community that carries a bearing upon the *actus reus* thereto, to be an offence under the 1989 Act. The court may peruse the FIR and statements under section 164 CrPC to pass the scrutiny of judicial mind at the very outset. Hence, where such nexus is not spelt, the bar under section 18A is not attracted, and anticipatory bail may be granted. The observations of Ravindra Bhat, J. in para 32 before disposing off the Public Interest Litigation gave a caveat when the High Court resorts to anticipatory bail in prima facie cases:[24]

> 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 Code of Criminal Procedure, 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 F.I.R, 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.

[23] *Id.*, at para 56.
[24] *Supra* note 3.

V. Critical Analysis

While challenging the insertion of sections 18 and 18A of the 1989 Act, the fundamental argument is that the provisions and Act in general are being misused to level scores and further personal motives. Firstly, the author considers this line of argument fallacious because several statutes[25] stem from Part-III of the Indian Constitution, intended for various vulnerable classes of society, keeping in mind the historical subjugation and backwardness. There are several provisions with reversal of burden (in contrast to the 'presumption of innocence') to reach the goalpost of a just society.[26]

Secondly, one cogent reason for such protective discrimination is that vulnerable sections are discouraged from reporting the crime on account of huge pendency of cases.[27] Providing the escape routes to the accused, enabling them to anticipatory bail will only impact the legislative spirit and framework of the law. That is to say, instead of a deterrent against the offender who allegedly commits an offence under the 1989 Act, it would deter the victims from coming forward and reporting the crime.

Thirdly, the abuse of law is not the sole ground for challenging the vires of a speculative law. Also, the literal interpretation of section 18A of the 1989 Act nowhere lays down such proviso with regards to anticipatory bail on "*prima facie* consideration".

Fourthly, the acquittal is not a ground to conclude the complaint is frivolous. It can be due to several reasons like faulty evidence/investigation etc.[28] Fifthly, for the sake of argument, even

[25] The Protection of Civil Rights Act, 1955; The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; The National Commission for Backward Classes Act, 1993; The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995; The National Trust for Welfare of Persons with Autism; Cerebral Palsy, Mental Retardation and Multiple Disability Act, 1999; The Rehabilitation Council of India Act, 1992; The Maintenance and Welfare of Parents and Senior Citizens Act, 2007; The Dowry Prohibition Act, 1961; The Protection of Women from Domestic Violence Act, 2005.

[26] The Indian Evidence Act, 1872, ss. 111A, 113A & B, 114A *etc.*; special statutes like the Prevention of Corruption Act, 1988, The Maharashtra Control of Organised Crime Act, 1999, The Narcotic Drugs and Psychotropic Substances Act, 1985, The Protection of Children from Sexual Offences Act, 2012.

[27] For instance, at the end of 2007, 79 percent of cases remained pending for trial showing no significant progress over a pendency rate of 82.5 percent in 2001, National Coalition for Strengthening SCs and STs (PoA) Act, 2010. 20 years Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act Report Card, New Delhi.

[28] Acknowledged in *Prathvi Raj Chauhan Case.*

assuming the complaint to be concocted, leads to the conclusion that it is due to imperfection or weakness of character of that individual complainant and not the whole class/caste as such.[29] Every provision can be misused to settle scores, and it cannot be struck down or diluted for that matter to nullify the purpose of that Act.

Sixthly, the accused always possesses other remedies like quashing to signal abuse of law (which is also a *prima facie* inquiry as to the *mala fide* nature of the complaint), if any, which can be resorted to as a pre-trial measure. The offender may resort to inherent powers under section 482 of the CrPC to quash the F.I.R in accordance with the 7 guidelines in para 105 of *Bhajan Lal case.*[30] More particularly, pointers 1, 5 and 7 of *Bhajan Lal case*[31] spell that if the F.I.R at face value in its entirety looks mala fide or does not amount to a cognizable offence, it ought to be quashed to prevent any miscarriage of justice. These guidelines are illustrations wherein the court may use this provision to avoid the abuse of the process of any court. Even the extraordinary powers under article 226 of the Indian Constitution can be invoked to prevent miscarriage of justice.

---

[29] *Id.*, The court observed in Para 49 – "For lodging a false report, it cannot be said that the caste of a person is the cause. It is due to the human failing and not due to the caste factor. Caste is not attributable to such an act...."

[30] *State of Haryana* v. *Ch. Bhajan Lal*, AIR 1992 SC 604, para 105:

> 1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.
> 2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
> 3. Where the uncontroverted allegations made in the F.I.R or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
> 4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.
> 5. Where the allegations made in the F.I.R or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
> 6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
> 7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

[31] *Ibid.*

Lastly, the investigation agency's job is to proceed with the arrest based on evidence and the seriousness of the crime. The F.I.R and arrest are standalone, and both the provisions voice their tone differently as the former warrants immediate registration on learning about a cognizable offence (the use of word 'shall' in section 154 of the Code instead of 'may') whereas the latter (section 41 of the Code uses the word 'may' instead of 'shall') has additional qualification of being "credible information" and "reasonable suspicion". In paras 98 and 100, the court in the constitutional bench decision of the *Lalita Kumari case* clarified on this point.

VI. Law as it stands

After the position is settled as discussed above in *Prathvi Raj Chauhan* v. *Union of India*, the High Courts have applied the dictum of law laid down, and the same has been analysed in this part. At the outset, it is witnessed that the courts have applied judicial mind perhaps in a casual manner granting anticipatory bail on a prima facie basis where the complaint appeared to be suspicious or frivolous. The bar created by sections 18 and 18A(i) thereby devoiding the individual of relief under section 438 of the Code has been applied only in select cases, based upon the facts and circumstances of the case.

Anticipatory bail was granted in *Mallu* v. *The State of Karnataka*.[32] The court failed to find any specific allegation against the accused regarding his making denigrate caste abuses or any specific overt acts that would attract the 1989 Act in the impugned case. Therefore, pre arrest bail was granted in the event of his arrest on executing a personal bond in a sum of Rs. 50,000/- with a solvent surety for like sum and subject to section 438(2) of the Code alike conditions.

In *Papu Ashok Supekar* v. *The State of Maharashtra*[33], the Sessions Judge had dismissed the bail application on March 13, 2019, under section 438 of the Code and the same was appealed before High Court under section 14A(2) of the 1989 Act. The High court, while granting anticipatory bail

[32] *Mallu* v. *The State of Karnataka*, Criminal Petition No. 200397/2020.
[33] *Papu Ashok Supekar* v. *The State of Maharashtra*, Criminal Appeal (ST.) No. 250 of 2020 and Interim Application No. 1 of 2020 in Criminal Appeal (ST.) No. 250 of 2020.

with bond and conditions, noted that prima facie, the F.I.R did not disclose the essential ingredients of the offence under section 3(1)(r) and section 3(1)(s) of the 1989 Act.

In *Agasara Jadiyappa* v. *The State of Karnataka*[34] the complainant alleged that the accused, with his group in default of the loan, heckled the family members in agricultural land, outraged the modesty of women and abused them by taking the caste name. Hence, the Sessions Judge dismissed the petition on the ground that there is a bar under section 18 of the said Act. However, the High court reversed the decision and considered it a fit case to grant anticipatory bail as only a sentence was added in the complaint that the accused referred to the caste name as "Nayaka" and abused in a filthy language. Hence, a prima facie case was not made out for applicability of the provisions of the said Act as it was clear that no specific abuse was made taking the caste name.

The High Court denied anticipatory bail in *Juli* v. *State of Kerala*[35]. The appellant used obscene words to the annoyance of the Health Inspector in the Municipality (complainant) and threatened him and caused obstruction to him in discharging his duties as a public servant. When the complainant came out of his cabin, the appellant followed him and abused him by calling him by his caste name in the presence of the staff and the members of the public who were in the office. The learned Sessions Judge dismissed the anticipatory bail sought under section 438 CrPC as the allegations appeared to fall under sections 3(1)(r) and 3(1)(s) of 1989 Act *prima facie* as per section 18A bar of 1989 Act. Appeal arose under section 14A of 1989 Act before the High Court which confirmed the view and dismissed the contention of appellant that she had no knowledge of the fact that the victim is a person who belongs to a scheduled caste. On the contrary, it was observed that the fact that the appellant called the victim by his caste name indicates that the appellant had knowledge of that caste.

VII. Conclusion

The High Court decisions pursuant to the Apex Court's decision indicate that the courts are considering the anticipatory bail pleas despite explicit bar in the statute and providing the offenders the remedy of anticipatory bail accused under the 1989 Act on a *prima facie* application of judicial mind. The author finds that *albeit* the Apex Court signified the importance of the 2018 Amendment

[34] *Agasara Jadiyappa* v. *The State of Karnataka*, Criminal Petition No. 100404/2020.
[35] *Juli* v. *State of Kerala*, 2020 (4) KHC 45.

in its observations, it paved the way to providing another window in the form of anticipatory bail on *prima facie* basis as a remedial measure (note that it had already held the amendment to be constitutional). This ought not to have been done when alternative remedies (like if the allegation appears patently frivolous) were already existing, as discussed in the critical analysis part thoroughly. This goes against the tenets of protective discrimination, and the mandate of the 1989 Act. Undoubtedly, the philosophy of bail is tossed by this argument, but it is for the larger societal interests and is the need of the hour.