CHAPTER-SIX

BAIL UNDER SPECIAL LEGISLATION

Shyam D. Nandan *
Deepa Kansra **

I Introduction

APART FROM THE Indian Penal Code, there are special legislations passed by the Parliament of India to deal with particular offences. Most of those legislations, like the Food Adulteration Act, 1954 (repealed), the Dowry (Prohibition) Act, 1961, the Narcotics Drugs and Psychotropic Substancses Act, 1985 *etc*. borrow the procedural mechanism provided in the Code of Criminal Procedure (hereinafter referred to as 'Code') including the bail provisions therein. However, with the increase in complexity of crimes in the last four decades there has been a lot of pressure on the State to enact laws which can deal with these complexities. The substantive provisions of the Indian Penal Code as well as the procedures provided under the Code were evidently found wanting in many respects. Thus came into existence certain special legislations which created new offences and provided for different procedures to be followed to try those offences. These procedures were more stringent and they even tugged at the time tested principles of procedural fairness and human rights. As far as the bail provisions are concerned, it has been said in the earlier chapters that the Code has always viewed bail as a right of the accused, to be denied only in exceptional circumstances. There was one viewpoint that this outlook was becoming a hindrance to investigation and prosecution of crimes.

The Terrorism and Disruptive Activities Act, (TADA), 1985 followed by 1987 Act was one of the first modern day specialized criminal legislations to be enacted with the purpose of curbing the growing menace of terrorism. Being a special statute it could override the provisions of other more general statutes.[1] The bail provision of the Act was much more stringent than sections 437/439 of the Code. Section 20 (8) of TADA read as under:

> (8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made

---

* Advocate on Record, Supreme Court of India.

** Assistant Professor, Human Rights Studies Programme, School of International Studies, Jawaharlal Nehru University. New Delhi.

1 *Yakub Abdul Razak Memon* v. *State of Maharashtra*, (2013) 13 SCC 1 at 654.

thereunder shall, if in custody, be released on bail or on his own bond unless, –

a. the Public Prosecutor has been given an opportunity to oppose the application for such release, and

b. where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(9) The limitations on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail.

As is apparent, the above mentioned provision turned the time tested common law principle of "presumption of innocence" upside down. While under section 437 of the Code the onus is on the prosecution to prove the requirements therein, TADA virtually shifted the onus on to the accused to *prima facie* establish his innocence as a condition precedent to being granted bail. Although TADA has long been repealed, its provisions happened to become a template for the "bail provisions" in many specialised criminal legislations that followed.

Legislations like the Narcotic Drugs and Psychotropic Substances Act,1985, Companies Act,2013, Maharashtra Control of Organised Crime Act,1999, the Prevention of Money Laundering Act, 2002 *etc*. have been carefully drafted to enhance the position of the state during investigation and prosecution of the offences mentioned therein. In relation to bail, most of the specific statutes have incorporated provisions which mandate that a specified procedure be followed by the concerned judge, coupled with a general mandate that bail should not ordinarily be granted in cases involving serious offences.

On the applicability of specified procedure under special legislations, the Court in *State of Maharashtra* v. *Vishwanath Maranna Shetty,*[2] stated that when a prosecution is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising thereunder, the provisions cannot be ignored while dealing with such an application.[3] Similarly, in the case of *Raju*

---

2 AIR 2013 SC 158. Also see, *Union of India* v. *Aharwa Deen* (2000) 9 SCC 382.

3 In this regard, reference can be made to the newly enacted s. 212(6) of the Companies Act, 2013 which now recognizes offences as mentioned therein as cognizable and non-bailable. Accordingly, bail for such offences can be granted only (a) after the public prosecutor has been given an opportunity to oppose the same, and (b) the court has sufficient reason to believe that the person is not guilty of offence and shall not likely commit any offence when on bail.

Premji v. *Customs NER Shillong Unit* and *Arun* v. *D. Pakyntein,*[4] the Court held that where a statute confers drastic powers and provides for stringent penal provisions including the matters relating to grant of bail, the conditions precedent therefore must be scrupulously complied with.[5]

On the point of gravity of the offence involved in the case, the Court in *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra,*[6] stated that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail. In specific reference to the cases involving economic offences, the Court in *Nimmagadda* v. *CBI,*[7] stated as follows:[8]

> Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

The following are some of the important legislations and related case laws that provide for the conditions of bail applicable therein.

II Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act)

The NDPS Act was adopted as a comprehensive legislation to deal with the problem of illicit drug trafficking and drug abuse. A bare reading of the Act indicates the intent of the legislature towards maintaining stringency with the provisions and punishments provided therein.[9] Keeping in mind the broad objectives of the Act, a few limitations have been prescribed with regard to the power to grant bail under

---

4 2009(7) SCALE 568, (2009)16 SCC 496.

5 Also *Muraleedharan* v. *State of Kerala*, 2001CriLJ 2187, (2001) 4 SCC 638.

6 (2005) 5 SCC 294.

7 (2013) 7 SCC 466.

8 *Id.* at para 25.

9 The objective of the Act was highlighted in *Noor Aga* v. *State of Punjab* (2008) 16 SCC 417. The Court stated "That provisions of the NDPS Act and the punishment provided therein are stringent, flowing from elements such as heightened standard for bail, absence of any provision for remissions, specific provision for grant of minimum sentence…the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but on the other, it is also necessary to uphold the individual human rights and individual dignity as provided for under the UN Declaration of Human Rights…

the Act.[10] In particular, section 37 of the Act mandates a specific procedure that must be followed in matters pertaining to bail under the Act.

The section reads as follows:

> 37. Offences to be cognizable and non-bailable
>
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), -
>
> (a) Every offence punishable under this Act shall he cognizable;
>
> (b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless:
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.

The Court in *Union of India* v. *Rattan Mallik alias Habul,*[11] explained the true import of Section 37 as follows:[12]

> It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act.[13]

---

10 The provision under the NDPS Act, 1985 is similar to the provision provided under the UP Gangsters and Anti- Social Activities (Prevention) Act, 1986. See, *Dharmendra Kirthal* v. *State of Uttar Pradesh* (2013) 8 SCC 368.

11 (2009)2 SCC 624. Also see, *Union of India* v. *Sanjeev* V. *Deshpande*, 2014 (13) SCC 1.

12 *Id.* at para 12.

13 A similar provision can also be found under the Maharashtra Control of Organised Crime Act, 1999 under s. 21. See *State of Maharashtra* v. *Vishwanath Maranna Shetty,* AIR 2013 SC 158.

The Court also stated:[14]

> We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of not guilty. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

Thus, the accused cannot be released on bail under the Act unless and until the conditions and limitations imposed under Section 37 are satisfied.[15]

On the applicability of the section, the High Court of Punjab and Haryana at Chandigarh in *Paramjit Singh Chahal* v. *State of Punjab,*[16] stated that the limitations under section 37 of the NDPS Act will not apply in cases wherein there has been a violation of procedural safeguards and adequate materials to infer a false implication. It will be a fit case to release the accused on bail in these circumstances.

In *Union of India* v. *Thamisharasi*,[17] the court stated that clause (b) of sub-section (1) of section 37 imposes limitations on granting of bail in addition to those provided under the Code of Criminal Procedure. The two limitations under NDPS are:

1. An opportunity to the public prosecutor to oppose the bail application, and
2. Satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The limitations on granting of bail come in only when the question of granting bail arises on merits.

In other words, the provision is not attracted when the grant of bail is automatic on account of the default in filing the complaint within the maximum period of

---

14 *Id.* at para 14.

15 See *Union of India* v. *Devi Saran* 1997(21) ACR 963; *N.R. Mon* v. *Mohd Nasimuddin,* (2008) 6 SCC 721.

16 2014 SCC Online P&H 6179: Crl. M. No.8339-M of 2014, date of decision: 22-3-2014.

17 (1995) 4 SCC 190.

custody permitted during investigation by virtue of Sub-section (2) of Section 167 Cr.P.C.[18]

The provision of bail under the NDPS Act has been discussed critically by the Court in the matter of *Thana Singh* v. *Central Bureau of Narcotics*[19] wherein the accused was in prison for more than twelve years, awaiting the commencement of his trial under the NDPS Act. The Court gave necessary directions to be observed in relation to proceedings under the NDPS Act.

III Maharashtra Control of Organized Crime Act, 1999 (MCOCA)

Section 21 (4) of the Maharashtra Control of Organized Crime Act, 1999 (MCOCA) mandates a certain procedure to be followed in matters relating to bail. Section 21 reads as follows:

Section 21. Modified application of certain provisions of the code.

(1) Notwithstanding anything contained in the Code or in any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code and "cognizable case" as defined in that clause shall be construed accordingly.

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modifications that, in sub-section (2),—

(a) the reference to "'fifteen days", and "sixty days" wherever they occur, shall be construed as references to "thirty days" and "ninety days" respectively;

(b) after the proviso, the following proviso shall be inserted, namely :-

"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Special Court shall extend the said period upto one hundred and eighty days, on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days"

(3) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act.

---

18 For detailed discussion see, Chapter Seven-Default Bail in this book.

19 2013 (1) SCALE 696, (2013) 2 SCC 590.

(4) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless-

(a) the Public Prosecutor has been given an opportunity to oppose the application of such release; and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(5) Notwithstanding anything contained in the Code, the accused shall not be granted bail if it is noticed by the Court that he was on bail in an offence under this Act, or under any other Act, on the date of the offence in question.

(6) The limitations on granting of bail specified in sub-section (4) are in addition to the limitations under the Code or any other law for the time being in force on the granting of bail.

(7) The police officer seeking the custody of any person for pre-indictment or pre-trial interrogation from the judicial custody shall file a written statement explaining the reason for seeking such, custody and also for the delay, if any in seeking the police custody.

As in the case of section 37 of the NDPS Act, the analogous provision contained in MCOCA also imposes the additional twin burdens on the accused which are to be proven to the 'reasonable satisfaction' of the court for the accused to be granted bail. In the case of *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra,*[20] the question which arose before the Supreme Court was whether this statute requires that before a person is released on bail, the court, *prima facie*, must come to the conclusion that he is not guilty of such offence? Also, is it necessary for the Court to record such a finding? Would there be any machinery available to the Court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?

---

20 (2005)5 SCC 294.

Drawing inspiration from to the objectives of the statute[21] the court laid down the perimeter to ascertain what are the 'grounds' to be seen by the Court to arrive at a 'reasonable satisfaction' regarding the innocence of the accused :[22]

> ….restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under (Section 279 in the said case) the Indian Penal Code may debar the Court from releasing the accused on bail. For such reasons, a statute should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the Court is, to see the culpability of the accused and his involvement in the commission of an organized crime either directly or indirectly. The court at the time of application for grant of bail shall consider the application for grant of bail shall consider from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission, negligence or dereliction may not lead to a possibility of

---

21 The Statement of Objects and Reasons of the Act are as under:

Organized crime has been for quite some years now come up as a very serious threat to our society. It knows no national boundaries and is fueled by illegal wealth generated by contract, killing, extortion, smuggling in contrabands, illegal trade in narcotics kidnappings for ransom, collection of protection money and money laundering, etc. The illegal wealth and black money generated by the organized crime being very huge, it has had serious adverse effect on our economy. It was seen that the organized criminal syndicates made a common cause with terrorist gangs and foster terrorism which extend beyond the national boundaries. There was reason to believe that organized criminal gangs have been operating in the State and, thus, there was immediate need to curb their activities. It was also noticed that the organized criminals have been making extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission would be an indispensable aid to law enforcement and the administration of justice. The existing legal frame work i.e. the penal and procedural laws and the adjudicatory system were found to be rather inadequate to curb or control the menace of organized crime. Government, therefore, decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organized crime.

22 *Supra* note 6 at 317, para 38.

> his having culpability in the matter which is not a sine qua non for attracting the provisions of MCOCA.

The Court then ascertained the role of the court concerned in the case while passing an order granting or rejecting bail and its effect on the overall trial. It held: [23]

> The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the Court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and on order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However such an offence in future must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

The Court also clarified that the duty of the court is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Considering the gravity of the offences made culpable by MCOCA the Court gave a note of caution stating that *the court may have to probe into the matter deeper so a as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction*. These findings "may not have a bearing on the merit of the case" and the trial court is "free to decide" the case after trial, unprejudiced by the observations in the order on the bail application.

The above observations in *Ranjitsing Brahmajeetsing Sharma* deserve to be quoted *in toto* since these words have become the basis for deciding bail applications under special criminal statutes having *pari materia* provisions regarding bail. These words ought to be read carefully since the Court has tried to balance traditional bail jurisprudence with the diktats of modern criminal law. Although, for all practical

---

23 *Id*. at 318, para 44.

purposes, the onus to prove his/her innocence has shifted on to the accused, the Court places on the court granting bail the responsibility of looking deep into the materials on record, while considering the bail application with an open mindset i.e. *so a as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction*.

This judgment has been relied upon consistently. However, subsequent judgments have tried to make the requirements more stringent. It was held by the Court in *Chenna Boyanna Krishna Yadav* v. *State of Maharashtra* [24] that:[25]

> The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression 'reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence.

In *State of Maharashtra* v. *Vishwanath Maranna Shetty,*[26] the Supreme Court yet again stated that:[27]

> [S]ub-section (4) of Section 21 mandates that it is incumbent on the part of the Court before granting of bail to any person accused of an offence punishable under MCOCA that there are reasonable grounds for believing that he is not guilty of such offence and he is not likely to commit any offence while on bail….
>
> The analysis of the relevant provisions of the MCOCA, similar provision in the NDPS Act and the principles laid down in both the decisions show that substantial probable cause for believing that the accused is not guilty of the offence for which he is charged must be satisfied. Further, a reasonable belief provided points to existence of such facts and circumstances as are sufficient to justify the satisfaction that the accused is not guilty of the alleged offence.[28]

What can be seen from the above analysis of judgments on the bail provisions in MCOCA is that the law has largely been settled *vis a vis* similar provisions in all the special statutes like NDPS Act. However, one legislation that has got considerable attention in recent times is the Prevention of Money Laundering Act, 2002. This modern day criminal legislation has a much more stringent bail provision which needs to be understood contextually.

---

24 (2007) 1 SCC 242.

25 *Id.* at 247.

26 (2012) 10 SCC 561.

27 *Id.* at para 19

28 *Id.* at para 30.

IV Prevention of Money Laundering Act, 2002 (PMLA)

The Prevention of Money Laundering Act, 2002 (PMLA) has all the characteristics of a modern day criminal Act. It is unique since it creates a completely new offence i.e. money laundering which is linked with most other criminal offences. Since "money laundering" deals with property acquired using "proceeds" of other crimes, it becomes a complex offence.

It can be seen that both NDPS Act[29] and MCOCA[30] permit the court to enlarge the accused on bail if it is reasonably satisfied about the innocence of the accused regarding the offences dealt with by the respective statutes and further if it is satisfied that the accused would not commit that crime if let out on bail. When it comes to PMLA, the ambit of the bail provision of the statute is/was much broader.

As mentioned above 'money laundering' is a complex offence which is inextricably connected to many other offences. Therefore, the Schedule to the Act has three parts namely A,B and C which contains various offences as made culpable. In particular Part A contains offences under the Indian Penal Code,1860 as well as offences under most Special Acts including NDPS Act, MCOCA and Prevention of Corruption Act.

Section 44 of the Act permits the Special Court under the Act to try an offence under section 4 of the Act and "*any scheduled offence connected to the offence under that Section*". Further section 45 of the Act, which deals with the power of the Special Court to grant bail, reads thus:

Section 45. Offences to be cognizable and non bailable:

> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless:
>
> (i) the Public Prosecutor has been given a opportunity to oppose the application for such release; and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

This section unlike the analogous sections in the NDPS Act and the MCOCA applies the twin conditions cumulatively for a scheduled offence and not for an

---

29 S. 36C (2) of the NDPS Act, 1985.

30 S. 21 (4) of MCOCA, 1999.

offence under the Act. In other words, if a person is accused of having committed minor offences under the Indian Penal Code, he/she would be entitled to bail as per section 439 of the Code. However, if he/she is also accused of having committed an offence under section 4 of PMLA, then he/she will have to satisfy the twin tests laid down in section 45 of the Act, so far as the said offences are concerned. Moreover, even if a person is only accused of a Scheduled Offence, merely because the trial is being conducted jointly with others accused of offences under PMLA, the former would be subjected to the double test scrutiny under section 45.

Another anomaly that arose in this context was that when it came to anticipatory bail, there was no bar under the Act.[31] Therefore, the provisions of section 438 of the Code would continue to be applied when a person seeks pre-arrest/anticipatory bail for all offences including the scheduled offences. The result would be that it was easier to get anticipatory bail in case of offences under PMLA than to seek regular bail after arrest.

In the case of *Nikesh Tarachand Shah* v. *Union of India,*[32] the Supreme Court had to decide upon the the constitutionality of section 45 of PMLA which was challenged as being discriminatory and arbitrary. The Court observed that:[33]

> The mere circumstance that the offence of money laundering is being tried with the Schedule A offence without more cannot naturally lead to the grant or denial of bail (by applying Section 45 (1) for the offence of money laundering and the predicate offence.

The Court considered various scenarios that would arise in the case of a joint trial where a bail application is filed. It then upheld the contention of the petitioner and came to the conclusion that the provisions of section 45 would be discriminatory *qua* an accused being tried for a scheduled offence having punishment of more than three years coupled with an offence under PMLA *vis a vis* a person being tried for an offence merely under the provisions of PMLA. In the former case, the grant of bail would be dependent on circumstances having nothing to do with the offence under PMLA while in the latter case bail will be granted as per section 439 of the Code. In the words of the Court:[34]

> All these examples show that manifestly arbitrary, discriminatory and unjust results would arise on the application or non application of Section 45, and would directly violate Articles 14 and 21, in as much as the procedure for bail would become harsh, burdensome, wrongful

---

31 For a detailed discussion see, Chapter Five-Anticipatory Bail in this book.

32 (2018) 11 SCC 1 : 2017 (13) SCALE 609.

33 *Id.* at 33.

34 *Id.* at 34.

> and discriminatory depending upon whether a person is being tried for an offence which also happens to be an offence under Part A of the Schedule or an offence under Part A of the Schedule together with an offence under the 2002 Act. Obviously, the grant of bail would depend upon a circumstance which has nothing to do with the offence of money laundering. On this ground alone, Section 45 would have to be struck down as being manifestly arbitrary and providing a procedure which is not fair or just and would, thus, violate both Articles 14 and 21 of the Constitution.

Further it was held that:[35]

> This, again is laying down a condition which has no nexus with the offence of money laundering at all, and a person who may prove that there are reasonable grounds for believing that he is not guilty of the offence of money laundering may yet be denied bail, because he is unable to prove that there are reasonable grounds for believing that he is not guilty of the scheduled or predicate offence. This would again lead to a manifestly arbitrary, discriminatory and unjust result which would invalidate the Section.

The Court also struck down the provision on a third ground, holding that the classification of scheduled offences on the basis of their sentencing would have no rational nexus with the objective of PMLA and to the granting of bail for offences committed under the Act, and, therefore, the section will have to be annulled on the basis of the equal protection clause. The Court was also of the opinion that the anomaly between the grant of anticipatory bail and regular bail, which is created by section 45 would also lead to manifestly arbitrary and unjust results and would, therefore violate articles 14 and 21 of the Constitution.[36]

V Anticipatory Bail under Special Legislations

It has been seen that most special Acts rely on the provisions of the Code *i.e.* section 438, when it comes to granting pre-arrest/anticipatory bail. The NDPS Act, the PML Act *etc* are typical examples. The question that arose before the three judge bench of the Calcutta high court in *Teru Majhi* v. *State of W.B* [37] was whether the special court constituted under the Act would have the power to grant pre-arrest bail under Section 438 of the Code. Although there was no difference of opinion

---

35 *Id.* at 35.

36 See, Chapter One of this book entitled -Individual Freedom and Criminal Justice Administration: Constitutional Perspective With Special Reference to Right to Bail, for elaborate discussion on constitutional issues.

37 (2014) SCC Online Cal 7684.

regarding the entitlement of an accused under the Act to be granted pre-arrest bail, the view of the prosecution was that such a power only vested in the high court. This view was based on the contention that the special court under the Act was merely deemed to be a sessions court for the purposes of trial of offences under the Act and being a court of first production, it did not have the power to grant pre-arrest bail under the Act.

The high court held that the special court was not the court of first production and after interpreting the provisions of section 36 C of the Act, it came to the conclusion that no provision of the Code was excluded for the purposes of the said section unless there was a specific exclusion in the Act. Not finding such an express exclusion anywhere in the statute, it held that the special court under the NDPS Act could grant pre-arrest/anticipatory bail as per section 438 of the Code.

Some other statutes like MCOCA,1999[38] and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989[39] completely exclude the operation of Section 438 of the Code and do not permit the granting of pre-arrest/ anticipatory bail in cases involving offences laid down in the statutes.

Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 expressly provides for the exclusion of section 438 of the CrPC in relation to any case involving the arrest of any person on any accusation of having committed an offence under the said Act.

The section reads as follows:

> Section 438 of the Code not to apply to persons committing an offence under the Act.—Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.

The constitutional validity of section 18 was upheld in *Balothia*[40] and the provision was held to be not violative of article 14 and article 21. The exclusionary provision pertaining to bail under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 has to be understood in light of two factors; the purpose of the anti-discrimination law, and the usage of penal law to enforce the constitutional objectives of tolerance and non-discrimination.[41] In the year 2016, amendments introduced to the Act reflect upon the intention of the Parliament to further strengthen the law in light of the prevailing social conditions.[42] The exclusion

---

38 S. 21 (3) of MCOCA,1999.

39 S. 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.

40 *State of M.P.* v. *Ram Krishna Balothia* (1995) 3 SCC 221.

41 Also see, *Rajulapati Ankababu* v. *Counsel*, 2017(3) L.S. 316 .

42 Also see, *Suman Thakur* v. *State of Bihar,* Criminal Appeal (SJ) No.591 of 2016.

of section 438 of CrPC by virtue of section 18 of the SC/ST Act has been a well substantiated arrangement in furtherance of both statutory and constitutional imperatives. The Supreme Court in *Manju* v. *Onkarjit Singh*[43] observed that exclusion of section 438 of the Code in connection with offences under the SC/ST Act has to be viewed in the context of several factors such as the prevailing social conditions which give rise to such offences, and the apprehension that perpetrators of such atrocities are likely to threaten and intimidate their victims and prevent or obstruct them in the prosecution of these offenders, if the offenders are allowed to avail of anticipatory bail.

In *State of Madhya Pradesh* v. *Ram Kishan,*[44] the Supreme Court was of the view that the provision of Section 438 under the CrPC did not apply to any case involving arrest of any person accused of having committed offences under section 3 of the said Act. Additionally, in *Kapil Durgwani* v. *State of Madhya Pradesh,*[45] and *Balesh* v. *State*[46] it was stated that the scope of section 18 of the SC/ST Act read with section 438 of the Code, is such that it creates a specific bar to the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no court shall entertain an application for anticipatory bail, unless it *prima facie* finds that such offence is not made out.

Yet again, in *Vilas Pandurang Pawar* v. *State of Maharashtra,*[47] the question raised before the Court was whether a person charged with various offences under the IPC and SC/ST Act is entitled to anticipatory bail under Section 438? The Court made a direct reference to Section 18 of the Act which reads as; "nothing in Section 438 of the Code shall apply in relation to any case involving arrest of any person on an accusation of having committed an offence under this Act." The Supreme Court also stated that the scope of section 18 vis-à-vis section 438 is that it creates a specific bar in the grant of anticipatory bail. It added:[48]

> When an offence is registered against a person under the provisions of SC/ST Act, no court shall entertain application for anticipatory bail unless it, prima facie, finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court

---

43 (2017) 13 SCC 75 : Reported in Cr. Appeal No.570 of 2017 arising out of S.L.P. (Cri) No.1929 of 2015.

44 (1995) 3 SCC 221.

45 2010 (5) MPHT 42.

46 2013 SCCOnLine 4997 : Delhi High Court, Bail Appln. 2242/2013(Decided On: 11.12.2013).

47 (2012) 8 SCC 795 : 2012 (8) SCALE 577.

48 *Id.* at para 10.

> is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence.

In *Mukesh Kumar Saini* v. *State (Delhi Administration),*[49] the court stated that the statute speaks clearly that anticipatory bail cannot be availed by the persons, who are accused of having committed the offences under the SC/ST Act. However, merely because of section of the SC/ST Act is mentioned in the FIR, that itself cannot be a ground to decline the anticipatory bail. For the offence to be made out under section 3 (1) of the SC/ST Act the basic ingredients of the offence need to be present; (a) there must be an intentional insult or intimidation with intend to humiliate SC/ST member by a non-SC/ST member; (b) that insult must have been done in any place within the public view.

The Patna high court in *Sajjo* v. *State of Bihar,*[50] stated the following:[51]

> (a) That an application under section 438 Cr.P.C. with respect to offences under the provisions of SC&ST Act is not maintainable as of matter of right either before High Court or before the court of Session. However, if in the circumstances set forth below, the court is of the opinion that offences alleged are in applicable under the Provisions of SC & ST Act then certainly an application under section 438 Cr.P.C. is maintainable and relief can be granted.
>
> (b) Merely mentioning the provisions either in the FIR or the complaint petition regarding commission of the offences under SC&ST Act would not itself denude the court to exercise its power under section 438 Cr.P.C
>
> (c) The court is required to lift the veil in each case and is required to come to a finding as to whether an offence under the provisions of SC&ST Act is made out or not,
>
> (d) For the purpose of coming to the conclusion about applicability of the provisions of SC&ST Act in a particular case, the court is not required to make an in-depth inquiry or to examine the materials on record meticulously. At this stage for the purpose

---

49 2001 Cri.LJ 4587.

50 2010 SCC OnLine Pat 1630 : 2010 (2) PLJR 690.

51 *Id.* at para 13.

of consideration of prayer for anticipatory bail, court is required to see only as to whether a prima-facie case is made out or not.

(e) For the purpose of coming to a conclusion as to whether offence under the provisions of SC&ST Act is made out or not, it would be suffice [sic] to scrutinize the FIR or the complaint petition, as the case may be. Calling for the case diary, charge sheet, statement of witnesses and other materials on record and considering the defence of accused at this stage would be contrary to the Legislative intent of section 18 of the SC&ST Act and as such for the purpose of consideration of application under section 438 Cr.P.C. same are to be avoided.

(f) In a case of barbaric nature of atrocities punishable under the Provisions of SC & ST Act or in a case of attack with casteist angle, bar u/s 18 of SC & ST Act shall be applicable, and petition under section 438 Cr.P.C. cannot be entertained.

(g) Merely calling someone by caste name does not ipso facto attract the Provisions of SC & ST Act.

In 2017 in *Anil Kumar* v. *State of Madhya Pradesh*[52] the Court opined that :

> …Section 18 of the Atrocities Act gives a vision, direction and mandate to the Court as to the cases where the anticipatory bail must be refused, but it does not and it certainly cannot whisk away the right of any Court to have a prima facie judicial scrutiny of the allegations made in the complaint. Nor can it under its hunch permit provisions of law being abused to suit the mala fide motivated ends of some unscrupulous complainant.

The Supreme Court in *Subhash Kashinath Mahajan* v. *State of Maharashtra*,[53] has restated this position. A division bench has clarified *Balothia* and held that the eclipse on anticipatory bail under section 18 cannot be interpreted as absolute. In these matters, judicial discretion[54] has to be applied before denying anticipatory bail because such denial would be against due process. The courts must apply their mind to examine whether a "prima facie case is made out or the case is patently false or mala fide." If *prima facie* the case appears to be genuine, "custodial interrogation and pre-trial arrest and detention" are permissible. In this way the Court has read down section 18 of the SC/ST Act, 1989 in the light of article 21. Several objections to the judgement were raised by political parties leading to an

---

52 2017 Cr.A.No.2854/2017.

53 (2018) 6 SCC 454 : 2018 (4) SCALE 661.

54 Chapter Four of this book is exclusively dedicated to "Judicial Discretion".

won more serious consideration by the government of an absolute exclusion of anticipatory bail under the Act.[55]

The above tests laid down in the context of Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 would equally be applicable to cases involving Section 21(3) of MCOCA which is an identical provision.

VI Conclusion

It has been noted that most of the special legislations are covering grave and heinous offences and have specific and stringent provisions regarding the grant of bail. Other statutes ordinarily confer more discretionary powers upon the courts like provided under Ss 437/439 of the Criminal Procedure Code. From a cursory glance of the developments in the area it is evident that the jurisprudence as far as the bail provisions of the Code are concerned seems to be well settled.[56] However, when it comes to some of the special legislations as covered in the text above, it cannot be ignored that they work on different parameters and objectives. The legislations draw the curious researcher to further understanding the influence of the crime control objectives of penal law on the established due process considerations of the same. As is evident from the provisions of the special legislations, the principle of presumption of innocence, which has been sacrosanct and the bedrock of criminal jurisprudence, also interpreted as a human right by the Supreme Court[57] is turned upside down.

The provisions for bail in statutes like MCOCA and NDPS Act have been protected by the Supreme Court in *Nikesh Tarachand Shah*[58] on the ground that they only apply the twin tests to the offences under the respective statutes, unlike PMLA. But when it comes to the inversion of presumption of innocence, the Court was very circumspect in giving its views. It says that *provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature*.[59] The discomfort of the Court with provisions of this ilk is evident when it states that the Supreme Court upheld the analogous provision of MCOCA 'somewhat grudgingly'[60] vide its judgment in *Ranjit Brahmjeetsing Sharma.*[61]

---

55 See also, discussion under Chapter Five-Anticipatory Bail in this book.

56 The comments of the Law Commission of India in its 268th Report (May, 2017) and the need for a Bail Act are not included in this discussion.

57 *See* Sinha, J. in *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra, supra* note 18 at para 35.

58 *Supra* note 26 at para 55.

59 *Id.* at para 70.

60 *Id.* at para 73.

61 *Supra* note 20.