Page 1828 - 1843 **DOI:** *https://doij.org/10.10000/IJLMH.117246*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 2

2024

Evolution of Bail Provisions in Specialized Criminal Legislation: A Study of Indian Statutes and Judicial Precedents

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ABSTRACT

The dissertation explores the evolution of bail provisions within specialized criminal laws in India, particularly focusing on the shifting landscape influenced by statutes such as the Terrorism and Disruptive Activities Act (TADA) of 1985. The study delves into the impact of stringent bail conditions introduced by specific legislations, analysing how they departed from established principles under the Code of Criminal Procedure. Through an in-depth examination of key legislative enactments like the Companies Act of 2013, the Narcotic Drugs and Psychotropic Substances Act of 1985, and significant case law such as State of Maharashtra v. Vishwanath Maranna Shetty, the research elucidates the rationale behind distinct bail procedures tailored to address complex criminal activities. The dissertation critically evaluates judicial interpretations emphasizing the necessity of rigorous scrutiny in granting bail, particularly in cases involving economic offences. By elucidating the interplay between legal provisions and judicial precedents, this study sheds light on the nuanced approaches adopted within India's criminal justice system towards bail, reflecting broader shifts in legal philosophy and policy responses to evolving criminal complexities.

Keywords: *Bail, PMLA, Criminal, TADA, NDPS, MCOCA, I.P.C, Cr.P.C.*

I. INTRODUCTION

The Indian Parliament has created special laws to address specific offences in addition to the Indian Penal Code. The majority of those laws, such as the Food Adulteration Act of 1954 (repealed), the Dowry (Prohibition) Act of 1961, the Narcotics Drugs and Psychotropic Substances Act of 1985, and so forth, appropriate the procedural framework and bail guidelines found in the Code of Criminal Procedure (henceforth referred to as the "Code"). Nonetheless, there has been significant pressure on the State to establish legislation that can handle these complications because to the rise in criminal complexity over the past forty years. It was clear that there were significant shortcomings with both the substantive provisions and the procedures of the Indian Penal Code. As a result, several specific laws were enacted, establishing new

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offences and establishing various trial procedures for them. These proceedings were harsher and even went against long-standing norms of human rights and procedural justice. Regarding the bail requirements, it has been stated in previous chapters that the Code has always considered bail to be an accused person's right that should only be withheld in extreme cases. There was a point of view that said attitude was starting to get in the way of criminal investigations and prosecutions.

The Terrorism and Disruptive Activities Act (TADA) of 1985, which was later amended in 1987, was among the first specialised criminal laws of the modern era to be passed with the aim of containing the terrorist threat. Since it is a specific statute, its provisions may take precedence over those of other, more general statutes.[2] The Act's bail provision was far stricter than the Code's sections 437 and 439. TADA's Section 20(8) states as follows:

(8) Regardless of the Code, no one charged with a crime punishable by this Act or any rule made under it may be released from custody on bail or his own bond unless: a. the Public Prosecutor has been given a chance to object to the request for release; and b. in the event that the Public Prosecutor objects, the Court is satisfied that there are reasonable grounds to believe the accused is not guilty of the crime in question and that he is not likely to commit another crime while on bail.

(9) The restrictions on the granting of bail outlined in subsection (8) apply in addition to any restrictions currently in effect under the Code or any other applicable law.

It is clear that the aforementioned clause upended the well-established common law doctrine of the "presumption of innocence." While the prosecution had the burden of proving the standards outlined in section 437 of the Code, TADA essentially transferred this burden to the accused, requiring him to prove his innocence before being granted bail. Despite being long since repealed, the provisions of TADA ended up serving as a model for the "bail provisions" included in a number of subsequent specialised criminal laws.

Laws such as the Companies Act of 2013, the Narcotic Drugs and Psychotropic Substances Act of 1985, the Maharashtra Control of Organised Crime Act of 1999, the Prevention of Money Laundering Act of 2002, and others have been meticulously crafted to strengthen the state's hand in the investigation and prosecution of the offences listed in them. Regarding bail, the majority of the relevant statutes contain rules requiring the competent court to follow a particular procedure in addition to a general directive that bail should not typically be granted

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

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in cases involving significant offences.

The State of Maharashtra v. Vishwanath Maranna Shetty[3] case addressed the applicability of specified procedures under special legislations. The court held that when a prosecution is brought for an offence under a special statute and that statute contains specific provisions for handling matters arising thereunder, the provisions cannot be disregarded in handling such an application.[4] In a similar vein, the Court held in Raju Premji v. Customs NER Shillong Unit and Arun v. D. Pakyntein[5] that the precedents must be strictly followed when a statute grants drastic powers and specifies strict penal provisions, including those pertaining to the granting of bail.[6]

The Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra[7] Court held that, notwithstanding the lack of need for specific justifications, the order granting bail must show that the court has exercised reasonable judgement in determining whether to grant or deny the applicant the privilege of bail. This ruling was made in light of the seriousness of the offence at hand. With particular regard to the cases concerning economic offences, the Court declared in Nimmagadda v. CBI,[8] the following:[9]

Economic offences are treated differently and require a different strategy when it comes to bail. The economic offence that involves widespread conspiracies and significant loss of public monies must be taken seriously and treated as a serious offence that threatens the nation's financial stability by negatively impacting the whole economy.

The following are some significant laws and relevant case laws that specify the bail requirements that apply in each of these situations.

II. The NDPS Act (Narcotic Drugs and Psychotropic Substances Act) of 1985

Adopted as a complete piece of law, the NDPS Act aims to address the issues of drug usage and illicit drug trafficking. A cursory perusal of the Act reveals the legislature's intention to uphold

[3] AIR 2013 SC 158. Also see, Union of India v. Aharwa Deen (2000) 9 SCC 382.
[4] In this context, it is possible to refer to the recently passed Companies Act, 2013 §212(6), which recognises the offences listed therein as cognizable and non-bailable. As a result, the public prosecutor must be given the chance to object before the court can issue bail for such offences, and the court must have good grounds to believe that the individual receiving release is not guilty of the crime and is unlikely to commit another while on it.
[5] 2009(7) SCALE 568, (2009)16 SCC 496.
[6] Also Muraleedharan v. State of Kerala, 2001CriLJ 2187, (2001) 4 SCC 638.
[7] (2005) 5 SCC 294.
[8] (2013) 7 SCC 466.
[9] Id. at para 25.

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the strictness of the rules and penalties it contains.[10] A few restrictions have been established regarding the authority to grant bail under the Act, keeping in mind the general goals of the Act.[11] Section 37 of the Act, in particular, specifies a process that needs to be followed when dealing with bail under the Act.

This is how the section is written:

37. Crimes to be prosecutable but not subject to bail

(1) Regardless of the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), all offences punishable under this Act shall be cognizable;

(2) No one charged with an offence punishable under Sections 19 or 24 or 27-A, as well as offences involving commercial quantity, may be released on bail or on his own bond unless:

(i) the Public Prosecutor has been given a chance to contest the request for release; and

(ii) in the event that the Public Prosecutor objects, the court is satisfied that there are reasonable grounds to believe that the accused is innocent of the offence in question and that he is not likely to commit any crimes while on bail.

The restrictions on the granting of bail outlined in clause (b) of subsection (1) apply in addition to any restrictions on the granting of bail under the Code of Criminal Procedure, 1973 (2 of 1974), or any other currently in effect statute.

In Union of India v. Rattan Mallik alias Habul,[12] the Court elucidated the true meaning of Section 37 as follows:[13] It is evident from a cursory reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the authority to grant bail to an individual accused of an NDPS Act offence is subject to the limitations imposed by both clause (b) of sub-section (1) of Section 37 of the NDPS Act and Section 439 of the Code of Criminal Procedure, 1973.[14]

The Court added:[15]

[10] The case of Noor Aga v. State of Punjab (2008) 16 SCC 417 emphasised the Act's goal. "The punishment provided by the NDPS Act is severe, stemming from elements like a higher standard for bail, no provision for remissions, and a specific provision for the imposition of a minimum sentence," the Court declared.In light of international treaties, the court must work to give effect to the parliamentary goal and intent, but it must also protect each person's human rights and dignity as guaranteed by the UN Declaration of Human Rights.

[11]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.

[12] (2009)2 SCC 624. Also see, Union of India v. Sanjeev V. Deshpande, 2014 (13) SCC 1.

[13] Id. at para 12.

[14] 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.

[15] Id. at para 14.

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It is important to note that the Court is not required to record a finding of not guilty while evaluating a bail application under Section 37 of the NDPS Act. In order to determine whether or whether the accused has committed an offence under the NDPS Act, it is now not required nor desirable to carefully consider the evidence. The question is whether there is a good cause to think the accused is innocent of the charge(s) against him and, moreover, that, while out on bond, he is not likely to commit another crime under the relevant Act. The Court's satisfaction about the presence of the aforementioned twin requirements is restricted to the issue of the accused's release on bond.

As a result, the accused cannot be released on bail under the Act until all requirements and restrictions outlined in Section 37 have been met.[16] The limitations under section 37 of the NDPS Act will not apply in cases where there has been a violation of procedural safeguards and adequate materials to infer a false implication, according to the High Court of Punjab and Haryana at Chandigarh in Paramjit Singh Chahal v. State of Punjab.[17] In these circumstances, it will be appropriate to release the accused on bond.

In Union of India v. Thamisharasi,[18] the court ruled that in addition to the restrictions outlined in the Code of Criminal Procedure, clause (b) of sub-section (1) of section 37 puts additional restrictions on the granting of bail. Under the NDPS, there are two limitations: 1. The public prosecutor's opportunity to contest the bail application; and 2. The court's determination that there are reasonable grounds to believe the accused is not guilty of the offence in question and is not likely to commit any crimes while out on bail. The restrictions on bail only apply when the issue of bail is raised on the merits.

Stated differently, the clause does not apply when bail is automatically granted due to noncompliance with submitting the complaint within the maximum amount of time allowed for detention throughout the inquiry as stipulated in Sub-section (2) of Section 167 Cr.P.C.[19] In the case of Thana Singh v. Central Bureau of Narcotics,[20] where the accused was imprisoned for over twelve years while awaiting the start of his trial under the NDPS Act, the Court critically examined the provision of bail under the Act. The Court issued the required directives to be followed with regard to NDPS Act proceedings.

[16] See Union of India v. Devi Saran 1997(21) ACR 963; N.R. Mon v. Mohd Nasimuddin, (2008) 6 SCC 721.
[17] 2014 SCC Online P&H 6179: Crl. M. No.8339-M of 2014, date of decision: 22-3-2014.
[18] (1995) 4 SCC 190.
[19] Ibid
[20] 2013 (1) SCALE 696, (2013) 2 SCC 590.

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III. The Maharashtra Control of Organised Crime Act, 1999 (MCOCA)

The Maharashtra Control of Organised Crime Act, 1999 (MCOCA) stipulates a specific process that must be adhered to in bail-related cases in Section 21(4). Section 21 says what it says:

Section 21: Modified applicability of specific code provisions.

1) Every act punishable under this Act must be assumed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and "cognizable case," as defined in that subsection, shall be construed accordingly, regardless of anything contained in the Code or in any other legislation.

2) Section 167 of the Code shall be applied in connection with a case involving an offence punishable under this Act, with the following modifications: (a) the references to "fifteen days" and "sixty days" wherever they occur, shall be construed as references to "thirty days" and "ninety days" respectively; (b) the following proviso shall be inserted after the proviso, 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 accused's detention beyond the said period of ninety days."

3) In any case where someone is arrested on suspicion of committing an offence covered by this Act, nothing in section 438 of the Code shall apply.

4) In spite of the provisions of the Code, no one who has been charged with a crime punishable by this Act may be released from custody on bail or his own bond unless: (a) the Public Prosecutor has been given a chance to object to the request for release; and (b) in the event that the Public Prosecutor objects, the Court is satisfied that there are reasonable grounds to believe the accused is innocent of the crime in question and that he is not likely to commit another one while on bail.

5) In spite of what the Code says, if the accused is found to have been on bail for an offence under this Act or any other Act on the date of the offence in issue, the accused will not be granted bail.

6) The restrictions on the granting of bail outlined in sub-section (4) are in addition to any restrictions currently in effect under the Code or any other applicable law.

7) A written statement outlining the basis for the request for custody, along with any delays in obtaining police custody, must be filed by the police officer requesting the custody of

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an individual for pre-trial questioning or pre-indictment from court custody.

Similar to section 37 of the NDPS Act, the MCOCA's corresponding clause places two extra responsibilities on the accused: they must be proven to the court's "reasonable satisfaction" in order for the accused to be granted bail. The Supreme Court was asked to rule on whether this statute compels the court to find that a person is not guilty of an offence before releasing them on bail in the case of Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra.[21] Is it also required that the Court documents this kind of finding? Would the Court have access to any tools to ensure that, once being released on bond, the accused would not commit any crimes at all?[22]

The court established the parameters to determine what are the "grounds" to be considered by the Court in order to reach a "reasonable satisfaction" regarding the accused's innocence, taking inspiration from the statute's goals.[23]

It is not advisable to overly limit the Court's ability to issue bail. A bail order may be issued if the court determines, after considering the evidence presented, that there is a good chance he won't be found guilty after all. The Court's satisfaction about the likelihood that he won't commit an offence while out on bail must be interpreted to mean an offence under the Act, not just any offence, no matter how big or small. If the Indian Penal Code is given such a wide interpretation, the court may be prevented from releasing the accused on bail even if there is a possibility that the accused may commit an offence under Section 279 in the particular case. A statute shouldn't be read in a way that would result in absurdity because of these reasons. Additional requirements for the Court would be determining the accused's responsibility and his direct or indirect involvement in the commission of an organised crime. When granting bail, the court will take into account whether the applicant had the necessary mens rea at the time of the

[21] (2005)5 SCC 294.

[22] The following is the Act's Statement of Objects and Reasons:
For a considerable amount of time now, organised crime has emerged as a grave danger to our community. It is driven by illicit riches obtained through contracts, murders, extortions, smuggling in illegal goods, the illegal trafficking of drugs, kidnappings for ransom, the gathering of protection money, money laundering, and other unlawful activities. It is transnational in scope. Due to the enormous amount of black money and illicit income that organised crime generates, our economy has suffered greatly. It was observed that terrorist gangs and organised crime groups had a common cause, and that these organisations supported terrorism that crossed international borders. Given the likelihood that organised crime organisations had been active in the State, it was imperative to put an immediate stop to their operations. Additionally, it was seen that wire and oral communications have been heavily utilised by organised crime groups in their illicit endeavours. The ability to intercept these types of communications in order to gather proof of criminal activity or to stop criminal activity altogether would be extremely helpful to law enforcement and the administration of justice. It was discovered that the current legal framework, which includes the adjudicatory system, procedural and penal laws, was not very effective in containing or managing the threat posed by organised crime. In order to combat the threat of organised crime, the government chose to pass a unique law with strict and disincentive restrictions, including the authority to intercept oral, electronic, or wire communications under certain conditions.

[23] Supra note 6 at 317, para 38.

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request. A minor infraction, act of carelessness, or neglect may not necessarily result in his being held accountable for the situation, and it is not a requirement in order to be subject to the MCOCA's requirements.

After that, the court determined the relevant court's position in the case and how granting or refusing bail would impact the case as a whole. It contained:[24]

We believe that the language of Section 21(4) does not require the court to determine beyond a reasonable doubt that the person seeking bail has not broken any Act-related laws. If the court decides to grant bail based on such a construction, it must conclude that the petitioner has not committed the relevant offence. It will be impossible for the prosecution to get the petitioner found guilty in such a case. The lawmakers cannot have intended for this to happen. Therefore, it is necessary to interpret Section 21(4) of MCOCA properly. It must be interpreted in a way that allows the court to strike a careful balance between awarding bail far in advance of the start of the trial and rendering a verdict of acquittal or conviction. Likewise, upon granting bail, the court must document its determination regarding the likelihood of his committing a crime. In the future, though, this kind of offence must fall under the Act and not any other offence. Since it is difficult to predict an accused person's behaviour in the future, the court must take this into account while taking into account the accused person's history, his tendencies, and the circumstances surrounding the alleged act.

The Court also made it clear that reaching a decision based on broad probability rather than carefully weighing the evidence is the court's responsibility. Given the seriousness of the offences for which MCOCA established liability. The court issued a warning, noting that further investigation may be necessary in order to determine if the evidence gathered against the accused throughout the investigation is sufficient to support a conviction. The trial court is "free to decide" the case following trial, unaffected by the observations in the order on the bail application, and these conclusions "may not have a bearing on the merit of the case." Since the aforementioned observations in Ranjitsing Brahmajeetsing Sharma deserve to be quoted in their whole, they should be used as the foundation for determining whether to grant bail under specific criminal statutes that incorporate pari materia bail provisions. The Court has attempted to strike a compromise between the requirements of contemporary criminal law and established bail jurisprudence, so it is important to carefully study these words. Even though the accused now has, in all practicality, the burden of proving their innocence, the court assigns the bail-granting judge the task of carefully reviewing the record and keeping an open mind

[24] Id. at 318, para 44.

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when evaluating the bail request, so that it may determine that the evidence gathered against the accused during the investigation does not support a conviction.

This decision has been frequently relied upon. Subsequent rulings have attempted to tighten the standards, nevertheless. In Chenna Boyanna Krishna Yadav v. State of Maharashtra,[25] the Court decided as follows:[26]

The satisfaction that the accused is innocent must be predicated on justifiable arguments. "Reasonable grounds" refers to more than just circumstantial evidence. 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,[27] the Supreme Court yet again stated that:[28] Sub-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 MCOCA's pertinent sections, the NDPS Act's corresponding provision, and the principles established in both decisions indicate that there must be a sufficient basis to believe the accused is not guilty of the crime for which he is charged. Furthermore, the existence of facts and circumstances sufficient to support the conviction that the accused is not guilty of the claimed offence is indicated by a reasonable belief furnished.[29]

The preceding examination of court rulings regarding the bail provisions in MCOCA reveals that, in comparison to analogous provisions found in all other special acts, such as the NDPS Act, the law has essentially been resolved. Nonetheless, the Prevention of Money Laundering Act, 2002 is one piece of law that has received a lot of attention lately. Contemporary criminal legislation features an increasingly strict bail provision that necessitates contextual understanding.

IV. The Money Laundering Prevention Act of 2002 (PMLA)

All the features of a contemporary criminal act are present in the Prevention of Money Laundering Act, 2002 (PMLA). It is distinct because it establishes a brand-new crime called money laundering, which is connected to the majority of other crimes. "Money laundering" is a complicated crime since it deals with assets obtained through the "proceeds" of previous

[25] (2007) 1 SCC 242.
[26] Id. at 247.
[27] (2012) 10 SCC 561.
[28] Id. at para 19
[29] Id. at para 30.

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crimes.

It is evident that both MCOCA[30] and NDPS Act[31] allow the court to increase the accused's bail amount if it is reasonably convinced that the accused is innocent of the crimes covered by the relevant statutes and that, if released on bond, the accused would not commit those crimes. The scope of the statute's bail provision is/was far wider when it comes to PMLA. As was already established, "money laundering" is a complicated crime that is intricately linked to numerous other crimes. Consequently, a number of offences that are considered culpable are listed in three sections of the Schedule to the Act, A, B, and C. Specifically, Part A includes charges covered under the Indian Penal Code, 1860 as well as offences under the majority of Special Acts, such as the Prevention of Corruption Act, the NDPS Act, and the MCOCA. An crime under section 4 of the Act as well as "any scheduled offence connected to the offence under that Section" may be tried by the Special Court under the Act pursuant to section 44 of the Act. Additionally, section 45 of the Act states the following regarding the Special Court's ability to grant bail:

Section 45: Crimes to be cognizable but not subject to bail:

(1) The Code of Criminal Procedure, 1973 (2 of 1974) states that no one accused of a crime that carries a sentence of more than three years in prison under Part A of the Schedule may be released on bail or on his own bond unless the following conditions are met:

(i) the Public Prosecutor has been given a chance to object to the application for such release; and

(ii) in the event that the Public Prosecutor objects, the court is convinced that there are reasonable grounds to believe that the accused is innocent of the offence in question and that he is unlikely to commit any crimes while on bail.

In contrast to its counterparts in the NDPS Act and MCOCA, this section applies the twin criteria cumulatively to a scheduled offence rather than an offence covered by the Act. Stated differently, an individual who is charged with a minor offence under the Indian Penal Code is eligible for bail under section 439 of the Code. But, insofar as the aforementioned charges are concerned, he or she will need to pass the dual requirements outlined in section 45 of the Act if they are also charged with violating section 4 of the PMLA. Furthermore, even in the event that an individual is just charged with a Scheduled Offence, they will still be subject to section 45's double test scrutiny simply because their trial is being held concurrently with others accused of

[30] S. 36C (2) of the NDPS Act, 1985.
[31] S. 21 (4) of MCOCA, 1999.

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PMLA offences.

An additional oddity in this situation was that the Act did not impose a ban on anticipatory bail.[32] Therefore, for all offences, including the scheduled ones, the requirements of section 438 of the Code would still apply to anyone requesting pre-arrest or anticipatory release. As a result, it was simpler to get anticipatory bail under the PMLA than it was to request conventional bail following an arrest.

The Supreme Court had to rule on the legality of section 45 of the PMLA, which was contested as being arbitrary and discriminatory, in the case of Nikesh Tarachand Shah v. Union of India.[33] The Court noted that:-[34]

Granting or refusing bail (by using Section 45 (1) for the money laundering offence and the predicate offence) cannot logically result from the simple fact that the money laundering charge is being tried alongside the Schedule A offence without more.

The Court took into consideration a number of situations that can occur in a joint trial in which a bail request is made. It then upheld the petitioner's argument and concluded that section 45 would discriminate between an accused person being tried for a scheduled offence under PMLA that carries a sentence of more than three years and an accused person being tried for an offence under PMLA alone. The Court stated that in the former scenario, bail would be granted in accordance with section 439 of the Code, whereas in the later scenario, bail would be granted based on factors unrelated to the PMLA offence:[35]

All of these instances demonstrate how the application or nonapplication of Section 45 would result in clearly arbitrary, discriminatory, and unjust outcomes that would directly violate Articles 14 and 21. Specifically, the bail procedure would become onerous, onerous, wrongful, and discriminatory based on whether an individual is being tried for an offence that also happens to be an offence under Part A of the Schedule or an offence under Part A of the Schedule in addition to an offence under the 2002 Act. Of course, a situation unrelated to the money laundering charge would determine whether or not bail was granted. Just on this basis, Section 45 would have to be invalidated because it is blatantly arbitrary and establishes an unfair and unjust process, which is against Articles 14 and 21 of the Constitution.

It was also decided that:[36]

[32] Ibid.
[33] (2018) 11 SCC 1 : 2017 (13) SCALE 609.
[34] Id. at 33
[35] Id. at 34.
[36] Id. at 35.

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Once more, this creates a condition that has nothing to do with the money laundering offence. Even if an individual can demonstrate that he has good reason to believe he is innocent of the money laundering offence, he may still be refused bail if he cannot demonstrate that he is innocent of the scheduled or predicate offence. This would once more produce an obviously unfair, discriminatory, and arbitrary outcome, nullifying the Section.

The Court further invalidated the provision on a third ground, ruling that the equal protection clause would require the section to be revoked because the goal of the PMLA and the granting of bail for offences committed under the Act would not be rationally connected to the classification of scheduled offences based on their sentencing. The Court further held that the apparent arbitrary and unjust outcomes resulting from the inconsistency between the section 45 grant of anticipatory bail and normal bail would violate articles 14 and 21 of the Constitution.[37]

V. ANTICIPATORY BAIL IN COMPLIANCE WITH CERTAIN LAWS

It has been observed that the majority of special Acts rely on section 438 of the Code to provide anticipatory bail or pre-arrest. Typical examples include the NDPS Act and the PML Act. In Teru Majhi v. State of W.B.,[38] the three-judge bench of the Calcutta high court was asked to decide whether the special court established by the Act would have the authority to issue pre-arrest bail in accordance with Section 438 of the Code. While opinions on whether an accused person is entitled to pre-arrest bail under the Act were unanimous, the prosecution believed that the high court alone had the authority to provide such a power. This opinion was founded on the argument that the Act's special court was only considered to be a sessions court for the purposes of trying offences under the Act, and since it was a court of first production, it lacked the authority to grant pre-arrest bail.

After interpreting section 36 C of the Act, the high court held that the special court was not the court of first production and concluded that no provision of the Code was excluded for the purposes of the said section unless the Act specifically provided for an exclusion. It decided that the special court established by the NDPS Act could give pre-arrest/anticipatory bail in accordance with section 438 of the Code since it could not identify an express exclusion of this kind anywhere in the statute.

Other statutes, such as MCOCA, 1999,[39] and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989,[40] prohibit the granting of pre-arrest or anticipatory bail in

[37](2014) SCC Online Cal 7684.
[38] Id at 36
[39] S. 21 (3) of MCOCA,1999.
[40] S. 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.

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cases involving offences specified in the statutes. They also completely exclude the operation of Section 438 of the Code.

In cases when someone is arrested on suspicion of committing an act under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, section 18 of the Act specifically states that section 438 of the CrPC shall not apply.

This is how the section is written:

Section 438 of the Code shall not apply to those who violate the Act.If someone is arrested on suspicion of committing an offence under this Act, nothing in Section 438 of the Code will apply to the situation.

In Balothia,[41] the constitutional legality of section 18 was maintained, and it was decided that the clause did not violate articles 14 and 21. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 contains an exclusionary provision regarding bail. This provision must be interpreted in the context of two things: the anti-discrimination law's goal and the application of penal law to uphold the non-discrimination and tolerance goals of the constitution.[42] The Act was amended in 2016 to reflect the Parliament's determination to fortify the law even further in light of the societal conditions that were in place at the time.[43]

Section 18 of the SC/ST Act permits the exclusion of section 438 of the CrPC, which is a well-founded system that advances both legislative and constitutional requirements. In Manju v. Onkarjit Singh,[44] the Supreme Court made the observation that the exclusion of section 438 of the Code with regard to crimes under the SC/ST Act must be considered in light of various factors, including the social conditions that give rise to these crimes and the fear that those who commit these atrocities will intimidate and threaten their victims and hinder or prevent them from being prosecuted if they are granted anticipatory bail.

The Supreme Court held in State of Madhya Pradesh v. Ram Kishan,[45] that any case involving the arrest of a person suspected of violating section 3 of the relevant Act was exempt from the application of Section 438 under the CrPC. Furthermore, it was established in the cases of Kapil Durgwani v. State of Madhya Pradesh,[46] and Balesh v. State,[47] that the application of section 18 of the SC/ST Act, in conjunction with section 438 of the Code, provides a particular obstacle

[41] S. 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.
[42] Also see, Rajulapati Ankababu v. Counsel, 2017(3) L.S. 316 .
[43] Suman Thakur v. State of Bihar, Criminal Appeal (SJ) No.591 of 2016.
[44] (2017) 13 SCC 75 : Reported in Cr. Appeal No.570 of 2017 arising out of S.L.P. (Cri)No.1929 of 2015
[45] (1995) 3 SCC 221.
[46] 2010 (5) MPHT 42.
[47] 2013 SCCOnLine 4997 : Delhi High Court, Bail Appln. 2242/2013(Decided On:11.12.2013).

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to the granting of anticipatory bail. A court cannot grant anticipatory bail in cases where an offence is registered against a person under the SC/ST Act unless it determines, based on prima facie evidence, that the offence is not proven.

Once more, the court was asked to decide in Vilas Pandurang Pawar v. State of Maharashtra[48] whether someone accused of a number of crimes under the IPC and SC/ST Act may get anticipatory relief under Section 438. The Act's Section 18, which states that "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," was specifically mentioned by the Court. The Supreme Court further declared that section 18's reach in relation to section 438 is limited to the creation of a particular bar in the granting of anticipatory bail. It also stated:[49] A court cannot grant anticipatory bail in cases where an offence is registered against a person under the SC/ST Act unless it determines, based on preliminary evidence, that the offence is not proven. Furthermore, there is little room for evaluation of the evidence and other records while evaluating the bail application. It is not anticipated of the court to critically examine the evidence that is now on file. When Section 438 of the Code prohibits the granting of bail to individuals who are members of Scheduled Castes and Scheduled Tribes, and a provision of the Special Act was enacted to protect them, the provision in the Special Act cannot be readily disregarded by a thorough analysis of the evidence.

In Mukesh Kumar Saini v. State (Delhi Administration),[50] the court ruled that the statute makes it quite clear that those who are accused of violating the SC/ST Act are not eligible for anticipatory bail. But, just because a section of the SC/ST Act is included in the FIR does not mean that the anticipatory bail should be denied on its own. The following elements must be met for the offence to be established under section 3 (1) of the SC/ST Act:

(a) a non-SC/ST member must have intentionally insulted or intimidated a SC/ST member with the intent to degrade them; and

(b) the insult must have been committed in a public setting.

In Sajjo v. State of Bihar,[51] the Patna High Court made the following declaration:

(a) Section 438 of the Cr.P.C. prohibits the filing of applications related to offences under the SC&ST Act as a matter of right in either the High Court or the Session Court. However, an application under section 438 Cr.P.C. is unquestionably maintainable, and

[48] (2012) 8 SCC 795 : 2012 (8) SCALE 577.
[49] Id. at para 10.
[50] 2001 Cri.LJ 4587.
[51] 2010 SCC OnLine Pat 1630 : 2010 (2) PLJR 690.

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relief may be granted, if the court determines under the criteria outlined below that the acts alleged are applicable under the provisions of the SC & ST Act.

(b) The court may nevertheless exercise its authority under section 438 Cr.P.C. even if it just mentions the provisions found in the FIR or the complaint petition pertaining to the commission of offences under the SC&ST Act.

(c) The court must lift the curtain in every instance and determine whether or not an offence under the SC&ST Act's provisions is proven.

The court is not needed to conduct a thorough investigation or carefully review all of the materials on file in order to determine whether the provisions of the SC&ST Act apply in a given instance. The court's only duty at this point is to determine whether or not a prima-facie case has been established in order to hear a motion for anticipatory bail.

(d) Examining the FIR or the complaint petition, as applicable, would be sufficient to determine whether or not an offence under the provisions of the SC & ST Act is made out. The legislative intent of section 18 of the SC & ST Act would be violated if the case diary, charge sheet, witness statement, and other materials on file were called for and the accused's defence was considered at this point. As a result, these should be avoided for the purpose of considering an application under section 438 Cr.P.C.

(e) Bar u/s 18 of the SC & ST Act shall apply in cases of attacks with a cast angle or of barbaric nature of atrocities punishable under the provisions of the Act; petitions under section 438 Cr.P.C. cannot be heard.

(f) The provisions of the SC & ST Act are not automatically applicable when someone is called by their caste.[52]

Section 18 of the Atrocities Act gives the Court a vision, direction, and mandate as to the cases where the anticipatory bail must be refused, but it does not and certainly cannot take away any Court's right to have a prima facie judicial scrutiny of the allegations made in the complaint, the Court held in Anil Kumar v. State of Madhya Pradesh[53] in 2017. Furthermore, it cannot, under its hunch, allow legal provisions to be misused for the ill-intentioned benefit of some dishonest complainant.

This stance has been reiterated by the Supreme Court in Subhash Kashinath Mahajan v. State of Maharashtra.[54] In analysing Balothia, a division bench determined that the restriction on

[52] Id. at para 13.
[53] 2017 Cr.A.No.2854/2017.
[54] (2018) 6 SCC 454 : 2018 (4) SCALE 661.

anticipatory bail under section 18 is not absolute. Judicial discretion[55] must be used in certain cases before anticipatory bail can be denied since doing so would violate due process. In order to determine if a "prima facie case is made out or the case is patently false or mala fide," the courts must use their judgement. Pre-trial arrest and custody as well as "custodial interrogation" are acceptable if the case seems legitimate at first glance. The SC/ST Act, 1989's section 18 has been interpreted by the Court in accordance with article 21. Political parties brought up a number of issues with the ruling, which forced the administration to give the complete exclusion of anticipatory bail under the Act more careful thought.[56]

The standards that were previously established in relation to Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 would also apply in situations requiring Section 21(3) of MCOCA, as the two provisions are identical.

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[55] Ibid.

[56] Sinha, J. in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, supra note18 at para 35.

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