2023/KER/40947

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

FRIDAY, THE 21ST DAY OF JULY 2023 / 30TH ASHADHA, 1945

CRL.A NO. 1275 OF 2022

AGAINST THE ORDER/JUDGMENT IN CRL.M.P.NO.248 OF 2022 IN RC 2/2020/NIA OF THE SPECIAL COURT FOR THE TRIAL OF NIA CASES, ERNAKULAM

APPELLANT/PETITIONER/ACCUSED NO.20:

AHAMMEDKUTTY POTHIYIL THOTTIPARAMBIL,
AGED 60 YEARS, S/O.LATE MOHAMMED @ BAPPU HAJI,
POTHIYIL THOTTIPARAMBIL HOUSE, THAZHEKKODE P.O.,
PERINTHALMANNA, MALAPPURAM DISTRICT, PIN - 679357

BY ADV BABU S. NAIR

RESPONDENTS/RESPONDENT/UNION OF INDIA & COMPLAINANT:

1 THE UNION OF INDIA
REPRESENTED BY THE NATIONAL INVESTIGATION AGENCY,
THROUGH THE DEPUTY SOLICITOR GENERAL OF INDIA,
HIGH COURT OF KERALA, ERNAKULAM, KOCHI - 682020

2 THE SUPERINTENDENT OF POLICE
THE NATIONAL INVESTIGATION AGENCY,
28/443, GIRI NAGAR, KADAVANTHRA,
ERNAKULAM, KOCHI, PIN – 682 020

BY ADV S.MANU DSG OF INDIA

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 21.07.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

2023/KER/40947

C.R.

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Criminal Appeal No.1275 of 2022

Dated this the 21st day of July, 2023

JUDGMENT

P.B.Suresh Kumar, J.

The moot question in this case is whether the exclusion of the application of Section 438 of the Code of Criminal Procedure (the Code) to the offences punishable under the Unlawful Activities (Prevention) Act, 1967 contained in Section 43D(4) of the said Statute, is absolute.

2. The appellant is accused No.20 in R.C.No.2/2020/NIA, a crime registered under Sections 16, 17 and 18 of the Unlawful Activities (Prevention) Act, 1967 (the UAP Act). The appellant challenges in this appeal, the order dismissing the application preferred by him before the Special Court for Trial of NIA Cases (the Special Court) seeking anticipatory bail in the said case.

3. On 5.7.2020, 30.244 kg of 24 karat gold valued

14.82 crores was seized from an import cargo addressed to the Consulate General of the United Arab Emirates (UAE) in Thiruvananthapuram at the Air Cargo Complex of the Thiruvananthapuram International Airport by Customs (Preventive) Commissionerate, Cochin. It is seen that based on information that the proceeds of the smuggled gold could be used for financing terrorism in India, the Ministry of Home Affairs, Government of India directed the National Investigating Agency (NIA) constituted under the National Investigation Agency Act, 2008 (NIA Act) to investigate into the said transaction and it is on that basis, the crime referred to above was registered on 10.07.2020 initially against P.S.Sarith, a former Public Relations Officer of the Consulate General of UAE and a few others. Later, in the course of the investigation, several others were also arrayed as accused in the case including the appellant. On completion of investigation against 20 accused, a final report has been filed against them before the Special Court, on 06.01.2020 alleging commission of offices punishable under Sections 16, 17, 18 and 20 of the UAP Act. The essence of the case put forward by NIA in the final report against the charge-sheeted accused is that the accused who, in spite of having the knowledge that the act of

smuggling of gold into India in large quantity would damage the monetary stability of India and friendly relations with UAE, with the motive to gain money, conspired together, recruited people, formed a terrorist gang, raised funds and smuggled gold from UAE through the import cargo addressed to diplomats at the Consulate General of UAE, in Thiruvananthapuram and thereby caused extensive and irreparable damage to the security and economic stability of the country.

4. It is stated in the final report that investigation is not over in respect of nine accused mentioned separately therein. After submitting the said final report, a petition is seen filed by NIA before the Special Court, invoking Section 173(8) of the Code seeking permission for conducting further investigation against the said nine accused. The name of the appellant was not included in the final report or in the petition filed by NIA before the Special Court seeking permission to conduct further investigation. It is seen that later, another petition has been filed by NIA before the Special Court stating that the appellant who played a major role in the crime was omitted to be shown as an accused in the final report against whom investigation is not concluded and seeking permission of the court for further

investigation against the appellant also under Section 173(8) of the Code.

5. It is seen that in the meanwhile, some of the accused in the case who have been arrested, applied for regular bail, and the Special Court granted bail to a few and declined bail to a few others. The NIA challenged the order granting bail to the accused in the case before this court. The accused who were denied bail have also challenged the said decision of the Special Court before this court. The appeals preferred by the parties to the case were disposed of together, as per the judgment reported in **Muhammed Shafi P. v. National Investigation Agency, Kochi**, 2021 KHC 145. As per the said judgment, this court affirmed the impugned decision of the Special Court. It was found by this Court in the said case that smuggling of gold simplicitor into the country covered by the provisions of the Customs Act will not fall within Section 15(1)(a)(iiia) of the UAP Act, unless evidence is brought out to show that it is done with the intent to threaten or likely to threaten the economic security or monetary stability of India. The view taken by this court in the case was that what is made an offence under Section 15(1)(a)(iiia) is causing damage to the monetary stability of India by way of

smuggling of high quality counterfeit Indian paper currency, coin or any other material relatable to currency or coin and the expression "other material" contained in Section 15(1)(a)(iiia) does not include gold. It was however, clarified in the judgment that if the investigating agency succeeds in digging out materials to show complicity of the accused in a terrorist act, they would be free to move the court for cancellation of bail. The judgment was rendered on 18.02.2021. Though the said judgment was challenged by NIA before the Apex Court, the Apex Court refused to interfere with the bail granted, and issued only limited notice in the matter to examine the questions of law raised.

6. Later, when the final report was filed, the remaining accused arrested in the case also applied for bail. The Special Court did not grant them bail. The accused challenged the decision of the Special Court in separate appeals before this Court and in terms of the common judgment dated 02.11.2021, another Division Bench granted bail to them also following the view taken by the earlier Division Bench as per the judgment reported in **Mohammed Shafi v. National Investigation Agency**, 2021 (6) KLT 659. It was made clear in the said judgment that if there are transnational forces involved in

subverting the security and stability of the Nation by any act; to further which the smuggling of gold was carried out, then the provisions of the UAP Act are attracted, specifically Section 15. It was also made clear in the said judgment that the findings rendered therein are only *prima facie* findings and it shall not be understood that this court has held that the offences under the UAP Act alleged against the accused have not been attracted at all and that the question whether the offences alleged against the accused under the UAP Act are attracted is to be decided by the Special Court at the time of trial.

7. When the arrested accused have been enlarged on bail, the appellant moved the Special Court for anticipatory bail, invoking Section 438 of the Code. The case set out by the appellant in the application preferred by him in this regard is that in the light of the findings rendered by the two Division Benches of this court that smuggling of gold simplicitor will not make out an offence punishable under the UAP Act, the only allegation against him being that he conspired with the remaining accused and financed as also facilitated smuggling of large quantity of gold from UAE to India, no offence punishable under the UAP Act has been made out against him in the case. Section 43(D)(4) of

the UAP Act excludes the application of Section 438 of the Code in relation to any case involving the arrest of any person accused of having committed an offence punishable under the UAP Act. According to the appellant, inasmuch as a *prima facie* case of commission of offences punishable under the UAP Act has not been made out against him, the bar under Section 43(D)(4) does not apply. The appellant relied on the decision of the Apex Court in **Subhash Kashinath Mahajan v. State of Maharashtra**, (2018) 6 SCC 454, wherein it was held that an identical provision in the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, (SC/ST Act) does not preclude the court from considering an application for grant of anticipatory bail in a case where a *prima facie* case of commission of offence under the said Statute is not made out.

8. The application for anticipatory bail preferred by the appellant was opposed by the NIA. Though the Special Court took the view that it does have the power to grant anticipatory bail in appropriate cases, dismissed the application for anticipatory bail, taking the view that having regard to the allegations made against the appellant that he had been responsible for financing/smuggling of gold in larger quantities to

India and the fact that he kept himself aloof from the investigating agency all throughout, it is not an appropriate case in which an order of anticipatory bail could be granted. It is aggrieved by the said decision of the Special Court that the appellant has preferred this appeal.

9. Heard Adv.Babu S. Nair, for the appellant and Sri.S.Manu, the Deputy Solicitor General of India for the National Investigating Agency.

10. The learned counsel for the appellant, placing reliance on the judgments of this Court in **Muhammed Shafi P. v. National Investigation Agency, Kochi**, 2021 KHC 145 and **Mohammed Shafi v. National Investigation Agency**, 2021 (6) KLT 659, contended vehemently and persuasively that in the light of the factual findings rendered in the said cases, in the absence of any material to indicate that the appellant and others have smuggled large quantity of gold into India with the intent to threaten the economic security and monetary stability of India, a case under Section 15 of the UAP Act is not made out. The learned counsel has taken us through the entire final report filed in the case by the NIA to substantiate the said contention. According to the learned counsel, the essence of the final report,

if examined in the light of the various supporting documents, would only show that the accused had smuggled large quantity of gold into India in order to make money. It was also contended by the learned counsel that it is in the said circumstances that the Division Bench in **Mohammed Shafi v. National Investigation Agency**, 2021 (6) KLT 659 chose to grant bail to all the arrested accused in the case who were not granted bail by the Special Court.

11. At the outset, the learned Deputy Solicitor General of India submitted that in the light of Section 43(D)(4) of the UAP Act, excluding the application of Section 438 of the Code in relation to a case involving the arrest of a person accused of having committed an offence punishable under the UAP Act, the application for anticipatory bail preferred by the appellant before the Special Court is not maintainable. It was pointed out by the learned Deputy Solicitor General of India that the decision of the Apex Court in **Subhash Kashinath Mahajan** rendered in the context of an identical provision contained in the SC/ST Act, cannot have any application to the facts of the present case. According to the learned Deputy Solicitor General of India, it is a judgment rendered having regard to the object sought to be

achieved by introducing an identical provision in the SC/ST Act and the reasons, based on which the Apex Court has held in the said case that notwithstanding the exclusion of the application of Section 438 of the Code to the offences punishable under the SC/ST Act, the court would be empowered to exercise the power conferred on it under Section 438 of the Code, if a *prima facie* case is not made out, does not apply to a case where the offence alleged is an offence punishable under the UAP Act. It was also submitted by the learned Deputy Solicitor General of India that the investigating agency has collected very many incriminating materials against the appellant which establishes his complicity in the crime. In order to substantiate the said point, the learned Deputy Solicitor General of India has referred to the various allegations levelled against the appellant in the final report already filed in the case. It was also pointed out by the learned Deputy Solicitor General of India that unlike in the case of the accused who have been arrested and interrogated, inasmuch as the appellant was evading arrest by remaining abroad, the investigating agency could not interrogate him so far and only if the investigating agency gets an opportunity to interrogate the appellant, a true picture of his involvement could be gathered.

The learned Deputy Solicitor General of India has argued, placing reliance on the decision of the Apex Court in **State represented by the C.B.I. v. Anil Sharma**, 1997 KHC 1035 that custodial interrogation is qualitatively more elicitation oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code and the interrogation of an accused who is protected and insulated by a pre-arrest order, would reduce the interrogation as a mere ritual. According to the learned Deputy Solicitor General of India, even assuming that the application for anticipatory bail preferred by the appellant is maintainable, the appellant who is evading arrest in the case and avoiding interrogation by the investigating agency, especially in a case of this nature, cannot claim an order of anticipatory bail, merely based on *prima facie* findings rendered by this Court in the earlier decisions granting bail to other accused in the case. It was argued by the learned Deputy Solicitor General of India, placing reliance on the judgment of the Apex Court in **Chidambaram P. v. Directorate of Enforcement**, 2019 KHC 6886, that the power under Section 438 of the Code being an extraordinary remedy, not part of the fundamental right guaranteed under Article 21 of the Constitution, the same cannot

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be claimed as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.

12. After the matter was heard and reserved for orders, the learned Deputy Solicitor General of India has brought to the notice of this court, the decision of the High Court of Bombay in **Anand Teltumbde v. State of Maharashtra**, 2020 SCC OnLine Bom 1692, in which an application preferred by an accused in a case registered under the UAP Act for anticipatory bail has been dismissed as not maintainable, rejecting the identical argument put forward by the learned counsel for the appellant that the exclusion of the application of Section 438 of the Code to the offences punishable under the UAP Act is not absolute. The learned Deputy Solicitor General of India submitted that the said decision has been affirmed by the Apex Court in **Anand Teltumbde v. State of Maharashtra**, (2021) 12 SCC 125.

13. In the light of the said development, the matter was listed again, and the learned counsel for the appellant was given an opportunity to address arguments afresh in the matter as regards the maintainability of the application for anticipatory

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bail preferred by the appellant before the Special Court. Accordingly, the learned counsel for the appellant addressed arguments afresh in the matter. Apart from reiterating the submissions already made, the learned counsel for the appellant pointed out that the decision of the Apex Court in **Anand Teltumbde** is not against the ratio in **Subhash Kashinath Mahajan**. To bring home the said point, the learned counsel has drawn our attention to the observation made by the Apex Court in paragraph 2 of the judgment in **Anand Teltumbde** that it cannot be said that no *prima facie* case is made out in the matter, to contend that the Apex Court has affirmed the impugned decision since a *prima facie* case of commission of the offence under the UAP Act is made out therein, and not since the application is not maintainable. The learned counsel has also brought to our notice, the decision of another Division Bench of this Court in **Jayarajan P. v. State and another,** 2016 KHC 244, wherein a passing observation has been made by this Court that it is not necessary for the court to peruse the case diary statement while dealing with the application for anticipatory bail, to contend that the exclusion of the application of Section 438 of the Code to the offences punishable under the UAP Act is not

absolute.

14. We have given a thoughtful consideration to the arguments advanced by the learned counsel for the parties on either side.

15. Section 43C of the UAP Act dealing with the application of provisions of the Code and Section 43D of the UAP Act dealing with modified application of certain provisions of the Code, read thus:

> "**43C. Application of provisions of Code**
>
> The provisions of the Code shall apply, insofar as they are not inconsistent with the provisions of this Act, to all arrests, searches and seizures made under this Act.
>
> **43D. Modified application of certain provisions of the Code.**
>
> (1) x x x
> (2) x x x
> (3) x x x
>
> (4) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.
>
> (5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:
>
> PROVIDED that such accused person shall not be

> released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.
>
> (6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail."

As evident from the extracted provisions, sub-section (4) of Section 43D is the provision excluding the application of Section 438 of the Code to any case involving the arrest of any person accused of having committed an offence punishable under the UAP Act. Sub-section (5) of Section 43D provides in addition that notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of the UAP Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release. The said sub-section also provides that such accused person shall not also be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true. Sub-

section (6) of Section 43D provides further that the restrictions on granting of bail specified in sub-section (5) are in addition to the restrictions under the Code or any other law for the time being in force on granting of bail. According to us, it is necessary to refer to the object of the UAP Act to understand the true effect of the provision excluding the application of Section 438 of the Code as contained in sub-section (4). It is seen that the UAP Act is introduced with a view to provide for a more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities. The preamble of the UAP Act as it stands now, reads thus:

> "An Act to provide for the more effective prevention of certain unlawful activities of individuals and associations, and for dealing with terrorist activities, and for matters connected therewith.
>
> WHEREAS the Security Council of the United Nations in its 4385th meeting adopted Resolution 1373 (2001) on 28th September, 2001, under Chapter VII of the Charter of the United Nations requiring all the States to take measures to combat international terrorism;
>
> AND WHEREAS Resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1390 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 (2005), 1735 (2006) and 1822 (2008) of the Security Council of the United Nations require the States to take action against certain terrorists and terrorist organisations, to freeze the assets and other economic resources, to prevent the entry into or the transit

through their territory, and prevent the direct or indirect supply, sale or transfer of arms and ammunitions to the individuals or entities listed in the Schedule;

AND WHEREAS the Central Government, in exercise of the powers conferred by section 2 of the United Nations (Security Council) Act, 1947 (43 of 1947), has made the Prevention and Suppression of Terrorism (Implementation of Security Council Resolutions) Order, 2007;

AND WHEREAS it is considered necessary to give effect to the said Resolutions and the Order and to make special provisions for the prevention of, and for coping with, terrorist activities and for matters connected therewith or incidental thereto."

As evident from the preamble, the statute as it stands now is one which has been amended in tune with the resolutions adopted by the Security Council of the United Nations under the Charter of the United Nations requiring the member States to take measures to combat international terrorism and to take action against terrorists and terrorist organisations, to freeze the assets and economic resources, to prevent the entry into or the transit through their territory and prevent the direct or indirect supply, sale or transfer of arms and ammunitions to the individuals or entities listed in the Schedule to the Statute. As noted, Section 43D not only excludes the application of Section 438 of the Code to the offences punishable under the UAP Act, but also puts

restrictions on persons accused of an offence punishable under Chapter IV and VI of the UAP Act from being released on regular bail, unless the conditions prescribed in sub-section (5) of Section 43D, namely, that the Public Prosecutor shall be given an opportunity of being heard on the application for the release of the accused on bail and that the court, on a perusal of the case diary or the report made under Section 173 of the Code, is of the opinion that there are no reasonable grounds for believing that the accusation against the person concerned is *prima facie* true, are satisfied. If the scheme of the UAP Act is that no person accused of an offence punishable under Chapter IV and VI of the UAP Act shall be released on bail unless the twin conditions referred to in sub-section (5) of Section 43D are satisfied, there cannot be any doubt that the Statute does not contemplate grant of anticipatory bail to accused under any circumstance whatsoever, for if the provision is interpreted to hold that the Statute does not bar absolutely the application of Section 438 of the Code, in the absence of any restriction in the Statute in the matter of granting anticipatory bail, it would lead to an anomalous and absurd position that anticipatory bail can be granted to a person accused of an offence punishable under the

UAP Act unconditionally and restrictions would apply only in the matter of claiming regular bail. Needless to say, the exclusion of the application of Section 438 of the Code to any case involving any person accused of having committed an offence punishable under the UAP Act is absolute. We take this view also for the reason that the right to seek anticipatory bail is not part of the fundamental right guaranteed to the accused under Article 21 of the Constitution. Having regard to the present dimension and impact of international terrorism on civil society, the UAP Act being a Statute intended for the prevention of, and for coping with terrorist activities, we are also of the view that the Statute is framed excluding the application of Section 438 of the Code to the offences punishable under the UAP Act, consciously. Needless to say, an application for anticipatory bail is not maintainable in respect of offences punishable under the UAP Act.

16. As pointed out by the learned Deputy Solicitor General of India, identical view is taken by the High Court of Bombay also in **Anand Teltumbde** and the decision in the said case has been affirmed by the Apex Court in **Anand Teltumbde v. State of Maharashtra**. We do not find any merit in the argument advanced by the learned counsel for the appellant

based on the observations made by the Apex Court in paragraph 2 of the judgment in the said case, for the Apex Court in terms of the said judgment affirmed the view taken by the Bombay High Court that the application for anticipatory bail preferred by the accused involved in that case, is not maintainable. There is also no merit in the argument advanced by the learned counsel for the appellant based on the decision of this Court in **Jayarajan P.,** for this Court has not considered in that case the question whether the exclusion of the application of Section 438 of the Code to the offences punishable under UAP Act is absolute.

17. Before delving into the question whether the ratio in **Subhash Kashinath Mahajan** has any application to a case registered under the UAP Act, it is necessary to understand the ratio in the said case. It is seen that the Apex Court has held earlier also in **Vilas Pandurang Pawar v. State of Maharashtra**, (2012) 8 SCC 795 that the exclusion of the application of Section 438 of the Code to the offences punishable under the SC/ST Act is not absolute and that power under Section 438 of the Code can be invoked in favour of persons accused of offences punishable under the SC/ST Act if a *prima facie* case of commission of offence under the SC/ST Act is not made out on the

facts. Earlier, in **State of M.P. v. Ram Kishna Balothia,** (1995) 3 SCC 221, the Apex Court repelled the challenge against Section 18 of the SC/ST Act on the ground that the same is violative of Article 21 of the Constitution of India, holding that the exclusion of Section 438 of the Code in connection with the offences under the SC/ST Act had to be viewed in the context of prevailing social conditions and the apprehension that perpetrators of such atrocities are likely to threaten and intimidate the victims and prevent or obstruct them in the prosecution of these offenders, if they are granted anticipatory bail. It was also held by the Apex Court in the said case, referring to the Statement of Objects and Reasons of the SC/ST Act, that members of SC and ST are vulnerable and are denied number of civil rights and they are subjected to humiliation and harassment; that vested interests try to cow them down and terrorise them and that there was increase in disturbing trend of commission of atrocities against members of SC and ST and therefore, if anticipatory bail is granted to persons accused of the offences punishable under SC/ST Act, such persons would misuse their liberty and terrorise the victims and prevent investigation.

18. **Subhash Kashinath Mahajan** is a case where

it was argued that the ratio in **Ram Kishna Balothia** needs to be revisited and it is in the said context that the Apex Court has considered afresh the question whether Section 18 of the SC/ST Act creates an absolute bar against grant of anticipatory bail. On an elaborate consideration of the background of the SC/ST Act, the object sought to be achieved by the said enactment, the provisions therein as also the judgments rendered till then by the Apex Court and the various high courts, it was held by the Apex Court that it is unnecessary to revisit the decision of the court in **Ram Kishna Balothia** as the judgment can be appropriately clarified having regard to the law laid down by the Apex Court in various cases as to the scope of Articles 14 and 21 of the Constitution. Thereupon, it was clarified by the Apex Court that Section 18 of the SC/ST Act does not apply to cases where there is no *prima facie* case or to cases of patent false implication or when the allegation is motivated for extraneous reasons. A few other general directions were also issued by the Apex Court in the said case to protect innocent persons from arrest and false implications. Even though the SC/ST Act was amended subsequently by introducing a new provision as Section 18A to overcome the general directions issued by the Apex Court in

Subhash Kashinath Mahajan, the general directions issued against false implications have been recalled by the Apex Court later on a review petition preferred by the Union Government. But the declaration of law made in **Subhash Kashinath Mahajan** that there is no absolute bar against grant of anticipatory bail in cases under the SC/ST Act, if no *prima facie* case is made out or where on judicial scrutiny the complaint is found to be *prima facie mala fide*, remained unaltered.

19. It is seen that the newly introduced Section 18A of the SC/ST Act was challenged subsequently before the Apex Court and the challenge was repelled by a Three Judge Bench of the Apex Court in **Prathvi Raj Chauhan v. Union of India**, (2020) 4 SCC 727 holding that it has become of academic importance in the light of the order passed in the review petition, in terms of which the position as prevailed prior to **Subhash Kashinath Mahajan** was restored. It was clarified in the said case that Section 438 of the Code shall not apply to cases under the SC/ST Act except in cases where a complaint does not make out a *prima facie* case for applicability of the provisions of the SC/ST Act. It was, however, observed in the said case that while considering an application seeking pre-arrest bail, the courts

have to balance the two interests namely, that the power is not so used as to convert the jurisdiction into that under Section 438 of the Code, but that it is used sparingly and such orders are made in very exceptional cases where no prima facie offence is made out as shown in the FIR, and further also that if such orders are not made out in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of the process of law.

20. Let us now consider the question whether the ratio in **Subhash Kashinath Mahajan** has any application to a case registered under the UAP Act. As already noticed, the question considered in **Subhash Kashinath Mahajan** was whether there is an absolute bar in the SC/ST Act against grant of anticipatory bail and the question was answered in the negative. A close and meticulous reading of the decision of the Apex Court in **Subhash Kashinath Mahajan** would indicate that the reasons in essence, on the basis of which the Apex Court held that the SC/ST Act does not bar absolutely the grant of anticipatory bail, are the following:

i) The provisions of the SC/ST Act need to be given a purposive interpretation in the context of its

background and its object to achieve the purpose of law.

ii) In the background of the prevailing social conditions, if perpetrators of atrocities against members of SC/ST communities are granted anticipatory bail, they would not only threaten and intimidate the victims and prevent or obstruct them from prosecuting the offenders, but would also misuse their liberty and terrorise the victims and prevent investigation;

iii) In statutes where an identical provision excluding the application of Section 438 of the Code exists, there are restrictions on accused for being released on regular bail also, whereas there is no such restriction in the SC/ST Act in the matter of releasing the accused on regular bail. The position in SC/ST Act is that after rejecting an application under Section 438 of the Code, the court can grant regular bail immediately after the arrest and there is no logical rationale behind the situation of putting a fetter on grant of anticipatory bail when there is no such restriction for grant of regular bail.

iv) It has been judicially acknowledged that there have been instances of abuse of the provisions of the Act for settling private disputes. There are also instances of complaints being lodged against public servants/quasi-judicial/judicial officers with oblique

motive for satisfaction of vested interests.

v) The Act has become an instrument to blackmail or to wreak personal vengeance. The Act is also being used to deter public servants from performing their bona fide duties. Consequently, innocent citizens are termed as accused, which is not intended by the legislature. As such if exclusion of the application of Section 438 Of the Code is not limited to genuine cases, there will be no protection to innocent citizens.

Paragraphs 44 to 50, 53, 63 and 64 of the judgment of the Apex Court in **Subhash Kashinath Mahajan** read thus:

> "44. In the light of the above, we first consider the question whether there is an absolute bar to the grant of anticipatory bail in which case the contention for revisiting the validity of the said provision may need consideration in the light of the decisions of this Court relied upon by the learned Amicus.
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> 45. Section 18 of the Atrocities Act containing bar against grant of anticipatory bail is as follows:
>
> > "***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."
>
> 46. In Balothia, Section 18 was held not to be violative of Articles 14 and 21 of the Constitution. It was observed that (at SCC p. 225, para 6) exclusion of Section 438 CrPC in connection with offences under the Act had to be viewed in the context of prevailing social conditions and

the apprehension that perpetrators of such atrocities are likely to threaten and intimidate the victims and prevent or obstruct them in the prosecution of these offenders, if they are granted anticipatory bail. Referring to the Statement of Objects and Reasons, it was observed that members of SC and ST are vulnerable and are denied number of civil rights and they are subjected to humiliation and harassment. They assert their rights and demand statutory protection. Vested interests try to cow them down and terrorise them. There was increase in disturbing trend of commission of atrocities against members of SC and ST. Thus, the persons who are alleged to have committed such offences can misuse their liberty, if anticipatory bail is granted. They can terrorise the victims and prevent investigation.

47. Though we find merit in the submission of the learned Amicus that judgment of this Court in Ram Kishna Balothia [State of M.P. v. Ram Kishna Balothia, may need to be revisited in view of judgments of this Court, particularly Maneka Gandhi, we consider it unnecessary to refer the matter to the larger Bench as the judgment can be clarified in the light of law laid down by this Court. Exclusion of anticipatory bail has been justified only to protect victims of perpetrators of crime. It cannot be read as being applicable to those who are falsely implicated for extraneous reasons and have not committed the offence on prima facie independent scrutiny. Access to justice being a fundamental right, grain has to be separated from the chaff, by an independent mechanism. Liberty of one citizen cannot be placed at the whim of another. Law has to protect the innocent and punish the guilty. Thus considered, exclusion has to be applied to genuine cases and not to false ones. This will help in achieving the object of the law.

48. If the provisions of the Act are compared as

against certain other enactments where similar restrictions are put on consideration of matter for grant of anticipatory bail or grant of regular bail, an interesting situation emerges. Section 17(4) of the Terrorist and Disruptive Activities (Prevention) Act, 1985 ("TADA", for short — since repealed) stated

> "**17. (4)** ...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 the provisions of this Act...."

Section 17(5) of the TADA Act put further restriction on a person accused of an offence punishable under the TADA Act being released on regular bail and one of the conditions was: where the Public Prosecutor opposes the application for grant of bail, the court had to be satisfied that there were reasonable grounds for believing that the accused was not guilty of such offence and that he was not likely to commit any such offence while on bail

49. The provisions of the Unlawful Activities (Prevention) Act, 1967 (for short "the UAPA Act"), namely, under Sections 43-D(4) and 43-D(5) are similar to the aforesaid Sections 17(4) and 17(5) of the TADA Act. Similarly the provisions of the Maharashtra Control of Organised Crime Act, 1999 (for short "the MCOC Act"), namely, Sections 21(3) and 21(4) are also identical in terms. Thus, the impact of release of a person accused of having committed the offences concerned under these special enactments was dealt with by the legislature not only at the stage of consideration of the matter for anticipatory bail but even after the arrest at the stage of grant of regular bail as well. The provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short

"the NDPS Act") are, however, distinct in that the restriction under Section 37 is at a stage where the matter is considered for grant of regular bail. No such restriction is thought of and put in place at the stage of consideration of matter for grant of anticipatory bail. On the other hand, the provisions of the Act are diametrically opposite and the restriction in Section 18 is only at the stage of consideration of matter for anticipatory bail and no such restriction is available while the matter is to be considered for grant of regular bail. Theoretically it is possible to say that an application under Section 438 of the Code may be rejected by the court because of express restrictions in Section 18 of the Act but the very same court can grant bail under the provisions of Section 437 of the Code, immediately after the arrest. There seems to be no logical rationale behind this situation of putting a fetter on grant of anticipatory bail whereas there is no such prohibition in any way for grant of regular bail. It is, therefore, all the more necessary and important that the express exclusion under Section 18 of the Act is limited to genuine cases and inapplicable where no prima facie case is made out.

50. We have no quarrel with the proposition laid down in the said judgment that persons committing offences under the Atrocities Act ought not to be granted anticipatory bail in the same manner in which the anticipatory bail is granted in other cases punishable with similar sentence. Still, the question remains whether in cases where there is no prima facie case under the Act, bar under Section 18 operates can be considered. We are unable to read the said judgment as laying down that exclusion is applicable to such situations. If a person is able to show that, prima facie, he has not committed any atrocity against a member of SC and ST and that the

allegation was mala fide and prima facie false and that prima facie no case was made out, we do not see any justification for applying Section 18 in such cases. Consideration in the mind of this Court in Balothia is that the perpetrators of atrocities should not be granted anticipatory bail so that they may not terrorise the victims. Consistent with this view, it can certainly be said that innocent persons against whom there was no prima facie case or patently false case cannot be subjected to the same treatment as the persons who are prima facie perpetrators of the crime.

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53. It is well settled that a statute is to be read in the context of the background and its object. Instead of literal interpretation, the court may, in the present context, prefer purposive interpretation to achieve the object of law. Doctrine of proportionality is well known for advancing the object of Articles 14 and 21. A procedural penal provision affecting liberty of citizen must be read consistent with the concept of fairness and reasonableness.

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63. We have already noted the working of the Act in the last three decades. It has been judicially acknowledged that there are instances of abuse of the Act by vested interests against political opponents in panchayat, municipal or other elections, to settle private civil disputes arising out of property, monetary disputes, employment disputes and seniority disputes. It may be noticed that by way of rampant misuse complaints are “largely being filed particularly against public servants/quasi-judicial/judicial

> officers with oblique motive for satisfaction of vested interests".
>
> 64. Innocent citizens are termed as accused, which is not intended by the legislature. The legislature never intended to use the Atrocities Act as an instrument to blackmail or to wreak personal vengeance. The Act is also not intended to deter public servants from performing their bona fide duties. Thus, unless exclusion of anticipatory bail is limited to genuine cases and inapplicable to cases where there is no prima facie case was made out, there will be no protection available to innocent citizens. Thus, limiting the exclusion of anticipatory bail in such cases is essential for protection of fundamental right of life and liberty under Article 21 of the Constitution."

It is thus evident that it is having regard to the purpose for which the offences punishable under the SC/ST Act has been excluded from the application of Section 438 of the Code and having regard to the fact that the provisions in the SC/ST Act have been grossly abused in course of time and innocent persons are arrayed as accused, the Apex Court has held that the exclusion of the application of Section 438 of the Code to the offences punishable under the SC/ST Act is not absolute and such a view has been taken in order to prevent the abuse of the provisions therein. That apart, the Apex Court has also taken note of the fact in the said judgment that there are no restrictions in the SC/ST

Act in enlarging a person accused of an offence under the said statute on regular bail and the position is that after rejecting an application under Section 438 of the Code, the court can grant regular bail immediately after the arrest and there is no logical rationale behind the situation of putting a fetter on grant of anticipatory bail when there is no such restriction for grant of regular bail. The judgment of the Apex Court in **Subhash Kashinath Mahajan**, in the circumstances, cannot have any application to a person who is accused of an offence punishable under the UAP Act.

21. Even assuming that the exclusion of application of Section 438 of the Code to offences punishable under the UAP Act contained in Section 43D(4) therein, is not absolute, as in the case of the exclusion contained in the SC/ST Act, according to us, the case on hand is not a case in which the limited power of the court to grant pre-arrest bail could be invoked. As already noticed, the scope of the limited power as available to the courts to grant pre-arrest bail in the case of the exclusion contained in SC/ST Act has been explained by the three Judge Bench of the Apex Court in **Prathvi Raj Chauhan** thus:

> "33. I would only add a caveat with the observation and

> emphasise that 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 Criminal Procedure Code, 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 FIR, 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."

In the light of the aforesaid decision of the Apex Court, the position is that the power is not to be used so as to convert the jurisdiction into that under Section 438 of the Code, but it is only to be used in very exceptional cases, where no prima facie offence is made out. It was also cautioned by the Apex Court in the said case that the said power if used otherwise, the result would inevitably be a miscarriage of justice or abuse of the process of law resulting in defeating the intention of the Parliament.

22. Reverting to the facts, as noted, the allegation against the appellant is that the accused who had the knowledge that the act of smuggling of gold into India would damage the

monetary stability of India, with the motive to gain money, conspired together, recruited people, formed a terrorist gang, raised funds and smuggled gold from UAE to India in large quantity through import cargos addressed to diplomats at the Consulate General of UAE in Thiruvananthapuram, and thereby caused extensive and irreparable damage to the security and economic stability of the country. Is this an exceptional case in which the power of the court to grant pre-arrest bail could be exercised as clarified in **Prathvi Raj Chauhan.** According to us, the answer to this question shall be an emphatic 'no'. It is all the more so since the findings rendered by the two Division Benches of this Court that the alleged conduct on the part of the accused in the case, including the appellant, in smuggling large quantity of gold into India cannot be regarded as a terrorist act have not become final inasmuch as the Apex Court is examining the correctness of the legal questions involved in **Muhammed Shafi P. v. National Investigation Agency, Kochi**, though the decision of this Court in granting bail to the accused in the case has not been interfered with.

23. Be that as it may, as noted, final report has not been filed in the case against all the accused. Even the accused

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against whom final report has already been filed, further investigation is going on. The appellant is a person against whom final report has not been filed, inasmuch as investigation into his involvement in the crime is yet to be over. One of the reasons stated for not submitting final report against the appellant is that he is yet to be interrogated as he has been evading arrest all throughout, and having regard to the materials so far collected against the appellant, his custodial interrogation is necessary to obtain a clear picture of his complicity in the crime. Having regard to the averments in the final report submitted in the crime against some of the accused, where there is reference about the alleged involvement of the appellant also, we are of the view that the investigating agency cannot be found fault with in taking the stand that custodial interrogation of the appellant is necessary in the case. There is no bar against conducting further investigation under Section 173(8) of the Code after final report is submitted under Section 173(2) of the Code. Further investigation is merely a continuation of the earlier investigation. This position has been reiterated by the Apex Court in the recent judgment in **State v. Hemendhra Reddy**, 2023 SCC OnLine SC 515 also. Needless to say, the argument advanced by the learned counsel for the

appellant that inasmuch as final report has already been submitted against some of the accused in the crime, the investigating agency cannot bring any additional materials against the appellant and that the appellant is, therefore, entitled to be treated at par with the remaining accused in the case who have already been granted bail, is therefore without substance. In other words, on merits also, according to us, this is not an exceptional case in which the court could exercise the power to grant pre-arrest bail if at all such power could be exercised in a case of this nature involving an offence punishable under the UAP Act.

The appeal, in the circumstances, is devoid of merits and the same is, accordingly, dismissed.

Sd/-

P.B.SURESH KUMAR, JUDGE.

Sd/-

C.S.SUDHA, JUDGE.

YKB