

(1994) 03 MP CK 0016

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 1478 of 1993

Dr. Ram Krishna Balothia

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 25-03-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 15(4), 21
Criminal Procedure Code, 1973 (CrPC) — Section 438
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 14, 15, 18, 3, 8

Citation : AIR 1994 MP 143 : (1994) CriLJ 2658 : (1994) ILR (MP) 128 : (1994) JLJ 372 : (1994) 1 MPJR 217 : (1994) 39 MPLJ 644 : (1994) MPLJ 644

Hon'ble Judges : U.L. Bhat, C.J;P.P. Naolekar, J

Bench : Division Bench

Advocate : V.K. Tankha, for the Appellant; R. Shrivastava, for B.K. Rawat, A.A.G., for the Respondent

Judgement

P.P. Naolekar, J.

The decision in this petition shall also govern disposal of the petitions, list of which is annexed herewith.

The petitioners have challenged the constitutional validity of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act No. 33 of 1989) (for short hereinafter called the Act) in these petitions. Most of the petitioners are members of upper caste Hindus and some of them are Muslims. Offences u/s 3 of the Act are registered against the petitioners along with other provisions of the Indian Penal Code.

The contentions raised by the petitioners for challenging the constitutional validity of the Act are; (i) the entire Act is based on caste discrimination and, therefore, infringes Article 15(1) of the Constitution of India and it is not saved under Article 15(4) of the Constitution; (ii) Section 3 of the Act provides for punishment for offences of atrocities against persons belonging to members of

schedule castes and scheduled tribes by any person other than a member of scheduled castes and scheduled tribes which cannot be said to be a provision for advancement of the schedule castes and tribes; (iii) Section 8(a) of the Act is vague, unclear and preposterous, inasmuch as, it tries to create a premature criminal liability in an ambiguous manner; and (iv) Section 18 of the Act is violative of Articles 14 and 21 of the Constitution of India.

In order to appreciate the questions raised by the counsel for the petitioners, it is necessary and useful to refer to the broad spectrum of the Act and the Statement of object and reasons. The Act was brought into force to prevent the commission of offences of atrocities against the members of the scheduled castes and the scheduled tribes, to provide for Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto.

Section 2(a) defines "atrocities" to mean an offence punishable u/s 3. Section 3 deals with the offences against members of a scheduled caste or a scheduled tribe by any person who is not a member of a scheduled caste or scheduled tribe. Section 4 lays down punishment for neglect of duties by public servant, who is not a member of scheduled caste or tribe, for wilful neglect in the performance of his duties. Section 5 contains a provision for enhanced punishment for subsequent conviction. Section 8(a) raises a presumption as to abetment of offence. Section 10 relates to externment of persons likely to commit offences. Section 14 provides for establishment of Special Courts for the purpose of providing for speedy trial of offences under the Act. Section 15 relates to appointment of Special Public Prosecutors to conduct cases in the Special Courts. By virtue of Section 18, Section 438 of the Code of Criminal Procedure is made non-operative with regard to the offences enumerated under the Act. Section 19 provides that Section 360 of the Code of Criminal Procedure or the provisions of the Probation of Offenders Act shall not apply to persons found guilty of an offence under the Act. Section 21 imposes a duty on the Government to ensure effective implementation of the Act. The entire scheme of the Act is to provide protection to the members of the scheduled castes and scheduled tribes and to provide for Special Court and speedy trial of the offences.

Article 15(1) and (4) of the Constitution reads:

15(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

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(4) Nothing in this article or in clause (2) of Art. 29 shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes.

Article 15(4) has reference to Scheduled Castes and Scheduled Tribes. Article

341 of the Constitution authorises the President to issue notification specifying the castes, races or tribes or parts of or groups within castes, races or tribes to be scheduled castes in relation to the State or Union Territory. Article 342 makes, mutatis mutandis, the same provisions for scheduled tribes. Article 15(1) confers fundamental right on every citizen, that he cannot be discriminated on the basis only of religion, race, caste, sex, place of birth or any of them and confers on every citizen a legally enforceable fundamental right. Article 15(4) does not confer any fundamental right on scheduled castes or scheduled tribes, but merely confers discretionary powers on the State to make any special provisions for the advancement of Scheduled Castes and Scheduled Tribes.

The language used in Article 15(4) cannot be understood in a narrow sense. Article 15(4) embodies the doctrine of protective discrimination. The word "advancement" in clause (4) of Article 15 is not subject to any qualification and by no principle of interpretation it could be said that from the context it should be construed in a restricted sense, as amounting to only social and educational advancement. The expression "special provision for the advancement" is an expression of very wide import and brings within its sweep each and every kind of advancement. This is so because Scheduled Castes and Scheduled Tribes occupy a special position in our constitution. They have endured great illtreatment as untouchables for centuries, apart from their backwardness. It must be remembered that thousands of years of discrimination cannot be wiped out in one generation. It is in the fitness of things that every effort is to be made to correct this long standing and historical discrimination.

A special provision does not only mean to provide for education, agricultural programmes, schemes for training to purpose trade or business, free education, free hostel facilities, free food or clothes, advancement of loans, special facilities regarding recovery of loans etc. as argued by the counsel for the petitioners. To our mind, it would include all out effort by the State to make them stand on their own feet, to bring them into the mainstream of the National life, to live with dignity, self-esteem and with head held high. This is only possible if they are permitted to live in the society without fear or suppression from upper castes or top echelons of the society belonging to the another caste, creed or religion. The Act contains affirmative measures to weed out the root cause of the same, which has denied them civil rights and subjected them to various kinds of indignities, humiliations and harassment for various historical, social and economic reasons. Advancement of the oppressed people requires dealing with upper levels of the society when they try to suppress or deny legitimate aspirations of Scheduled Castes and Scheduled Tribes, their right to life and dignity, freedom from bonded labour and must protect them from the practice of untouchability, help to protect their self-respect and the honour of their women, and to shield them from oppressive land grabbers of the land allotted to them, protection from all kinds of oppression, social, political, economic and cultural must be provided for to ensure their advancement.

The Act is one of the legislative measures intended to do justice to members of Scheduled Castes and Scheduled Tribes, the most oppressed section of the society, by affirmative action. It contains ways and means to minimise inhuman sufferings, indignities and exploitation of socially downtrodden. Section 3 of the Act enumerates offences against scheduled castes and scheduled tribes by members of upper castes, by persons who are not members of Scheduled Castes and Scheduled Tribes. The provision for offences enumerated in Section 3 of the Act is actually meant for the purpose of achieving the aforesaid object and as such is for the advancement of the members of Scheduled Castes and Scheduled Tribes. The legislature has jurisdiction and authority to make such provisions, by exercising powers under Article 15(4) of the Constitution of India. The Act is protected under Article 15(4) of the Constitution of India.

It is further argued that Section 3 of the Act also operates against Muslims and Christians who are not believers of caste system. In *K.C. Vasanth Kumar and Another Vs. State of Karnataka, Chinnappa Reddy, J.* (as he then was) has held at page 1512:

"If poverty be the cause, caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste. So sadly and oppressively deep rooted is caste in our country that it has cut across even the barriers of religion. The caste system has penetrated other religious and dissident Hindus to whom the practice of caste should be anathema and today we find that practitioners of other religious faiths and Hindu dissentients are some times as rigid adherents to the system of caste as the conservative Hindus."

We do not find any material change in our social structure for the last decade, so as to take a different view of the matter. The above observation of the learned Judge is a complete answer to the argument advanced that Muslims and Christians who do not believe in caste system should not be brought within the ambit of Section 3 of the Act.

Section 8(a) of the Act is challenged on the ground that on mere financial assistance to a person accused of, or reasonably suspected of, committing offences under this chapter, a presumption shall be drawn unless the contrary is proved, that such person has abetted the offence, is vague, arbitrary and there cannot be any penal offence committed only on giving financial assistance.

Considering the entire purpose for which the Act has been enacted, the provisions in Section 8(a) is necessary for the effective implementation of the provision in Section 3 of the Act. It is necessary to prevent the moneyed persons from encouraging commission of offences u/s 3, in indirect way by rendering financial assistance to hired hands to get their work done. On the other hand, the interest of such persons is safeguard, as the presumption is rebuttable. The Act has further taken care to ensure that the powers are not misused. Special public Prosecutors are appointed u/s 15, Special Courts are invested with powers to try

offenders u/s 14 of the Act. The Special Prosecutors and Special Courts are required to be manned by experienced persons. By their experience, professional expertise, knowledge, judicial discipline and reading of human behaviour, they are well equipped with capacity to decipher truth from falsehood. The provision of Section 8(a) is not arbitrary and is necessary for the effective working of the Act.

By virtue of Section 18 of the Act, provisions of Section 438 of the Code of Criminal Procedure are made inapplicable to persons against whom any case for an offence punishable u/s 3 of the Act is registered. Section 438 of the Code of Criminal Procedure, 1973 provides for issuance of direction for grant of bail to a person apprehending arrest, that is to say, anticipatory bail is available to an accused under the Criminal Procedure Code. Section 18 of the Act reads thus:

" 18. 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.

Anticipatory bail is given in anticipation of arrest and, therefore, is effective at the very moment the person apprehends his arrest, whereas bail u/s 439 is sought after the arrest. The act of arrest directly affects the freedom of movement of a person arrested by the police and therefore has a direct bearing on personal liberty and investigational powers of the police. In *Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh*, it was observed by Krishna Iyer J. "the issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Article 21 are the life of that human right."

In *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab*, the constitutional validity and scope of Section 438 of the Code of Criminal Procedure has been considered and it has been held that powers to grant anticipatory bail should be exercised with due care and circumspection but beyond that it is not possible to lay down or formulate any hard and fast rule for grant or refusal of anticipatory bail which is left to the discretion of the Court. The circumstances in one case may turn out to be conclusive, which in another case may be no more than ordinary signification. While considering arguments on Article 21 of the Constitution of India, five Judges Bench has held in para 26 at page 1646;

"Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over generous infusion of constraints and conditions which are not to be found in Section 438

can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The bene-ficient provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, that in order to meet the challenge of Article 21 of the Constitution the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."

In *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, it has been authoritatively laid down that, if a law, depriving a person of personal liberty and prescribing a procedure for the purpose, is made within the meaning of Article 21, it has to stand the test of Article 14 of the Constitutions of India. The principle of reasonableness, which legally as well as philosophically, is an essential element of a equality or non-arbitrariness and procedure contemplated by Article 21, must answer a test of reasonableness. Law should be right and just and fair and not arbitrary, fanciful or oppressive; and if it is no procedure at all and the requirement of Article 21 would not be satisfied.

Counsel for the respondents relied on a Full Bench decision of the Rajasthan High Court in *Jai Singh and Another Vs. Union of India (UOI) and Others*, wherein it has been held that the right to anticipatory bail did not flow from Article 21 of the Constitution either expressly or impliedly, and that Article 21 is not intended to be a constitutional limitation upon the powers of the legislature. The Act being special enactment will prevail over general enactment, i.e. Code of Criminal Procedure, and, therefore, it is said that Section 18 of the Act is not hit by Article 21 of the Constitution of India.

With great respect to the learned Judges Constituting the Full Bench, we do not find ourselves in agreement with the view taken in *Jai Singh's* case (*supra*). The Full Bench mainly relied upon the provisions of Sub-section (7) of Section 20 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and the provisions of the Narcotic drugs and Psychotropic Substances Act, 1985 and the decisions of the Supreme Court reported in *Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat*, and *Narcotics Control Bureau Vs. Kishan Lal and others*,

In *Usmanbhai Dawoodbhai Menon's* case (*supra*) in paragraph 15, the Supreme Court has specifically said: "Before dealing with the contentions advanced, it is well to remember that the legislation is limited in its scope and effect. The Act is an extreme measure to be resorted to when the police cannot tackle the situation under the ordinary panel law" and said in paragraph 11 of the judgment that constitutional validity of the Act under Article 21 was left open. Thus, the Supreme Court has not considered the scope and ambit of Article 21 in that case.

In Narcotics Control Bureau's (supra), the Supreme Court was considering the scope of limitation imposed on the powers to grant bail u/s 439, Cr.P.C. The Supreme Court has held that non-obstante clause in Section 37 of the Narcotic Drugs and Psycho-tropic Substances Act should be given its due measuring and clearly it is intended to restrict the powers to grant bail u/s 439, Cr.P.C. limiting the scope of the applicability of the provisions of the Code regarding bail. The Supreme Court was not considering the total prohibition of the powers of the Court to grant bail.

In the light of the Supreme Court decisions, we have to consider whether procedure of non-application of Section 438 of the Code of Criminal Procedure, 1973 u/s 18 of the Act to the offences enumerated thereunder can be said to be a procedure as contemplated by Article 21 of the Constitution of India.

Article 21 requires that there should be some form of procedure or proceedings before a person can be condemned in respect of his life or liberty. The procedure so prescribed should not be unfair, unreasonable or arbitrary. Expression "personal liberty" has to be construed to be of widest amplitude. It covers various rights which go to constitute liberty and the right of freedom. Every person has right to remain free and that right can only be taken away by just, fair and reasonable procedure. Procedure prescribed under the ordinary law cannot be taken away, except in accordance with the principles underlying Articles 14 and 21. The very purpose of providing right to life and liberty beyond the reach of arbitrary or unreasonable procedure can be frustrated, if the court have no authority to consider the reasonableness of the procedure. It is possible that in case of extraordinary situations required to be tackled under the provisions of the Terrorist and Disruptive Activities (Preventive) Act or Narcotic Drugs and Psychotropic Substances Act, restrictions imposed on the applicability of provisions for non-applicability of Section 438 of the Code can be justified as being necessary to safeguard security of the State and public interest. The magnitude and the seriousness of the crime against the State or the society in general cannot be compared with those offences defined u/s 3 of the Act.

As long as Section 438 of the Code is in the statute book it is part of the ordinary law of the land and persons apprehending arrest on accusation of having committed non-bailable offences can invoke the provisions, though in case of more serious offences, Courts may be slow in ordering anticipatory bail. Denial of rights or procedure available u/s 438 of the Code, while it is in the statute book, has to be tested in the constitutional anvil of Articles 14 and 21. As explained by the Law Commission in its 41st Report, sometimes false cases are foisted for the purpose of disgracing or humiliating or harassing innocent persons. The reason may be rivalry of a political nature, personal nature etc. Section 438 of the Code is intended to meet such situation. Unless there are good reasons connected with security of the State and law and order of public interest or other equally weighty considerations, separate treatment in regard to certain offences or certain types of offenders may not pass test of Article 14. The classification must also have

nexus with the objects sought to be achieved. In regard to such special offences or offenders, the procedure must be capable of being regarded as reasonable or fair procedure as contemplated under Article 21.

When information is received by the police authority regarding commission of a cognizable offence punishable under the Act, case has to be registered and investigated. Necessarily the person accused of the offence has to be arrested, interrogated and dealt with under the provisions of the Code. Section 18 of the Act does not merely introduce restrictions regarding application of Section 438 of the Code. It renders totally inapplicable provisions of Section 438 of the Code with regard to all offences under the Act. This is not a case of restriction or selective non-applicability, but one of total non-applicability. While Section 438 of the Code is applicable to graver crimes under the I.P.C. or other penal statutes, it is not applicable even to comparatively minor offences under the Act. Justification which could be found in respect of offences under the T.A.D.A. or N.D.P.S. is not available in regard to all the offences under the Act. We are not called upon in this case to examine whether legislature could have introduced restrictions in regard to 438 of the Code or made it selectively inapplicable. The effect of Section 18 of the Act is to deny totally the benefit of Section 438 of the Code in respect of even offences for which comparatively minor punishment is prescribed. The Police Officer who registered a case under the Act has no discretion not to arrest the offender; if he fails to discharge his duty or acts negligently, he incurs the risk of being prosecuted for an offence u/s 4 of the Act. The object of the statute is to ensure advancement of members of Scheduled Castes and Scheduled Tribes by protecting them from harassment, humiliation, disgrace, indignity, exploitation and the like by members of stronger sections of the society. This purpose is not served by whole-sale denial of the benefit of Section 438 of the Code to all classes of offenders under the Act. The classification between whole classes of offenders under the Act on one hand and offenders under laws has no nexus with the objects to be achieved by the Act. Section 18 of the Act offends Article 14 of the Constitution.

The Act is capable of being misused considering the wide amplitude of the offences created thereunder. The wider the amplitude of the offence, the greater is the scope for misuse. The Investigating Authority is also ham-strung by the hovering presence of Section 4 of the Act. Many of the offences under the Act are of a comparatively minor nature. Yet the Act is intended to protect the dignity of a class of persons. Section 18 of the Act in its present form renders the procedure of the Act unfair and unreasonable and offends the very soul and spirit of Article 21 of the Constitution. Having regard to the nature of the offences under the Act and the punishments prescribed for many of them, the wholesale inapplicability of Section 438 of the Code renders Section 18 of the Act oppressive unfair and unreasonable.

For the aforesaid reasons, we hold that the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 are constitutionally

valid, except Section 18 of the Act, which does not conform to the norms of justice and fair play and prescribed a procedure which is impermissible under the Constitution and is liable to be struck down. Accordingly we strike down Section 18 of the Act as violative of Article 14 and Article 21 of the Constitution of India. In the circumstances of the case, the parties shall bear their own costs.