

D/L. 55.
September 14, 2023
MNS

**Calcutta High Court
In The Circuit Bench at Jalpaiguri
Appellate Side**

CRM (A) 653 of 2023

In Re: - An application for anticipatory bail under Section 438 of the Code of Criminal Procedure filed on 14.08.2023 in connection with Sadar Women Police Station Darjeeling Case No. 14 of 2023 dated 21.07.2023 under Sections 376/417/323/342/34 of the Indian Penal Code, 1860.

And

In the matter of: Hasibul Rahaman and another

.... petitioners

Mr. Rajesh Kumar Sharma,
Mr. Janardan Periwai,
Mr. Bikkey Sharma,
Ms. Rajashree Dasgupta

... for the petitioners

Mr. Nilay Chakraborty,
Ms. Sukanya Adhikary

... for the State

1. At the outset, an objection as to maintainability of the application under Section 438 of the Criminal Procedure Code is taken by the State. By placing reliance on Section 18A of the Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, "the 1989 Act"), it is contended that the said Section precludes any application in connection with charges under the said Act.
2. Learned counsel for the State also places reliance on Section 14A of the 1989 Act to argue that as per sub-section (2) thereof,

notwithstanding anything contained in sub-section (3) of Section 378 of the Code of Criminal Procedure, an appeal shall lie to the High Court against an order of the Special Court or the exclusive Special Court granting or refusing bail.

3. It is sought to be argued that since the contemplation of bail and anticipatory bail both emanate from Chapter 33 of the Criminal Procedure Code and belong to the same genre, the principles pertaining to bail as enshrined in Section 14A also applies to anticipatory bails.
4. It is contended that the disposal of an application for bail or anticipatory bail is of a final nature, thus, coming within the purview of Section 14A of the 1989 Act.
5. Learned counsel for the petitioners, while controverting the last point submitted above, argues that as per *Amarnath and others Vs. State of Haryana and another*, the provision under Section 14A pertains only to interlocutory orders.
6. More importantly, it is contended by learned counsel for the petitioner that Section 18A was introduced in the 1989 Act by way of the amendment of 2018, pursuant to a judgment passed by the Supreme Court, which was subsequently considered on review by a different Bench of the Supreme Court itself.
7. It is argued that the Supreme Court, while passing the said judgment, observed that the directions-in-question encroached upon the field reserved for the legislature and against the concept of protective discrimination and in favour of downtrodden classes

under Article 15(4) of the Constitution of India and also impermissible within the parameters laid down by the Supreme Court for exercise of powers under Article 142 of Constitution of India. Resultantly, the Supreme Court was of the considered opinion that Direction Nos. (iii) and (iv) issued by the said court deserved to be and were thereby recalled and consequently Direction No.(v) also vanished.

8. Importantly, Direction Nos. (iii) and (iv), which were recalled, pertained to arrest of a public servant under the 1989 Act, which could be only after approval of the appointing authority and regarding preliminary enquiry to be conducted by the DSP.
9. The directions which survived even after the said review order passed by the Supreme Court pertained, *inter alia*, to the opinion of the Supreme Court that 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.
10. It is argued that in view of the said observation of the Supreme Court, in terms of Article 141 of the Constitution of India, the law as observed therein should prevail, thereby diluting Section 18A of the 1989 Act.
11. Learned counsel also cites the judgment of *Prathvi Raj Chauhan Vs. Union of India and others*, reported at *AIR 2020 SC 1036*, where it was held *inter alia*, that concerning the applicability of provisions of Section 438, Code of Criminal Procedure, it shall not apply to the

cases under the 1989 Act; however, if the complaint does not make out a *prima facie* case for applicability of the provisions of the Act, the bar created by Sections 18 and 18A(1) shall not apply.

12. Learned counsel for the petitioners also relies on a coordinate Bench judgment of this Court in *Sk. Golam Murshed and others Vs. State of West Bengal and others*, where it was observed, by following *Subhash Kashinath Mahajan's* case, that 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. Section 18 cannot be read as being applicable to cases where individuals are falsely implicated for extraneous reasons, it was observed.

13. Learned counsel next relies on *Kingshuk Gupta Vs. State of West Bengal*, another coordinate Bench judgment of this Court, where the Court observed inter alia that Section 18A was not incorporated to introduce any higher bar in the matter of applicability of Section 438, Code of Criminal Procedure than what was envisaged in Section 18 thereof. While incorporating the said provision, that is, Section 18A, the legislator did not consider it necessary to repeal Section 18. Hence, it was held, both the provisions must be harmoniously read as they operate in the same field.

14. Learned counsel next cites *Danish Khan @ Saahil vs. State (Government of NCT of Delhi)* where the proposition of *Prathvi Raj Chauhan* was reiterated and it was observed that if the complaint does not make out a *prima facie* case for applicability of the

provisions of the Act, the bar created by Sections 18 and 18A(1) shall not apply.

15. Upon a careful consideration of the arguments of the parties, we are of the opinion that there is nothing in the cited judgments to dilute the proposition laid down in Section 18A, particularly in sub-section (2) thereof, of the 1989 Act, except for exceptional circumstances.
16. The judgment which holds the field now is *Union of India Vs. State of Maharashtra*, reported at *AIR 2019 SC 4917*.
17. One of the directions of *Kashinath's case*, which was retained by the Supreme Court in its latter judgment, was that 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*.
18. The said qualification, however, is not applicable as a standalone rider to the provisions of Section 18A. In order to come within the purview of the same, it has to be established that there is no *prima facie* case made out or the complaint was *prima facie mala fide*. No case of mala fides, as such, has been made out as yet in the instant case, since it would be premature at the anticipatory bail stage to observe that there was any mala fides on the part of the authorities in clubbing offences under the 1989 Act.
19. Insofar as the judgment of *Prathvi Raj Chauhan (supra)* is concerned, we observe that the Supreme Court's findings pertained specifically to the bar created by Section 18 and Section 18A(1) of the 1989 Act and do not touch sub-section (2) of the Section 18A.

The Supreme Court held that if the complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act, the bar created by Section 18 and 18A(1) are not applicable. If we scrutinize the respective Sections, we find that both Sections 18 and 18A(1) pertain primarily to arrest and enquiry.

20. Section 18 provides that nothing in Section 438 of the Criminal Procedure 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.* (Emphasis supplied)

21. “Accusation of having committed an offence under this Act” is quite wide.

22. Insofar as Section 18A(1) is concerned, the same speaks about preliminary enquiry not being required for registration of an FIR against any person and the investigating officer not being required to obtain approval for the arrest if necessary of any person. Such situations are qualified by the rider “against whom an accusation of having committed an offence under this Act has been made”, which refers specifically to ‘accusation’, thus arguably speaking about the complaint lodged.

23. However, sub-section (2) of Section 18A provides that the provisions of Section 438 of the Code shall not apply to “a case under this Act”, notwithstanding any judgment or order or direction of any court.

24. The Legislature, in its wisdom, whether pursuant to *Kashinath’s case* or otherwise, introduced the said provision and the same has not been obliterated from the statute book. Sub-section (2), in no

uncertain terms, pertains to a situation where “a case” under the 1989 Act exists. The expression “a case” is rather wider than “an accusation” of having committed an offence. Whereas an ‘accusation’ may be construed to mean only the conditions of the initial complaint, ‘a case under the Act’ is of a wider connotation. In the case at hand, although the initial complaint did not contain any allegation under the 1989 Act, subsequently the offence under the 1989 Act was clubbed, thereby lending the colour of the 1989 Act to the case sought to be made out against the petitioner.

25. If we carefully consider *Prathvi Raj (supra)*, we find that the said judgment does not negate Section 18A(2) of the 1989 Act at all, but merely dilutes the applicability of Section 18A (1) insofar as if the complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act, the bars created under Sections 18 and 18A(1) shall not apply.
26. We are not dealing with at present with a bar under Section 18A(1) or Section 18 of the 1989 Act as such, but with the blanket bar of Section 18A(2) which is on a different footing and is more expansive in nature.
27. In the judgment of the co-ordinate Bench of this court in *Sk. Golam Maurshed (supra)*, the Division Bench was considering a case where the individuals were falsely implicated for extraneous reasons and the complaint was prima facie mala fide. No such case has been made out in the present *lis* to justify importing the said ratio in the present case.

28. In the judgment of *Kingshuk Gupta (supra)*, the court was considering that Section 18A was not incorporated to introduce any higher bar than Section 18 and it was observed that Sections 18 and 18A have to be read harmoniously. Such proposition does not help the petitioner in the present case in any manner insofar as the bar of Section 18A(2) is concerned. Even if the ratio laid down there is taken to the hilt, Section 18 and 18A, read harmoniously, do not justify the negation of Section 18A(2) of the 1989 Act, which applies to any case under the 1989 Act, since the present case has also partaken of the colour of such a case upon clubbing of the offence under the 1989 Act.

29. Insofar as *Danish Khan@ Saahil (supra)* is concerned, although the learned Single Judge of the Delhi High Court had relied on *Prathvi Raj (supra)* there, we do not find why the said concept should be imported in the present case as well.

30. It was held therein that if the complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act, the bar created by Sections 18 and 18A(1) shall not apply.

31. In the present case, the question does not arise of Section 18 or Section 18A (1) arising, as we are not concerned merely with the initial complaint lodged, which did not contain any allegation under the 1989 Act.

32. The present issue relates to Section 18A (2), which is much wider in ambit and is not covered by the restrictions to Section 18A, sub-section (1) stipulated in *Prathvi Raj (supra)*.

33. The Supreme Court, in its wisdom, deliberately omitted to comment on Section 18A (2) while dealing with the dilution of the effect of Section 18A.
34. Hence, the provision-in-question, that is, Section 18A (2) does not get obliterated from the face of the statute merely by virtue of the judgments cited on behalf of the petitioners. What the said judgments do is at best dilute the operation of Section 18A insofar as sub-section (1) thereof, read with Section 18 of the 1989 Act, is concerned.
35. Thus, on a comprehensive assessment of the judgments cited by the parties, we are of the opinion that the bar under Section 18A (2) operates in respect of cases falling in the 1989 Act, for which purpose, we are to look into all the offences which have been alleged against the petitioners, including the initial complaint lodged against the petitioners as well as the subsequent Sections clubbed under the 1989 Act.
36. Learned counsel for the State has made a point in drawing an analogy with Section 14A insofar as the Special Court has been designated for the purpose of taking up issues under the 1989 Act, to extend protection to a particular class of society.
37. Since the Constitution provides such reasonable classification, it is not for the court, particularly, the High Courts, to negate the operation of the said Act and its rigours.
38. Hence, we are of the opinion that the provisions of Section 438 of the Code of Criminal Procedure Code, in the absence of any specific

case being made out of patent mala fides or palpable non-maintainability against the petitioners, cannot be invoked here in view of the bar embedded in Section 18A (2) of the 1989 Act.

39. Thus, CRM (A) 653 of 2023 is dismissed as not maintainable.

40. However, it is made clear that this Court has not gone into the merits of the contentions of the parties at all and it will be open to the petitioners to approach the jurisdictional court with a prayer for bail.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)