IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 26TH DAY OF JULY 2022 / 4TH SRAVANA, 1944

BAIL APPL. NO. 4966 OF 2022

CRIME NO.744/2022 OF TOWN SOUTH POLICE STATION, ERNAKULAM

PETITIONER/ACCUSED:

SOORAJ V. SUKUMAR
AGED 41 YEARS, S/O.V.S. SUKUMARAN NAIR,
VATTAPARAKKAL HOUSE,
KADANAD P.O., PALA,
KOTTAYAM DISTRICT, PIN - 686653

BY ADV. BABU S. NAIR

RESPONDENTS/STATE & COMPLINANT:

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM,
KOCHI, PIN - 682031

2 THE STATION HOUSE OFFICER
TOWN SOUTH POLICE STATION,
ERNAKULAM, ERNAKULAM DISTRICT, PIN - 682015

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*(ADDL.R3 IS IMPLEADED AS PER ORDER DATED 04/07/20222 IN BA.NO.4966/2022.

BY SRI.NOUSHAD K.A, PUBLIC PROSECUTOR

SMT.K.NANDHINI

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 13.07.2022, THE COURT ON 26.07.2022 PASSED THE FOLLOWING:

'C.R.'

BECHU KURIAN THOMAS, J.

B.A. No.4966 of 2022

Dated this the 26th day of July, 2022

ORDER

The right to seek pre-arrest bail is a creation of the statute, and the said right can be taken away by the statute itself. In tune with the aforesaid principle, section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short 'the Act'), curtailed the right of an accused alleged of offences committed under the Act to seek pre-arrest bail.

2. Section 18 of the Act was subjected to legal analysis in **Dr. Subhash Kashinath Mahajan v. State of Maharashtra and Another** [(2018) 6 SCC 454]. Subsequently, section 18A was introduced into the statute. The Supreme Court again considered the issue in the judgment in **Prathvi Raj Chauhan v. Union of India and Others** [(2020) 4 SCC 727]. The Court held that despite the bar under sections 18 and 18A, in exceptional cases where a prima facie case under the Act is not made out, the bar of section 18 and 18A of the Act will not be attracted.

3. Be that as it may, petitioner is facing an indictment for offences punishable under sections 354A(1)(iv), 509, 294(b) of the Indian Penal Code, 1860, sections 66E and 67A of the Information Technology Act 2000, apart from sections 3(1)(r), 3(1)(s) and 3(1)(w)(ii) of the Act in Crime No.744 of 2022 of the Ernakulam Town South Police Station. He has invoked the jurisdiction of this Court for obtaining pre-arrest bail.

4. Petitioner is the Managing Director of an online news channel called "True T.V.", which is professed to have a viewership of more than five lakhs. The present crime has a background; without narrating which, the sequence will not be complete.

5. The victim had filed a complaint against her employer - another media person, alleging that he was compelling her to videograph her nudity to create a morphed video of a lady minister of the State. The employer of the victim was arrested after registering a crime. Provoked by the arrest of a friend and fellow media person, petitioner telecasted an interview through his online channel. The content shows the petitioner interviewing the husband and father-in-law of the victim. The interview which was aired through petitioner's online media was uploaded on YouTube and circulated through Facebook as well. Alleging that the interview shown by the petitioner is spewing insult, hatred and ill-will against the members of the

Scheduled Tribe community, apart from abusing and ridiculing the victim, crime No.744 of 2022 was registered. The said crime has created an apprehension of arrest in the petitioner's mind, and thus this application for pre-arrest bail.

6. Since the maintainability of the bail application was questioned, all the learned counsel addressed the Court on the said issue.

7. Sri. Babu S.Nair, learned counsel for the petitioner, contended that the offences alleged against the petitioner under the IPC and the IT Act are all bailable, while the offences under the Act are prima facie not attracted, and hence the application for pre-arrest bail is maintainable. It was contended that to attract the offences under section 3(1)(r) and section 3(1)(s) of the Act, the insult or intimidation, or abuse must take place not only within public view but should also be in the presence of the victim. Reliance was placed on the decision in **E.Krishnan Nayanar v. Dr.M.A.Kuttappan, Member, Kerala Legislative Assembly and Others** (1997 CRL L.J. 2036). It was further submitted that the offence under section 3(1)(w)(ii) of the Act will apply only if the offending word, act or gesture is made towards a woman clearly indicating her presence. The learned counsel vehemently contended that admittedly the victim was not present during the interview, and hence the provisions of the

Act are not attracted and thus urged this Court to grant pre-arrest bail.

8. Smt.K.Nandhini, learned counsel appearing for the victim, submitted that the petitioner is a Mala Araya, which is a Scheduled Tribe. It was further argued that a perusal of the written text of the interview itself is sufficient to satisfy that the petitioner was intentionally insulting, intimidating, humiliating and even abusing a member of a Scheduled Tribe within public view and aimed the words against the victim with the knowledge that she is a member of the Scheduled Tribe. Relying upon the objects of the statute, learned counsel submitted that an interpretation which is in tune with the object of the statute is required to be adopted unless the provisions become redundant. Learned counsel relied upon the decisions in **Swaran Singh and Others. v. State through Standing Counsel and Another** [(2008) 8 SCC 435], **Prathvi Raj Chauhan v. Union of India and Others** [(2020) 4 SCC 727], **State of M.P. and Another v. Ram Kishna Balothia and Another** [(1995) 3 SCC 221] and two unreported decisions of this Court in B.A. No.3833 of 2018 (**Majeesh K.Mathew v. State of Kerala and Another**) and Crl.Appeal No.450 of 2020 (**Juli C.J. v. State of Kerala and Others**). Based on the above judgments, it was submitted that offences under the Act are made out, and hence the application for

bail is not maintainable.

9. Sri.K.A.Noushad, learned Public Prosecutor, while supporting the contentions of the victim, submitted that the benefit of pre-arrest bail cannot be granted to the petitioner in the present case since the decision in **Prathvi Raj Chauhan v. Union of India and Others** [(2020) 4 SCC 727] had declared that the pre-arrest bail can be granted to an accused in exceptional cases and that too only when a prima facie case under the Act is not made out. Referring to the provisions of sections 3(1)(r), 3(1)(s) and 3(1)(w)(ii) of the Act, it was submitted that undoubtedly the offences under the Act are made out, and therefore petitioner cannot file an application for pre-arrest bail. Learned Public Prosecutor also relied upon the decision in **Ms.Gayatri @ Apurna Singh v. State of Delhi and Another** [W.P.(Crl.) 3083 of 2016] and submitted that in the digital era, the interpretation that 'a woman must be present while the statement is made' would lead to anomalous results and that the statute would become redundant if such an interpretation is adopted.

10. The predominant issue that arises for consideration is whether a prima facie offence under sections 3(1)(r), 3(1)(s) and 3(1)(w)(ii) of the Act or any one of those provisions are made out. If any of the offences are made out, this application is not maintainable. On the other hand, if a prima facie case is not made out, the issue will

narrow down to whether the petitioner is entitled to be granted pre-arrest bail?

11. There are three ingredients that are required to be satisfied to make out an offence under section 3(1)(r) and section 3(1)(s) of the Act. They are:

(i) The accused must not be a member of the scheduled caste or scheduled tribe.
(ii) The insult or intimidation or abuse must be made with intent to humiliate a member of the particular community, and
(iii) The act must have been committed within public view.

12. The written text of the interview, which was published through YouTube, Facebook and other social media, was made available to the court as Annexure R3(b) and Annexure R3(d). Similarly, the compact disc containing the interview, as downloaded from YouTube, was produced as Annexure R3(c) and Annexure R3(e). Petitioner is admittedly not a member of the Scheduled Caste or Scheduled Tribe. On a perusal of the statements and observations made in the interview, it is noticed that 'words' of a demeaning nature have been used by the petitioner at several stages of the interview. He has also referred to the petitioner as an 'ST' on more than one occasion, indicative of knowledge that the victim is a member of the Scheduled Tribe. Thus, the words used by the petitioner in the

interview are prima facie insulting, humiliating and abusive, made with the knowledge that the victim belongs to a Scheduled Tribe community. The interview uploaded by the petitioner is an affront to women and the victim in particular. Therefore, the content of the uploaded interview satisfies the first two ingredients mentioned above.

13. As mentioned earlier, the contention of Adv. Babu S.Nair is that the victim was not present when the alleged interview was taken, and hence the offences under sections 3(1)(r), 3(1)(s) and both sub-clauses of section 3(1)(w) of the Act can have no application in view of the decision in **E.Krishnan Nayanar v. Dr. M.A.Kuttappan, Member, Kerala Legislative Assembly and Others** (1997 CRL L.J. 2036). The contention was, no doubt, impressive at first blush. If the contention of the petitioner is accepted, then, despite the interview being laced with disgraceful or degrading words against the victim, still, an offence under the Act will not be made out since the third ingredient mentioned above is not satisfied.

14. In the judgment in **E.Krishnan Nayanar's** case, a learned single Judge of this Court opined that the words within 'public view' in section 3(1)(x) of the Act (prior to amendment) are referable only to the person insulted and not to the person who insulted him and that at the time of the alleged insult, the person insulted must be present (emphasis supplied). For the purpose of a proper understanding,

paragraph 12 of the said judgment is extracted as below:

> *"A reading of Section 3 shows that two kinds of insults against the member of a Scheduled Castes or Scheduled Tribes are made punishable - one as defined under sub-section (ii) and the other as defined under sub-section (x) of the said section. …….under sub-section (x) insult can be caused to the person insulted only if he is present in view of the expression "in any place within public view". The words "within public view", in my opinion, are referable only to the person insulted and not to the person who insulted him as the said expression is conspicuously absent in sub-section (ii) of Section 3 of Act 3/1989. By avoiding to use the expression "within public view" in sub-section (ii), the Legislature, I feel, has created two different kinds of offences an insult caused to a member of the Scheduled Castes or Scheduled Tribes, even in his absence, by dumping excreta etc. in his premises or neighbourhood and an insult by words caused to a member of the Scheduled Castes or Scheduled Tribes "within public view" which means at the time of the alleged insult the person insulted must be present as the expression "within public view" indicates or otherwise the Legislature would have avoided the use of the said expression which it avoided in sub-section (ii) or would have used the expression "in any public place."*

15. The High Court of Andhra Pradesh had relied upon the aforesaid decision in its judgment dated 01-08-2014 in **N.V Ramana Raju v. The State of A.P.** [Crl. Pet. No. 8269/2011]. and held that "*the words used are 'in any place but within public view', which means that the public must view the person being insulted for which he must be present, and no offence on the allegations under the said section gets attracted if the person is not present.*"

16. To appreciate the context in which this Court expressed the

opinion in **E.Krishnan Nayanar's** case (supra), it is necessary to refer to the facts of that case briefly. In a convention held on 20.09.1996, the then Chief Minister of Kerala made a speech in an auditorium at Thalassery stating that the respondent, who was "a Harijan, was dancing on the table". The said statement was treated as offensive. The speech made within the four walls of an auditorium and not in the presence of the person insulted was held by this Court as not constituting the offence under section 3(1)(x) of the Act (as it then stood). Section 3(1)(x) of the Act has now been reintroduced as section 3(1)(r) and section 3(1)(s), and the wordings of the sections remain identical.

17. If the interpretation in **E.Krishnan Nayanar's** case is applicable to the instant case, would an offence under the Act be made out? The answer to this question would decide the question of the maintainability of this bail application.

18. Normally, the penal statutes are to be construed strictly. By process of interpretation, conduct which is not otherwise an offence cannot be converted as an offence. However, the aforesaid traditional rule has undergone a change in recent times. All statutes, including penal statutes, are to be fairly construed according to the legislative intent expressed in the enactment. To exclude a conduct which may otherwise fall within the purview of the penal statute through a

process of forced construction or equitable interpretation or verbal niceties will be against the intent of the legislature.

19. One of the main objectives of the Act's intent is to eliminate offences involving practices against members of the Scheduled Caste and Scheduled Tribe communities, which erode their self-esteem. The statement of objects and reasons indicates the objectives of the statute.

20. The Supreme Court had noticed in **Prathvi Raj Chauhan's** case (supra) that even after the commencement of the Act, instances of socially reprehensible practices against members of the Scheduled Caste and Scheduled Tribe communities are increasing. In such circumstances, adopting an interpretation which defeats the intent and purpose of the Act must be avoided. The Act was enacted to curb the menace of crimes, including insults and humiliation targeted against Scheduled Caste and Scheduled Tribe communities. A remedial statute of this nature must be able to adapt to the circumstances. For that purpose, the statute must be read as "always speaking" and with life. The statute can achieve its objective only if it applies even in the technologically advanced social milieu.

21. Though normally, statutes are to be construed by applying the principle of the maxim *contemporanea expositio est optima et fortissima in lege (contemporaneous exposition is the best and*

strongest in law). However, when the surrounding circumstances undergo a drastic change after the statute was enacted, the rigid application of the above maxim may not be conducive. Future discoveries and changes in technologies may have to be brought within the purview of the statutes.

22. Circumstances may arise when the language of a statute must be interpreted as embracing advancements in technology to avoid the statute becoming a dead letter. The Parliament would never have intended society to remain static, and therefore elasticity to the words ought to be brought in through the process of interpretation without doing damage to the legislative intent. This principle, known as the '*doctrine of the ongoing statute',* can be adopted in instances where it is obvious that the sweep of the Parliamentary intention could be fulfilled only if such an interpretation is adopted. If the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must have meaning and life in the changed circumstances, it ought to be treated as an ongoing statute.

23. In the decision in **Senior Electric Inspector and Others v. Laxminarayan Chopra and Another** (AIR 1962 SC 159), while considering the question as to whether the word '*telegraph line*' would include '*wireless lines'* the Supreme Court observed that a statute may be interpreted to include circumstances or situations which were

unknown or did not exist at the time of the enactment of the statute. The Court also opined that the Legislature must be presumed to be aware of the march of time and the revolutionary changes taking place in social, economic, political, scientific and other fields of human activity. It was held that, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations if the words are capable of comprehending them.

24. Reference to the decision in **State of Maharashtra v. Dr. Praful B. Desai** [(2003) 4 SCC 601] is also apposite. In the said decision, the Supreme Court held the Code of Criminal Procedure, 1973 to be an ongoing statute and adopted an interpretation to make the statute compatible with the contemporary situation. Yet again, in the decision in **Rabindra Singh v. Financial Commissioner, Cooperation, Punjab and Others** [(2008) 7 SCC 663], it was observed that "*with the development of science and technology, the ongoing statutes cannot be construed in such a manner so as to take the society backwards and not forward*".

25. Similarly, in the decision reported as **P. Gopalkrishnan Alias Dileep v. State of Kerala and Another** [(2020) 9 SCC 161] also, the Supreme Court adopted the said principle of the ongoing statute to regard the contents of a memory card as an electronic document after relying upon the observations in **State of Punjab and**

Others. v. Amritsar Beverages Ltd. and Others. [(2006) 7 SCC 607] that *"Creative interpretation had been resorted to by the Court so as to achieve a balance between the age-old and rigid laws on the one hand and the advanced technology, on the other. The Judiciary always responds to the need of the changing scenario in regard to development of technologies. It uses its own interpretative principles to achieve a balance when Parliament has not responded to the need to amend the statute having regard to the developments in the field of science. Internet and other information technologies brought with them the issues which were not foreseen by law as for example, problems in determining statutory liabilities. …….. Various new developments leading to various different kinds of crimes unforeseen by our legislature come to immediate focus"*.

26. As mentioned earlier, the interview in question was published through the online media channel of the petitioner. The offending content is informed as still available on YouTube and other social media. Publication in the digital world is done by uploading the content. Once uploaded, the content can be viewed by anyone from any part of the world with the 'click of a button' or 'the swipe of a finger'.

27. The digital world has transformed the concept of viewership. Unlike a speech made within an enclosed space in front of

an audience, the content, when uploaded, has its impact felt the world over. The influence of the internet is in its universal accessibility. Prior to the advent of the internet, a speech made within an enclosed area could be heard or viewed only by those present inside the enclosed space. However, after the emergence of the internet, the uploaded content can be viewed or heard by any member of the public at any time, as if they are present either viewing or hearing it, not only at the time it was telecasted but even when the programme is accessed. Each time a person accesses the content of the uploaded programme, he or she becomes present, directly or constructively, in the broadcast or telecast of the content.

28. Thus, after coming into force of the digital era, the presence of the person contemplated by the judgment of this Court in **E.Krishnan Nayanar's** case will also include the online presence or digital presence. Any other interpretation will restrict the applicability of the Act and make the statute lifeless to the changed circumstances. A restrictive interpretation will render the Act nugatory and redundant in technologically advanced times. When the statute was enacted, and even when this Court interpreted the word 'public view' in **E.Krishnan Nayanar's** case, the concept of online presence through the internet or social media was not in contemplation.

29. The digital presence of persons through the internet has

brought a change to the concept, purport and meaning of the word 'public view' in sections 3(1)(r) and 3(1)(s). When the victim accesses the content already uploaded to the internet, she becomes directly and constructively present for the purpose of applying the penal provisions of the Act. Thus, when insulting or abusive content is uploaded to the internet, the victim of the abuse or insult can be deemed to be present each time she accesses it. The third ingredient of sections 3(1)(r) and 3(1)(s) of the Act is also thus satisfied.

30. Section 3(1)(w)(ii) of the Act is also alleged against the petitioner. The said provision contemplates words, acts or gestures of a sexual nature towards a woman belonging to a Scheduled Caste or a Scheduled Tribe. Though arguments were advanced on the inapplicability of section 3(1)(w)(ii) of the Act, I do not propose to consider the said question in view of my finding in the preceding paragraphs on the applicability of sections 3(1)(r) and 3(1)(s). Therefore the question whether an offence under section 3(1)(w)(ii) of the Act is prima facie made out or not is therefore left open.

31. In the light of the above circumstances, I am of the view that though bailable offences alone are alleged against the petitioner under the Indian Penal Code, 1860 and non-bailable offence under the Information Technology Act, 2000, since the offences alleged under section 3(1)(r) and section 3(1)(s) of the Scheduled Castes and

Scheduled Tribes (Prevention of Atrocities) Act, 1989 cannot be said to be not made out, this application for anticipatory bail is not maintainable.

32. It is clarified that the observations in this judgment are solely for this bail application, and any observation on facts shall not be binding in any other proceeding.

This bail application is therefore dismissed.

Sd/-

BECHU KURIAN THOMAS,
JUDGE

vps

/True Copy/ PS to Judge