



**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Criminal Misc. Bail Application No. 9155/2019

Sunil Kallani S/o Hari Kishan Kallani, R/o Kallani Bhawan,
Dalmiya Dharmshala Road, Siliguri, District Darjeeling, West
Bengal.

-----Accused-Petitioner

Versus

State of Rajasthan Through Public Prosecutor

-----Respondent



For Petitioner(s) : Mr. Swadeep Singh Hora
Mr. Prawal Mishra
Mr. Aaryan Pareek

For Respondent(s) : Mr. S.S. Mehla, P.P.
Mr. V.R. Bajwa with Mr. Manish Parihar
for complainant

HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA

Order

RESERVED ON : 05/10/2021

PRONOUNCED ON : 25/10/2021

REPORTABLE

1. While hearing this anticipatory bail application, the question of law arose whether an anticipatory bail application would be maintainable by an accused who is already arrested and is in judicial custody in relation to another FIR registered against him for the offences mentioned therein.
2. Learned counsel for the petitioner and learned counsel for the complainant as well as learned Public Prosecutor had advanced their submissions.



3. It would therefore be apposite to first note down the relevant provisions of Code of Criminal Procedure ("Cr.P.C."). Sections 41, 46, 81, 105 and Section 438 Cr.P.C. are as under:

"41. When police may arrest without warrant.—(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

1(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:—

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary—

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

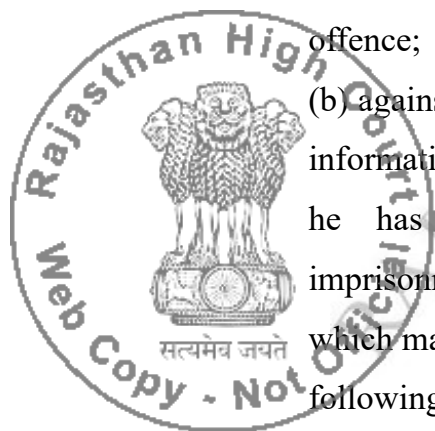
(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.

(ba) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has





reason to believe on the basis of that information that such person has committed the said offence;

(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or

(d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or

(i) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Subject to the provisions of section 42, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.

46. Arrest how made.—(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action:

Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on

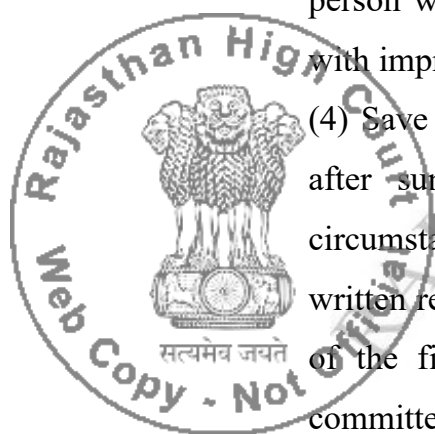


an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the police officer is a female, the police officer shall not touch the person of the woman for making her arrest.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

(4) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made.



81. Procedure by Magistrate before whom such person arrested is brought.—

(1) The Executive Magistrate or District Superintendent of Police or Commissioner of Police shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court:

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under section 71 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond, to the Court which issued the warrant:

Provided further that if the offence is a non-bailable one, it shall be lawful for the Chief Judicial Magistrate (subject to the provisions of section 437), or the Sessions Judge, of the district in which the arrest is made on consideration of the information and the documents referred to in sub-section (2) of section 78, to release such person on bail.

(2) Nothing in this section shall be deemed to prevent a police officer from taking security under section 71.



105. Reciprocal arrangements regarding processes.—(1) Where a Court in the territories to which this Code extends (hereafter in this section referred to as the said territories) desires that—

- (a) a summons to an accused person, or
- (b) a warrant for the arrest of an accused person, or
- (c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it, or
- (d) a search-warrant,

issued by it shall be served or executed at any place,—

(i) within the local jurisdiction of a Court in any State or area in India outside the said territories, it may send such summons or warrant in duplicate by post or otherwise, to the presiding officer of that Court to be served or executed; and where any summons referred to in clause (a) or clause (c) has been so served, the provisions of section 68 shall apply in relation to such summons as if the presiding officer of the Court to whom it is sent were a Magistrate in the said territories;

(ii) in any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country or place for service or execution of summons or warrant in relation to criminal matters (hereafter in this section referred to as the contracting State), it may send such summons or warrant in duplicate in such form, directed to such Court, Judge or Magistrate, and send to such authority for transmission, as the Central Government may, by notification, specify in this behalf.

(2) Where a Court in the said territories has received for service or execution—

- (a) a summons to an accused person, or
- (b) a warrant for the arrest of an accused person, or
- (c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it, or
- (d) a search-warrant,

issued by—

(i) a Court in any State or area in India outside the said territories;

(ii) a Court, Judge or Magistrate in a contracting State,

it shall cause the same to be served or executed as if it were a summons or warrant received by it from another Court in the said



territories for service or execution within its local jurisdiction; and where—

- (i) a warrant of arrest has been executed, the person arrested shall, so far as possible, be dealt with in accordance with the procedure prescribed by sections 80 and 81,
- (ii) a search-warrant has been executed, the things found in the search shall, so far as possible, be dealt with in accordance with the procedure prescribed by section 101:

Provided that in a case where a summons or search-warrant received from a contracting State has been executed, the documents or things produced or things found in the search shall be forwarded to the Court issuing the summons or search-warrant through such authority as the Central Government may, by notification, specify in this behalf.

438. Direction for grant of bail to person apprehending arrest.—

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that court may, after taking into consideration inter alia, the following factors namely: -

- (i) the nature and gravity of the accusation;
- (ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;
- (iii) the possibility of applicant to flee from justice; and
- (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session has not passed any interim order under this subsection or has rejected the application for grant of anticipatory bail, it shall be open to an officer incharge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.



(1A) Where the court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the court.

(1B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the court, if on an application made to it by the Public Prosecutor, the court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including—

- (i) a condition that the person shall make himself available for interrogation by a police officer as and when required;
- (ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
- (iii) a condition that the person shall not leave India without the previous permission of the Court;
- (iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence



under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code.”

4. Learned counsel for the petitioner submits that an anticipatory bail application would be maintainable even if a person is arrested in another case or in a similar case as he cannot be prevented from seeking restrained order from the court in the present FIR.

5. Learned counsel for the petitioner has relied on the judgments of the Supreme Court in **Gurbaksh Singh Sibbia etc., Vs. The State of Punjab**, reported in AIR 1980 SC 1632, **Central Bureau of Investigation, Special Investigation Cell-I, New Delhi Vs. Anupam J. Kulkarni**, reported in (1992) 3 SCC 141, **Sushila Aggarwal & Ors. Vs. State (NCT of Delhi) & Anr.**, reported in (2020) 5 SCC 1, **Sundeeep Kumar Bafna Vs. State of Maharashtra & Anr.**, reported in (2014) 16 SCC 623. and in **State of W.B. Vs. Dinesh Dalmia**, reported in (2007) 5 SCC 773. He also relied on judgment of this Court in **State of Rajasthan Vs. Santosh Yadav**, reported in (2005) 1 RLW 538 and judgment of Madras High Court in **State by Inspector of Police, Anti Land Grabbing Special Cell, City Crime Branch, Trichy Vs. K.N. Nehru** 2.K.N. Ramajayam 3. **M. Anbhazhagan**, reported in 2012 (1) MWN (Cr.) 4 (DB). He also relied on the order of Punjab & Haryana High Court in **Gurjant Singh Vs. State of Punjab, Criminal Misc. No.10829/2011, decided on 11.05.2011** and the order of Bombay High Court in **Vikram Sujit Das & Anr. Vs. State of Maharashtra**, 2020 SCC OnLine Bom 11401 to submit that an



anticipatory bail application under Section 438 Cr.P.C. would be maintainable.

6. Per contra, learned counsel appearing for the complainant submits that once a person stands already arrested, would not be entitled for moving an anticipatory bail application in another case as he stands already arrested and has to be produced by way of production warrant in any other case where it is alleged that he has committed a non-bailable cognizable offence.

7. Learned counsel has relied on the judgment of the Supreme Court in **Narinderjit Singh Sahni & Anr. Vs. Union of India & Ors.**, reported in (2002) 2 SCC 210, **Directorate of Enforcement Vs. Deepak Mahajan & Anr.**, reported in (1994) 3 SCC 440.

8. I have considered the submissions and also examined the law as laid down by the Supreme Court in the aforesaid judgments cited by both the parties.

9. However, it appears that the issue which has been raised before this Court, has not been addressed at any point of time by the Supreme Court or by any other High Court. Although two orders have been placed by learned counsel for the petitioner of Punjab & Haryana High Court and Bombay High Court but in both the cases the court did not examine whether the bail application was maintainable or not and simply granted anticipatory bail to the accused who stood already arrested and was confined to custody in another case.

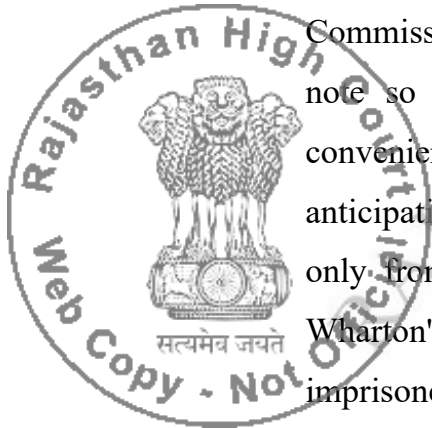
10. Section 438 Cr.P.C. as quoted above, provides an opportunity to a person to move an application for direction that if he is to be arrested in a case and the said person has reasons to believe that he shall be arrested then he may be released on bail and the said



person if granted anticipatory bail, it would be on the conditions as specified under Section 438 Cr.P.C.

11. In Gurbaksh Singh Sibbia etc. (supra), the Supreme Court observed as under:

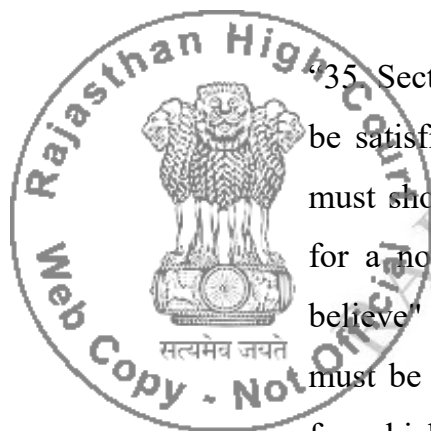
“7. The facility which Section 438 affords is generally referred to as 'anticipatory bail', an expression which was used by the Law Commission in its 41st report. Neither the section nor its marginal note so describes it but, the expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in Wharton's Law Lexicon, is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognisance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police





officer or other person making the arrest "shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". A direction under section 438 is intended to confer conditional immunity from this 'touch' or confinement."

12. Again the Supreme Court in Gurbaksh Singh Sibbia etc. (supra), further observed as under:



35. Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.

Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for granting such relief. It cannot leave the question for the decision of the Magistrate concerned under Section 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438.



Thirdly, the filing of a First Information Report is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F.I.R. is not yet filed.

Fourthly, anticipatory bail can be granted even after an F.I.R. is filed, so long as the applicant has not been arrested.

Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, in so far as the offence or offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested."

13. Thus, where the accused has already been arrested, the anticipatory bail application would not lie in the said case. However, the question still remains that if a person is to be arrested in another case other than for which he had already been arrested whether anticipatory bail would lie. In *Sushila Aggarwal* (supra), the Constitution Bench was examining the following questions referred to it:

“(1) Whether the protection granted to a person under Section 438 CrPC should be limited to a fixed period so as to enable the person to surrender before the trial court and seek regular bail.

(2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court.”

14. The Constitution Bench speaking through M.R. Shah, J. observed as under:

“7.1 At the outset, it is required to be noted that as such the expression “anticipatory bail” has not been defined in the Code. As observed by this Court in *Balchand Jain*, “anticipatory bail” means



“bail in anticipation of arrest”. As held by this Court, the expression “anticipatory bail” is a misnomer inasmuch as it is not as if bail is presently granted by the Court in anticipation of arrest. An application for “anticipatory bail” in anticipation of arrest could be moved by the accused at a stage before an FIR is filed or at a stage when FIR is registered but the charge sheet has not been filed and the investigation is in progress or at a stage after the investigation is concluded. Power to grant “anticipatory bail” under Section 438 Cr.P.C. vests only with the Court of Sessions or the High Court.

Therefore, ultimately it is for the court concerned to consider the application for “anticipatory bail” and while granting the “anticipatory bail” it is ultimately for the court concerned to impose conditions including the limited period of “anticipatory bail”, depends upon the stages at which the application for anticipatory bail is moved. A person in whose favour a pre-arrest bail order is made under Section 438 Cr.P.C. has to be arrested. However, once there is an order of pre-arrest bail/anticipatory bail, as and when he is arrested he has to be released on bail. Otherwise, there is no distinction or difference between the pre-arrest bail order under Section 438 and the bail order under Sections 437 & 439 Cr.P.C. The only difference between the pre-arrest bail order under Section 438 and the bail order under Sections 437 and 439 is the stages at which the bail order is passed. The bail order under Section 438 Cr.P.C. is prior to his arrest and in anticipation of his arrest and the order of bail under Sections 437 and 439 is after a person is arrested. A bare reading of Section 438 Cr.P.C. shows that there is nothing in the language of the Section which goes to show that the pre-arrest bail granted under Section 438 has to be time-bound. The position is the same as in Section 437 and Section 439 Cr.P.C.

7.2 While considering the issues referred to a larger Bench, referred to hereinabove, the decision of the Constitution Bench of this Court in Gurbaksh Singh Sibbia (supra) is required to be referred to and considered in detail. The matter before the Constitution Bench in the case of Gurbaksh Singh Sibbia (supra) was arising out of the decision of the Full Bench of the Punjab and Haryana High Court. The High Court rejected the application for bail after summarising, what according to it was the true legal position, thus,



“(1) The power under Section 438, Criminal Procedure Code, is of an extraordinary character and must be exercised sparingly in exceptional cases only;

(2) Neither Section 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled.

(3) The said power is not unguided or uncanalised but all the limitations imposed in the preceding Section 437, are implicit therein and must be read into Section 438.

(4) In addition to the limitations mentioned in Section 437, the petitioner must make out a special case for the exercise of the power to grant anticipatory bail.

(5) Where a legitimate case for the remand of the offender to the police custody under Section 167(2) can be made out by the investigating agency or a reasonable claim to secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act can be made out, the power under Section 438 should not be exercised.

(6) The discretion under Section 438 cannot be exercised with regard to offences punishable with death or imprisonment for life unless the court at that very stage is satisfied that such a charge appears to be false or groundless.

(7) The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised; and

(8) Mere general allegations of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless.”



15. In the concurring judgment delivered by Ravindra Bhat, J., the Supreme Court observed as under:

“47. Section 438 Cr.PC provides for the issuance of directions for the grant of bail to a person apprehending arrest. The Criminal Procedure Code, 1973 replaced the old code of 1898. The old code did not provide for any corresponding provision to Section 438 of the code of 1973. Under the old code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether courts had the inherent power to pass an order of bail in anticipation of arrest. The predominant position was that courts did not have such a power. Subsequently, the need for various amendments to make the code more comprehensive resulted in the enactment of the Code of Criminal Procedure in 1973. Interestingly, Section 438 does not expressly use the term “anticipatory bail”; its language instead empowers the court concerned to *issue directions for grant of bail*.

56. The reason for enactment of Section 438 in the Code was Parliamentary acceptance of the crucial underpinning of personal liberty in a free and democratic country. Parliament wished to foster respect for personal liberty and accord primacy to a fundamental tenet of criminal jurisprudence, that everyone is presumed to be innocent till he or she is found guilty. Life and liberty are the cherished attributes of every individual. The urge for freedom is natural to each human being. Section 438 is a procedural provision concerned with the personal liberty of each individual, who is entitled to the benefit of the presumption of innocence. As denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when not imposed by the legislature. In *Sibbia*, it was observed that:

“35.....Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.”



57. The interpretation of Section 438 - that it does not encapsulate Article 21, is erroneous. This court is of the opinion that the issue is not whether Section 438 is an intrinsic element of Article 21: it is rather whether that provision is part of fair procedure. As to that, there can be no doubt that the provision for anticipatory bail is pro-liberty and enables one anticipating arrest, a facility of approaching the court for a direction that he or she not be arrested; it was specifically enacted as a measure of protection against arbitrary arrests and humiliation by the police, which Parliament itself recognized as a widespread malaise on the part of the police.”

16. Thus the court answered the question raised before it that there is no time limit required to be laid down in the order of granting anticipatory bail.

17. The Scheme of Code of Criminal Procedure does not define the word “arrest”. In Chapter V of Code of Criminal Procedure, Section 41 lays down when police may arrest without warrant. Section 41B lays down procedure of arrest and duties of officer. Section 46 mentions how arrest is to be made.

18. Upon reading Section 46 Cr.P.C. (supra), it is apparent that arrest would mean to actually touch or confine the body of the person to custody of the police officer. Section 167 Cr.P.C. lays down that the custody may be given to the police for the purpose of investigation (called as remand) or be sent to jail (called as judicial custody). Thus the essential part of arrest is placing the corpus, body of the person in custody of the police authorities whether of a police station or before him or in a concerned jail.

19. The natural corollary is therefore that a person who is already in custody cannot have reasons to believe that he shall be arrested as he stands already arrested. In view thereof, the pre-condition of bail application to be moved under Section 438 Cr.P.C.



i.e. "reasons to believe that he may be arrested" do not survive since a person is already arrested in another case and is in custody whether before the police or in jail.

20. In order to meet out such provisions, Section 105 Cr.P.C. read with Sections 68 and 81 would apply.

21. In *Narinderjit Singh Sahni & Anr. (supra)*, the Apex Court did examine somewhat a similar issue though not completely. In the said case, writ petitions were filed under Article 32 of the Constitution of India before the Supreme Court and the Apex Court was confronted with twin issues – firstly pertaining to the maintainability of the petition under Article 32 and secondly that an order in the nature of anticipatory bail ought to be made available to the petitioners therein with regard to all the cases which were registered against them under Sections 407, 409, 420 and 120B IPC in various cases.

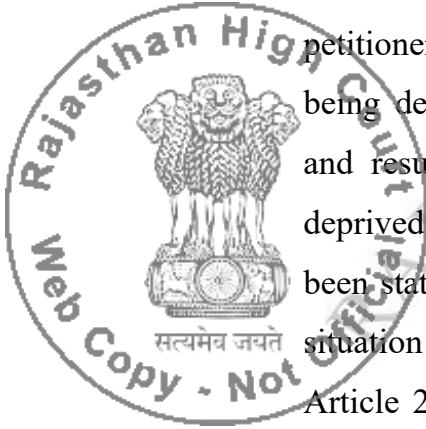
22. Examining the aforesaid aspects, the Apex Court in *Narinderjit Singh Sahni & Anr. (supra)* observed as under:

“49. Let us, therefore, analyse the situation in totality and consider the plea as emphasised by the petitioners herein. The records depict that thousands of innocent persons have fallen a prey in the methodology of working of finance companies and firms but does that mean and imply a denial of an opportunity of being heard or considered - the answer however, cannot possibly be in the affirmative. Doctrine of natural justice warrants a fair opportunity - we do not wish even to adumbrate the issue of natural justice here but the fact remains that the writ petitioners herein have come up with a petition on the ground that they have not been able to obtain benefit of the justice delivery system, reasons of which need not be dealt with presently but the factum of not being able to obtain the benefit and thereby it has been alleged that Article 21 stands



violated : In our view, judicial review or in other words maintainability of the petition under Article 32 cannot possibly be doubted in any way and as such we are unable to record our concurrence with the submissions of the respondents in the matter.

50. Let us however, try and analyse the grievance of the petitioners and consider as to whether there is any substance in such a grievance. Shortly put, the petitioners' grievance, which stands identical in all the writ petitions, stands out to be that though the petitioners were favoured with an order of bail in one case but are being detained by reason of production warrant in another matter and resultantly the petitioners are languishing in the jails being deprived of the order of grant of bail - this aspect of the matter has been stated to be violative of Article 21. In our view, however, the situation as noticed above does not ipso facto render it violative of Article 21. Article 21 of the Constitution postulates deprivation of life or personal liberty except according to the procedure established by law. Admittedly, the protection of personal liberty stands expanded to make the right to life under Article 21 more meaningful, the language of the Article itself records an exception indicating thereby that a person may be deprived of his liberty in accordance with the procedure established by law and it is in this sphere the courts will scrupulously observe as to whether the same stands differently and contra as regards the procedure established by law and in the event it is not so done, it would be a plain exercise of judicial power to grant redress to the petitioner. While there is no difficulty in appreciating the grievance and grant of relief in a given case but facts are too insufficient however, to come to a conclusion as regards the infraction of Article 21. Production warrants have been spoken of without any details whatsoever therefor - the reason offered is that the petitioners, in fact, are not in the know of things being behind the prison bars and it starts pouring in from all parts of the country and in the factual backdrop, as noticed above it is well nigh impossible to come to a finding as regards the infraction of Article 21 and since in the factual matrix, no infraction can be identified and thus question of sustaining the plea of infringement of Article 21 would not arise. In any event the liberty of the petitioners cannot be said to have been trifled within the absence of due process





of law. Deprivation, if any cannot be claimed to be not in accordance with due process of law.

51. On the score of anticipatory bail, it is trite knowledge that Section 438 CrPC is made applicable only in the event of there being an apprehension of arrest. **The petitioners in the writ petitions herein are all inside the prison bars upon arrest against all cognizable offences, and in the wake of the aforesaid question relieving the petitioners from unnecessary disgrace and harassment would not arise.**

52. In that view of the matter and since no infraction can be identified, the petition also cannot be sustained as regards the issue of anticipatory bail under Section 438.”

23. As pointed out by learned counsel for the petitioner that there may be cases where a person who has already been arrested in a particular case may be faced with registering of several FIRs by the persons who do not want him to be released from jail and in the said circumstances, only option available is to take anticipatory bail in other FIRs as the police would seek his arrest in all the cases. It may be subsequently registered against him for non-bailable offences and in such an event, there would be infraction of his personal liberty. However, this Court does not agree to the submissions noticed as above. Once the FIR has been registered in relation to an offence committed against any person by an accused, he cannot claim to be protected from offences which he may have committed with other persons who have their individual right of registering an FIR against such an accused. The accused will have to face investigation and subsequent trial in relation to each and every case individually. The question whether he may be punished separately or jointly for other cases, is a



completely different question altogether and need not be gone into the present case.

24. However, keeping in view observations in *Narinderjit Singh Sahni & Anr. (supra)* and considering that the purpose of preventive arrest by a direction of the court on an application under Section 438 Cr.P.C. would be an order in vacuum. As a person is already in custody with the police, this Court is of the view that such an anticipatory bail application under Section 438 Cr.P.C. would not lie and would be nothing but travesty of justice in allowing anticipatory bail to such an accused who is already in custody.

25. Examining the issue from another angle, if such an application is held to be maintainable, the result would be that if an accused is arrested say for an offence committed of abduction and another case is registered against him for having committed murder and third case is registered against him for having stolen the car which was used for abduction in a different police station and the said accused is granted anticipatory bail in respect to the offence of stealing of the car or in respect to the offence of having committed murder, the concerned Police Investigating Agency where FIRs have been registered, would be prevented from conducting individual investigation and making recoveries as anticipatory bail once granted would continue to operate without limitation as laid down by the Apex Court in *Sushila Aggarwal (supra)*. The concept of anticipatory bail as envisaged under Section 438 Cr.P.C. would stand frustrated. The provisions of grant of anticipatory bail are essentially to prevent the concerned person from litigation initiated with the object of injuring and humiliating



the applicant by having him so arrested and for a person who stands already arrested, such a factor does not remain available.

26. In view of above discussion, this Court holds that the anticipatory bail would not lie and would not be maintainable if a person is already arrested and is in custody of police or judicial custody in relation to another criminal case which may be for similar offence or for different offences.

27. Accordingly, it would be appropriate that in all bail applications moved under Section 438 Cr.P.C., a footnote is added mentioning that concerned petitioner has not been arrested and is not in custody in any other case.

28. In the present case, as the petitioner stands already arrested in another case, the present bail application moved under Section 438 Cr.P.C. would not lie and is accordingly dismissed.

(SANJEEV PRAKASH SHARMA),J

FATEH RAJ BOHRA /6

