Judgment Reserved on: 05.07.2023
Judgment Delivered on: 24.08.2023

HIGH COURT OF UTTARAKHAND AT NAINITAL

HON'BLE THE CHIEF JUSTICE SRI VIPIN SANGHI

AND

HON'BLE SRI JUSTICE MANOJ KUMAR TIWARI

AND

HON'BLE SRI JUSTICE RAVINDRA MAITHANI

Anticipatory Bail Application No. 76 of 2021

Saubhagya Bhagat ... Applicant

Versus

State of Uttarakhand & Anr. ... Respondents

With

Anticipatory Bail Application No. 34 of 2021

Devansh Khandelwal & Anr. ... Applicants

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 188 of 2021

Praveen Tyagi ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 215 of 2021

Sudhanshu Mehta ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 244 of 2021

Prarthana Asthana ... Applicant

Versus

State of Uttarakhand & Anr. ... Respondents

Anticipatory Bail Application No. 245 of 2021

Prarthana Asthana ... Applicant

Versus

State of Uttarakhand & Anr. ... Respondents

Anticipatory Bail Application No. 256 of 2021

Khimanand Dani ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 259 of 2021

Badri Prasad Arya ... Applicant

Versus

State of Uttarakhand & Anr. ... Respondents

Anticipatory Bail Application No. 261 of 2021

Vikas Kumar Sharma ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 268 of 2021

Deepak Kumar Rao ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 29 of 2022

Yogesh Kumar Gautam ... Applicant

Versus

State of Uttarakhand & Anr. ... Respondents

Anticipatory Bail Application No. 63 of 2022

Rahul Kumar Yadav ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 101 of 2022

Piyush Baliyan & Anr. ... Applicants

Versus

State of Uttarakhand & Others ... Respondents

Anticipatory Bail Application No. 150 of 2022

Lal Bahadur Kushwaha ... Applicant

Versus

State of Uttarakhand & Others ... Respondents

Anticipatory Bail Application No. 156 of 2022

Reshma ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 159 of 2022

Bhaguli Devi ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 161 of 2022

Naseem & Anr. ... Applicants

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 189 of 2022

Furkan ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 195 of 2022

Pranav Obrai & Others ... Applicants

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 198 of 2022

Neeraj Kumar Loshali ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 213 of 2022

Nayima ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 219 of 2022

Ranjeet Kaur *alias* Geeta ... Applicant

Versus

State of Uttarakhand & Anr. ...Respondents

Anticipatory Bail Application No. 253 of 2022

Raja Bhatt & Others ... Applicants

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 254 of 2022

Shadab ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 256 of 2022

Kamlesh Singh Chauhan ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 281 of 2022

Neeraj Kumar ... Applicant

Versus

State of Uttarakhand & Others ... Respondents

Anticipatory Bail Application No. 288 of 2022

Amit Kumar Singh ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 304 of 2022

Shubham Kumar ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 310 of 2022

Sandeep Singh Kandari & Anr. ...Applicants

Versus

State of Uttarakhand & Others ... Respondents

Anticipatory Bail Application No. 329 of 2022

Sayyaz ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 348 of 2022

Danish Raza ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 26 of 2023

Kiran Rana ... Applicant

Versus

State of Uttarakhand & Anr. ... Respondents

Anticipatory Bail Application No. 164 of 2023

Deshraj Saini ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 176 of 2023

Sanjay Bhalla ... Applicant

Versus

State of Uttarakhand ... Respondent

Mr. Girish Chandra Lakchaura and Mr. Dushyant Mainali, learned counsels for the applicant in ABA No. 76 of 2021.

Mr. Arvind Vashistha, learned Senior Counsel assisted by Ms. Disha Vashistha and Mr. Hemant Singh Mehra, learned counsels for the applicant in ABA No. 63 of 2022.

Mr. Alok Kumar, learned counsel for the applicants in ABA No. 101 of 2022.

Mr. Amit Kapri, learned counsel for the applicant in ABA No. 150 of 2022.

Mr. Ganesh Kandpal, learned counsel for the applicant in ABA No. 198 of 2022.

Mr. Bhuwnesh Joshi, learned counsel for the applicant in ABA No. 213 of 2022.

Mr. Tajhar Qayyum, learned counsel for the applicant in ABA No. 281 of 2022.

Mr. C.K. Sharma, learned counsel for the applicant in ABA No. 26 of 2023.

Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi and Mr. Pankaj Joshi, learned Brief Holders for the State of Uttarakhand.

Ms. Prabha Naithani, learned counsel for the complainant in ABA No. 215 of 2021.

Mr. B.D. Jha, Ms. Preeti Jha and Ms. Priyanka Jha, learned counsels for the complainant in ABA No. 198 of 2022.

The Court made the following:

Judgment: (Per: Hon'ble Manoj Kumar Tiwari, J.)

The question which falls for consideration by this Larger Bench is whether an application for anticipatory bail is maintainable after charge sheet has been filed in the Court?

2. It transpires that a learned Single Judge of this Court had referred the aforesaid question to a Larger Bench vide order dated 17.08.2022. The said question was answered in the affirmative by a Division Bench vide order dated 7.9.2022. Learned Single Judge, however, was of the opinion that the issues raised in the order of reference have not been considered and then the question was again referred to Larger Bench vide order dated

28.9.2022, passed in ABA/76/2021 and connected matters. Thus, the issue is now before a Full Bench.

3. Since the question was earlier answered by a Division Bench, therefore, before proceeding in the matter, it would be worthwhile to peruse the second order of reference dated 28.9.2022, which is extracted below:

> *"The following question was referred by this Bench to the Larger Bench on 17.08.2022:-*
>
> *"Whether an application for anticipatory bail is maintainable after the charge sheet has been filed in the court?"*
>
> *2. While making the reference, this Bench had taken note of the provision of Sections 46 and 438 of the Code of Criminal Procedure, 1973, Law Commission's 41st Report, the principles of law as laid down by the Hon'ble Supreme Court in the case of Shri Gurbaksh Singh Sibba and others v. State of Punjab, (1980)2 SCC 565, Satender Kumar Antil v. Central Bureau of Investigation and another, (2021) 10 SCC 773 and Sushila Aggarwal and others v. State (NCT of Delhi) and another, (2020) 5 SCC 1. In paragraph 22, 23 and 25 of the order dated 17.08.2022, this Court noted as hereunder:*
>
> > *"22. In view of the judgment in the case of Satender Kumar Antil (supra), after charge sheet is filed and cognizance is taken for offences under category 'A', bail application of such accused, on appearance, may be decided without the accused being taken into physical custody. It means, in such matters, the accused has no apprehension of his being taken into custody. Does it mean that for this category of cases, Section 438 of the Code is not applicable at all?*
> >
> > *23. If cognizance is taken and still anticipatory is maintained in the specified*

court, would not it impliedly interfere with the order summoning the accused? And if it so, is it the legislative intent for enacting Section 438 of the Code?

25. Recently, in the case of Sushila Aggarwal and others v. State (NCT of Delhi) and another, (2020) 5 SCC 1, the Hon'ble Supreme Court observed that the anticipatory bail is maintainable till charge sheet is filed and in para 7.1, the Hon'ble Supreme Court observed as hereunder:-

"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 [Balchand Jain v. State of M.P., (1976) 4 SCC 572 : 1976 SCC (Cri) 689], "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 CrPC vests only with the Court of Session or the High Court. ……"*

(emphasis supplied)

3. A Division Bench of this Court has answered the reference on 07.09.2022. The Division Bench observed that anticipatory bail application is maintainable even after filing of the charge sheet. While answering, the Division Bench did not make any mention of the judgment in the case of Satender Kumar Antil (supra) and the judgment in the case of Sushila Aggarwal (supra).

4. The judgment in the case of Sushila Aggarwal (supra) has been passed by the Constitution Bench of the Hon'ble Supreme Court, in which the Hon'ble Supreme Court observed ***"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...”***.
>
> *5. This Bench is bound to follow the reference answered by the Division Bench. But, in the case of Sushila Aggarwal (supra), the Hon’ble Court has held that anticipatory bail application could be moved until charge sheet has not been filed.*
>
> *6. This Bench is faced with a difficult situation. On the one hand, there is answer to the reference and, on the other hand, there are observations of the Hon’ble Supreme Court in the case of Sushila Aggarwal (supra). Instead of finding a way out within the parameters of law, this Court deems it disciplined action under law to refer the matter to the Larger Bench, so that the issue may be resolved.*
>
> *7. The matter is referred to the larger Bench for the aforementioned reasons.*
>
> *8. Let the Registry place the matter before Hon’ble the Chief Justice seeking directions for constitution of a Bench.*
>
> *9. Interim orders, if any, passed in any of the cases, shall remain in force till the next date of listing.”*

4. Learned Counsel for the applicants contend that as the legislature has not imposed any restriction regarding the stage at which an application for anticipatory bail could be entertained, therefore, reading some restriction or condition regarding the stage upto which such application can be filed, would not be warranted and would be against the dictum of the Constitution Bench judgments in the case of *Gurbaksh Singh Sibbia*[1] and *Sushila*

[1] 1980(2)SCC 565

Aggarwal[2]. It was further contended that the Constitution Bench judgment in the case of *Sushila Aggarwal*[2] nowhere provides that an application for anticipatory bail would be maintainable only till filing of charge sheet, and not thereafter.

5. Per contra, learned State Counsel contended that the provision for anticipatory bail under Section 438 CrPC is meant to protect a person from arrest at the hands of police, therefore, upon completion of investigation, when charge sheet is filed, the remedy of anticipatory bail would not be available to an accused person and he can then seek bail under Section 437 CrPC.

6. The concept of bail is an integral part of criminal justice system. Bail, in law, means procurement of release from prison of a person awaiting trial or an appeal, by deposit of security to ensure his submission at the required time to legal authority. The monetary value of the security, known also as the bail, or, more accurately, the bail bond, is set by the court having jurisdiction over the prisoner. The security may be cash, the papers giving title to property, or the bond of private persons of means. Failure of the person released on bail to surrender himself at the appointed time results in forfeiture of the security.

---

[2] 2020(5)SCC 1

7. The expression “bail” is not defined in the Code of Criminal Procedure. Hon’ble Supreme Court in the case of *Vaman Narain Ghiya v. State of Rajasthan*, reported as (2009) 2 SCC 281, has discussed the concept and philosophy of bail in para 6, 7 and 8 of the judgment, which are reproduced below:

> *“**6.** “Bail” remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression “bail” denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb “bailer” which means to “give” or “to deliver”, although another view is that its derivation is from the Latin term “baiulare”, meaning “to bear a burden”. Bail is a conditional liberty. Stroud's Judicial Dictionary (4th Edn., 1971) spells out certain other details. It states:*
>
> > *“... when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as*

is aforesaid, he is bailed—that is to say, set at liberty until the day appointed for his appearance."

Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

7. *Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have. (See A.K. Gopalan v. State of Madras)*

8. *The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have*

> *committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt."*

8. The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail and it is neither punitive nor preventative. In the case of *Sanjay Chandra v. C.B.I.*, reported as (2012) 1 SCC 40, Hon'ble Supreme Court held that deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. Para 40 of the said judgment is reproduced below:

> *"**40.** The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required."*

9. In the case of *Sandeep Kumar Bafna v. State of Maharashtra*, reported as (2014) 16

SCC 623, Hon'ble Supreme Court considered and discussed the concept of 'custody', 'detention' and 'arrest'. Para 16 of the said judgment is reproduced below:

> "**16.** It appears to us from the above analysis that custody, detention and arrest are sequentially cognate concepts. On the occurrence of a crime, the police is likely to carry out the investigative interrogation of a person, in the course of which the liberty of that individual is not impaired, suspects are then preferred by the police to undergo custodial interrogation during which their liberty is impeded and encroached upon. If grave suspicion against a suspect emerges, he may be detained in which event his liberty is seriously impaired. Where the investigative agency is of the opinion that the detainee or person in custody is guilty of the commission of a crime, he is charged of it and thereupon arrested. In *Roshan Beevi*, the Full Bench of the High Court of Madras, speaking through S. Ratnavel Pandian, J. held that the terms "custody" and "arrest" are not synonymous even though in every arrest there is a deprivation of liberty is custody but not vice versa. This thesis is reiterated by Pandian, J. in *Deepak Mahajan* by deriving support from *Niranjan Singh* v. *Prabhakar Rajaram Kharote*. The following passages from *Deepak Mahajan* are worthy of extraction: (SCC p. 460, para 48)
>
> > "*48*. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take

> that accused person into custody and deal with him according to law. Needless to emphasise that the arrest of a person is a condition precedent for taking him into judicial custody thereof. *To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender*. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide *Roshan Beevi*.
>
> *49*. While interpreting the expression 'in custody' within the meaning of Section 439 CrPC, Krishna Iyer, J. speaking for the Bench in *Niranjan Singh* v. *Prabhakar Rajaram Kharote* observed that: (SCC p. 563, para 9)
>
> > "*9*. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. *He can be stated to be in judicial custody when he surrenders before the court and submits to its directions*.""
>
> (emphasis supplied)

If the third sentence of para 48 is discordant to *Niranjan Singh*, the view of the coordinate Bench of earlier vintage must prevail, and this discipline demands and constrains us also to adhere to *Niranjan Singh*;

> ergo, we reiterate that a person is in custody no sooner he surrenders before the police or before the appropriate court. This enunciation of the law is also available in three decisions in which Arijit Pasayat, J. spoke for the two-Judge Benches, namely, (*a*) *Nirmal Jeet Kaur* v. *State of M.P.*, (*b*) *Sunita Devi* v. *State of Bihar*, and (*c*) *Adri Dharan Das* v. *State of W.B.*, where the co-equal Bench has opined that since an accused has to be present in court on the moving of a bail petition under Section 437, his physical appearance before the Magistrate tantamounts to surrender. The view of *Niranjan Singh* (*see* extracted para 49 supra) has been followed in *State of Haryana* v. *Dinesh Kumar*. We can only fervently hope that members of the Bar will desist from citing several cases when all that is required for their purposes is to draw attention to the precedent that holds the field, which in the case in hand, we reiterate is *Niranjan Singh*."

10. Right to life and personal liberty is a valuable right, available to all persons, guaranteed by Article 21 of the Indian Constitution and it is considered as one of the most precious rights. Hon'ble Supreme Court has held that life and liberty are the most prized possessions of an individual and the inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of State, but an essential requirement of any civilized society.

11. In the case of *A.K. Gopalan v. State of Madras*, reported as AIR 1950 SC 27,

Hon'ble Justice Mukherjea observed that "personal liberty" means liberty relating to or concerning the person or body of the individual and it is, in this sense, the antithesis of physical restraint or coercion. "Personal liberty" means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification.

12. In *Kharak Singh v. State of U.P.*, reported as AIR 1963 SC 1295, Hon'ble Subbarao, J. defined "Personal Liberty" as a right of an individual to be free from restrictions or encroachments on his person, whether these are directly imposed or indirectly brought about by calculated measure. Hon'ble Supreme Court held that personal liberty in Article 21 includes all varieties of freedoms except those included in Article 19.

13. In *Maneka Gandhi v. Union of India*, reported as (1978) 1 SCC 248, Hon'ble Supreme Court expanded the scope of expression "Personal Liberty" as used in Article 21 of the Constitution of India and rejected the argument that the expression "Personal Liberty" must be so interpreted as to avoid overlapping between Article 21 and Article 19(1). In para 5 of the judgment, the following observation was made:-

> *"---The expression "personal liberty" in Article 21 is of the widest amplitude and it covers a variety of*

> *rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19."*

14. Right to life is one of the basic human rights and not even the State has the authority to violate that right, as held by Hon'ble Supreme court in the case of *State of Andhra Pradesh v. Challa Ramakrishna Reddy*, reported as (2000) 5 SCC 712.

15. The Law Commission in its 41st Report dated September 24, 1969, emphasized the necessity of introducing a provision in the Code of Criminal Procedure enabling the High Court and the Court of Sessions to grant anticipatory bail. Accordingly, provision for anticipatory bail was made in Section 438 of the Code of Criminal Procedure, 1973. This provision allows a person to seek bail in anticipation of arrest on accusation of having committed a non-bailable offence. The basic purpose of insertion of this provision is that no person should be confined in custody unless held guilty.

16. In the case of *Gurbaksh Singh Sibbia v. State of Punjab*, reported in 1980 (2) SCC 565, a Constitution Bench of Hon'ble Supreme Court held that "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. Anticipatory bail once granted remains operative till conclusion of the trial unless it is cancelled under Section 439 of the Code."

17. In the case of *Balchand Jain v. State of M.P.*, reported as (1976) 4 SCC 572, Hon'ble Supreme Court held that conditions imposed by Section 437(1) CrPC are to be read in Section 438. Para 17 of the said judgment is extracted below:

> *"---As Section 438 immediately follows Section 437 which is the main provision for bail in respect of non-bailable offences it is manifest that the conditions imposed by Section 437(1) are implicitly contained in Section 438 of the Code. Otherwise the result would be that a person who is accused of murder can get away under Section 438 by obtaining an order for anticipatory bail without the necessity of proving that there were reasonable grounds for believing that he was not guilty of offence punishable with death or imprisonment for life. Such a course would render the provisions of Section 437 nugatory and will give a free licence to the accused persons charged with non-bailable offences to get easy bail by approaching the court under Section 438 and bypassing Section 437 of the Code."*

18. The aforesaid view was not accepted by Constitution Bench in the case of *Gurbaksh Singh Sibbia v. State of Punjab*, reported in

1980 (2) SCC 565, in para 26, which is reproduced below:

> *"**26.** We find a great deal of substance in Mr Tarkunde's submission that since 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 no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi , that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."*
>
> *(Emphasis supplied)*

19. In the case of *Gurbaksh Singh Sibbia* (supra), Constitution Bench of Hon'ble Supreme Court laid down certain principles, which are to be borne in mind while considering an application for anticipatory bail. These principles are summarized in para 35 to 39, which are reproduced below:

> "***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 individuals liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely*

> ***36***. *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.*
>
> ***37***. *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 FIR is not yet filed.*
>
> ***38***. *Fourthly, anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.*
>
> ***39***. *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, insofar 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."*

20. In para 38 of the aforesaid judgment, Constitution Bench held that anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.

21. In the case of *Salauddin Abdulsamad Shaikh v. State of Maharashtra*, reported as (1996) 1 SCC 667, a three-Judges Bench of Hon'ble Supreme Court took the view that anticipatory bail orders should be of a limited duration only and on expiry of that duration, the Court granting anticipatory bail should leave to the regular Court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is filed. Relevant extract of the said judgment is reproduced below:

> "*Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the outer date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular Court for bail.*"

22. The view taken in the case of *Salauddin Abdulsamad Shaikh (supra)* was followed in the case of *HDFC Bank Limited v. J.J. Mannan alias J.M. John Paul & Another*, reported as (2010) 1 SCC 679. Para 19 and 20 of the said judgment are reproduced below:

> "***19.****The object of Section 438 CrPC has been repeatedly explained by this Court and the High Courts to mean that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant. But at the same time the provisions of Section 438 CrPC cannot also be*

> *invoked to exempt the accused from surrendering to the court after the investigation is complete and if charge-sheet is filed against him. Such an interpretation would amount to violence to the provisions of Section 438 CrPC, since even though a charge-sheet may be filed against an accused and charge is framed against him, he may still not appear before the court at all even during the trial.*
>
> ***20.*** *Section 438 CrPC contemplates arrest at the stage of investigation and provides a mechanism for an accused to be released on bail should he be arrested during the period of investigation. Once the investigation makes out a case against him and he is included as an accused in the charge-sheet, the accused has to surrender to the custody of the court and pray for regular bail. On the strength of an order granting anticipatory bail, an accused against whom charge has been framed, cannot avoid appearing before the trial court."*

23. The view taken in the aforesaid two judgments, namely, *Salauddin Abdulsamad Shaikh* and *HDFC Bank Limited* was disapproved by another Constitution Bench of Hon'ble supreme Court in the case of *Sushila Aggarwal & Others v. State (NCT of Delhi) & Others*, reported as (2020) 5 SCC 1.

24. In the case of *Siddharam Satlingappa Mhetre v. State of Maharashtra & Others*, reported as (2011) 1 SCC 694, the view taken was that the order granting anticipatory bail for a limited duration and

thereafter directing the accused to surrender and apply for regular bail is contrary to the legislative intent and also the judgment of the Constitution Bench in *Gurbaksh Singh Sibbia*. Para 104 of the said judgment is reproduced below:

> "***104.*** *The validity of the restrictions imposed by the Apex Court, namely, that the accused released on anticipatory bail must submit himself to custody and only thereafter can apply for regular bail; this is contrary to the basic intention and spirit of Section 438 CrPC. It is also contrary to Article 21 of the Constitution. The test of fairness and reasonableness is implicit under Article 21 of the Constitution of India. Directing the accused to surrender to custody after the limited period amounts to deprivation of his personal liberty."*

25. The Constitution Bench in the case of *Sushila Aggarwal (supra)* disagreed with the view expressed in the case of *Siddharam Satlingappa Mhetre v. State of Maharashtra* by holding that it is too wide a view and cannot be considered good law.

26. Section 438 of the Code of Criminal Procedure, 1973 is extracted below:

> "***438. Direction for grant of bail to person apprehending arrest.—*** *(1) Where any person has reason to believe that he may be arrested on 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 the 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 sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1-A) 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.

(1-B) 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 issue 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 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860)."

27. A careful perusal of the aforesaid provision reveals that legislature has not imposed any restriction as regards the stage upto which an application for anticipatory bail can be entertained. The Constitution Bench in the case of *Gurbaksh Singh Sibbia v. State of Punjab*, reported as (1980) 2 SCC 565, has held that anticipatory bail can be granted so long as the applicant has not been arrested.

28. The question whether Courts by judicial interpretation can put some restrictions or conditions in the statute which the legislature itself did not think it proper or necessary to impose, was answered in the negative by the Constitution Bench in para 12 of the judgment in *Gurbaksh Singh Sibbia* (supra), which was approved by another Constitution Bench in para 7.3 of judgment rendered in the case of *Sushila Aggarwal v. State (NCT of Delhi)*, reported as (2020) 5 SCC 1.

29. The reason for making this reference can be gathered from para 4 and 5 of the order passed by the learned Single Judge on 28.9.2022, which are extracted below:

> *"4. The judgment in the case of Sushila Aggarwal (supra) has been passed by the Constitution Bench of the Hon'ble Supreme Court, in which the Hon'ble Supreme Court observed* ***"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...”***.
>
> *5. This Bench is bound to follow the reference answered by the Division Bench. But, in the case of Sushila Aggarwal (supra), the Hon’ble Court has held that anticipatory bail application could be moved until charge sheet has not been filed.”*

30. From reading of the reference order, it is revealed that the view expressed by learned Single Judge is based on observation in para 7.1 of the Constitution Bench judgment rendered in the case of *Sushila Aggarwal* (supra). This position becomes clear from para 25 of the earlier reference order dated 17.8.2022, in which extract of para 7.1 is reproduced 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 [Balchand Jain v. State of M.P., (1976) 4 SCC 572 : 1976 SCC (Cri) 689] , “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 CrPC vests only with the*

Court of Session or the High Court. ……"

(emphasis supplied)"

31. A careful perusal of the above extracted portion of para 7.1 reveals that the Constitution Bench has held that an application for anticipatory bail "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**". It is common knowledge that upon completion of investigation, either charge sheet or final /closure report is filed. Thus, the Constitution Bench does not prohibit filing of application seeking anticipatory bail after filing of charge sheet, as it was held that such an application can be filed upon completion of investigation. Para 7.7 of the judgment in *Sushila Aggarwal* (supra) reiterates that such application can be filed "at the stage when the investigation is complete and the charge sheet is filed". Para 7.7 of the said judgment is extracted below:

"We are of the opinion that the conditions can be imposed by the court concerned while granting pre-arrest bail order including limiting the operation of the order in relation to a period of time if the circumstances so warrant, more particularly the stage at which the "anticipatory bail" application is moved, namely, whether the same is at the stage before the FIR is filed or at the stage when the FIR is filed and the investigation is in progress or at the stage when the

> *investigation is complete and the charge-sheet is filed.”*

32. In para 52.13 of the concurring judgment authored by Hon’ble Justice S. Ravindra Bhatt, the earlier view is reiterated that anticipatory bail can be granted even after filing of FIR as long as the applicant is not arrested. In para 56 of the said judgment, it is held that “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. “

33. In para 63 of the said judgment, it is held that neither blanket restrictions can be read into Section 438 of CrPC nor inflexible guidelines in the exercise of discretion, be insisted upon, as that would amount to judicial legislation. Para 63, 69 and 72 of the said judgment are reproduced below:

> *“**63.** Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of*

discretion, be insisted upon — that would amount to judicial legislation.

69. *It is important to notice here that there is nothing in the provisions of Section 438 which suggests that Parliament intended to restrict its operation, either as regards the time period, or in terms of the nature of the offences in respect of which, an applicant had to be denied bail, or which special considerations were to apply. In this context, it is relevant to recollect that the court would avoid imposing restrictions or conditions in a provision in the absence of an apparent or manifest absurdity, flowing from the plain and literal interpretation of the statute (Ref. Chandra Mohan v. State of U.P.). In RBI v. Peerless General Finance & Investment Co. Ltd., the relevance of text and context was emphasised in the following terms : (SCC p. 450, para 33)*

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context.

With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

72. *The narrower interpretation preferred by this Court — in line of decisions starting with Salauddin highlighting the concerns with respect to the stages of investigation and enquiry and the nature and seriousness of the offence, in the opinion of the Court, ought not to lead one to cutting down the amplitude and the power and discretion otherwise available with the courts. The danger of this Court prescribing the limitations is that they become inflexible rules or edicts incapable of deviation. Instead, it would be safer to say that where there are circumstances or facts which pose peculiar problems or complexities pointing to the seriousness of an offence which the accused is implicated in, it is always open to courts (which have to deal with applications under Section 438) to impose the needed restrictions — be that in point of time or at the stage of investigation or enquiry. Each of these peculiar conditions may be imposed in the given circumstances of any case, which has those distinctive or special features. But they should not always be imposed invariably in all cases. In other words, if this Court were to weave conditions to impose and read into Section 438 that are not expressly provided, the danger would be that several applicants who*

> *might otherwise be entitled to relief, would be denied it altogether. For example, the classification of an offence or a category of offences as one wanting special treatment where the courts should not grant relief, would mean that regardless of the role of the accused and the nature of materials shown (whether adequate or not), the courts would be rendered powerless and denuded of the otherwise amplitude of discretion provided by the statute."*

34. The questions which fell for consideration before the Constitution Bench in the case of *Sushila Aggarwal v. State (NCT of Delhi)* are as follows:

> (i) 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?
>
> (ii) Whether the life of anticipatory bail should end at the time and stage when the accused is summoned by the court?

35. The first question was answered by the Constitution Bench by holding that although conditions can be imposed by the Court while granting pre-arrest bail including limiting the operation of an order in relation to period of time if circumstances so warrant, however, normal rule should be not to limit the order in relation to a period of time.

36. The second question was answered by holding that subject to compliance of the conditions, the anticipatory bail given to a person can continue till end of the trial. Thus, anticipatory bail once granted can, depending upon the conduct and behavior of the accused, continue after filing of charge sheet till trial.

37. Thus, law is well settled that filing of charge sheet does not affect continuance of anticipatory bail, if granted, as can be gathered from sub-Section (3) of Section 438 CrPC also. In such view of the matter, application for anticipatory bail cannot be held to be not maintainable merely because charge sheet is filed against the accused person. This would amount to doing violence with the language of Section 438, a provision meant to protect the personal liberty of people, which has to be construed in a manner which subserves its purpose and it would not be proper for this Court to read some restriction/condition in the said provision which was not put by the legislature.

38. The question whether anticipatory bail can be granted when cognizance is taken or the charge sheet is filed was considered by Hon'ble Supreme Court in the case of *Bharat Chaudhary v. State of Bihar*, reported as (2003) 8 SCC 77, and it was held that object of Section 438 CrPC is to prevent undue harassment of an accused by pre-trial arrest and detention and further that merely because

a court has taken cognizance on a complaint or the investigating agency has filed charge sheet, would not by itself prevent the courts concerned to grant anticipatory bail in appropriate cases. Para 7 of the said judgment is reproduced below:

> "***7***. *From the perusal of this part of Section 438 of CrPC, we find no restriction in regard to exercise of this power in a suitable case either by the Court of Session, High Court or this Court even when cognizance is taken or a charge-sheet is filed. The object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The fact, that a court has either taken cognizance of the complaint or the investigating agency has filed a charge-sheet, would not by itself, in our opinion, prevent the courts concerned from granting anticipatory bail in appropriate cases. The gravity of the offence is an important factor to be taken into consideration while granting such anticipatory bail so also the need for custodial interrogation, but these are only factors that must be borne in mind by the courts concerned while entertaining a petition for grant of anticipatory bail and the fact of taking cognizance or filing of a charge-sheet cannot by itself be construed as a prohibition against the grant of anticipatory bail. In our opinion, the courts i.e. the Court of Session, High Court or this Court has the necessary power vested in them to grant anticipatory bail in non-bailable offences under Section 438 of CrPC even when cognizance is taken or a charge-sheet is filed provided the facts of the case require the court to do so."*

39. Similarly, in the case of *Ravindra Saxena v. State of Rajasthan*, reported as (2010) 1 SCC 684, Hon'ble Supreme Court was examining validity of the order passed by the High Court rejecting application for anticipatory bail on the ground that challan has been presented. Para 7 and 8 of the said judgment are reproduced below:

> "***7**. We are of the considered opinion that the approach adopted by the High Court is wholly erroneous. The application for anticipatory bail has been rejected without considering the case of the appellant solely on the ground that the challan has now been presented.*
>
> ***8**. We may notice here that the provision with regard to the grant of anticipatory bail was introduced on the recommendations of the Law Commission of India in its Forty-first Report dated 24-9-1969. The recommendations were considered by this Court in a Constitution Bench decision in Gurbaksh Singh Sibbia v. State of Punjab. Upon consideration of the entire issue this Court laid down certain salutary principles to be followed in exercise of the power under Section 438 CrPC by the Sessions Court and the High Court. It is clearly held that the anticipatory bail can be granted at any time so long as the applicant has not been arrested. When the application is made to the High Court or the Court of Session it must apply its own mind on the question and decide when the case is made out for granting such relief."*

40. In the case of *Bhadresh Bipinbhai Sheth v. State of Gujarat*, reported as (2016) 1 SCC 152, Hon'ble Supreme Court while considering validity of an order of anticipatory bail granted to the accused after filing of charge sheet held as under:

> "***19.*** *In a matter like this where allegations of rape pertain to the period which is almost 17 years ago and when no charge was framed under Section 376 IPC in the year 2001, and even the prosecutrix did not take any steps for almost 9 years and the charge under Section 376 IPC is added only in the year 2014, we see no reason why the appellant should not be given the benefit of anticipatory bail. Merely because the charge under Section 376 IPC, which is a serious charge, is now added, the benefit of anticipatory bail cannot be denied when such a charge is added after a long period of time and inaction of the prosecutrix is also a contributory factor.*
>
> ***26.*** *Having regard to the facts of this case which have already been highlighted above, we feel that no purpose would be served in compelling the appellant to go behind bars, as an undertrial, by refusing the anticipatory bail in respect of alleged incident which is 17 years old and for which the charge is framed only in the year 2014. The investigation is complete and there is no allegation that the appellant may flee the course of justice. The FIR was registered and the trial commenced in the year 2001; albeit with the charge framed under Section 506 Part II IPC, and during all these periods, the appellant has participated in the proceedings. There is no allegation that during this period he had tried*

> *to influence the witnesses. In the aforesaid circumstances, even when there is a serious charge levelled against the appellant, that by itself should not be the reason to deny anticipatory bail when the matter is examined keeping in view other factors enumerated above."*

41. Hon'ble Supreme Court in the case of *Dr. Rajesh Pratap Giri v. State of U.P. & Another* (Criminal Appeal No. 272-273 of 2021) relied upon the observation made in para 77.3 of the judgment rendered in *Sushila Aggarwal* (supra) and held that the High Court erred in holding that the anticipatory bail granted to the appellant by the trial court had come to an end with the filing of charge sheet.

42. Similarly, in the case of *Vinod Kumar Sharma v. State of U.P. & Another*, reported as 2021 SCC OnLine SC 3225, Hon'ble Supreme Court was dealing with a case where the accused persons were granted anticipatory bail with the observation that after filing of charge sheet it shall be open to them to surrender and apply for regular bail before the competent authority. After filing of charge sheet, the accused persons applied for regular bail, which was rejected based on the observation made by Hon'ble Supreme Court while granting anticipatory bail to the accused persons. Hon'ble Supreme Court granted anticipatory bail to the accused persons. The observation made by Hon'ble Supreme Court in para 3 of the said judgment is extracted below:

> "***3***. *Merely because it was kept open for the petitioners to surrender and apply for Regular Bail after filing of the charge sheet, the same does not preclude the petitioners to apply for anticipatory bail under Section 438 Cr.P.C. after filing of the charge sheet. It also cannot be said, that same is a second application for grant of anticipatory bail as pleaded by learned counsel appearing for respondents, on the same cause of action."*

43. State Counsel had contended that anticipatory bail can be sought when there is an apprehension of arrest at the hands of the police, therefore, once charge sheet is filed, anticipatory bail application would not be maintainable as it would amount to interference with the summoning order, which is not permissible. The observation made by Hon'ble Supreme Court in the case of *Mahdoom Bava v. C.B.I.*, reported as 2023 SCC OnLine SC 299, is a complete answer to the aforesaid submission and the same is reproduced below:

> *"More importantly, the appellants apprehend arrest, not at the behest of the CBI but at the behest of the Trial Court. This is for the reason that in some parts of the country, there seems to be a practice followed by Courts to remand the accused to custody, the moment they appear in response to the summoning order. The correctness of such a practice has to be tested in an appropriate case. Suffice for the present to note that it is not the CBI which is seeking their custody, but the appellants apprehend that they may be remanded to custody by the Trial*

> *Court and this is why they seek protection. We must keep this in mind while deciding the fate of these appeals."*

44. Similarly, in the case of *Md. Asfak Alam v. State of Jharkhand*, reported as 2023 SCC OnLine SC 892, where accused was apprehending arrest in connection with an FIR lodged on 2.4.2022 under Section 498A/323/504/506 IPC and Section 3 & 4 of the Dowry Prohibition Act, the Court of Sessions dismissed his application for anticipatory bail on 28.6.2022; accused then approached High Court seeking anticipatory bail on 5.7.2022; no protection was granted till 7.8.2022, however, on 8.8.2022, High Court granted interim protection to the accused pending his anticipatory bail application; meanwhile, charge sheet was filed and cognizance was also taken on 1.10.2022; thereafter when pending anticipatory bail application was heard by High Court on 18.1.2023, it rejected the said application directing the accused to surrender before the competent court and seek regular bail; considering these factors and also highlighting the fact that the accused cooperated with the investigation both before 8.8.2022, when no protection was granted to him and after 8.8.2022, when he enjoyed protection till the filing of the charge sheet and the cognizance thereof on 1.10.2022, the Hon'ble Supreme Court observed, in para 14, that the High Court interpreted these factors in an entirely

different light and that there was no startling features or elements that stand out or any exceptional fact disentitling the accused to the grant of anticipatory bail and before setting aside the impugned order of High Court, further observed as under:

> *"...Thus, once the chargesheet was filed and there was no impediment, at least on the part of the accused, the court having regard to the nature of the offences, the allegations and the maximum sentence of the offences they were likely to carry, ought to have granted the bail as a matter of course. However, the court did not do so but mechanically rejected and, virtually, to rub salt in the wound directed the appellant to surrender and seek regular bail before the Trial Court. Therefore, in the opinion of this court, the High Court fell into error in adopting such a casual approach."*
>
> (emphasis supplied)

45. In the case of *Siddharth v. State of U.P.*, reported as (2022) 1 SCC 676, Hon'ble Supreme Court in para 9 has taken note of the practice of issuing non-bailable warrants for production of accused, who had cooperated with the investigation throughout, premised on the requirement that there is an obligation to arrest the accused and produce him before the court.

46. In the case of *Satender Kumar Antil v. CBI*, reported as (2022) 10 SCC 51, the view taken in the case of *Siddharth v. State of U.P.* (supra) was reiterated and it was observed that at the stage of sending an

accused to the Magistrate under Section 170 of CrPC, where the prosecution does not require the custody of the accused, there is no need for an arrest and there is not even a need for filing a bail application, as the accused is merely forwarded to the court for framing of charges and issuance of process for trial and it was observed that there may be a situation where the remand may be required, it is only in such cases that the accused will have to be heard.

47. Liberty of a person is his most prized possession. Liberty of an accused gets curtailed in the case of arrest by police and also in case of his remand to custody by the Magistrate/Court. Thus, the effect of arrest or remand is the same, namely, curtailment of liberty. Reputation of a person is damaged in both events, as the society makes no difference between arrest and remand. Section 438 CrPC also do not make any distinction between arrest by police or remand by Court. In the case of *Mahdoom Bava* (supra), Hon'ble Supreme Court has taken judicial notice of practice of remanding accused persons to custody when they appear in response to summoning orders. At times, an accused person, who has extended full cooperation during investigation, may have to suffer ignominy of being sent to judicial custody without any fault of his own. Since the language of Section 438 CrPC does not permit of any such limitation or restriction, therefore,

such limitation cannot be read into the statute so as to whittle down the scope of Section 438. The Constitution Bench in the case of *Gurbaksh Singh Sibbia* and *Shushila Aggarwal* have also held against reading any blanket restriction into Section 438 of the CrPC.

48. It is settled position in law that external aids cannot be used for interpreting a provision, when there is no ambiguity in the language of the statute. Law Commission's report, therefore, cannot be pressed into service for restricting the meaning of a statutory provision or for reading some conditions into it which are not provided by the legislature.

49. Hon'ble Supreme Court in the case of *Satender Kumar Antil v. Central Bureau of Investigation*, reported as (2021) 10 SCC 773, has nowhere held that provision for anticipatory bail made in Section 438 CrPC would not be applicable to persons against whom charge sheet is filed and cognizance is taken for offences under category 'A', although necessary guidelines were issued to protect the personal liberty of such persons.

50. In view of the legal position as discussed above, I am of the considered opinion that an application seeking anticipatory bail would be maintainable even after filing of charge sheet in the Court. The reference is answered accordingly.

51. Let these anticipatory bail applications be now placed before the appropriate Bench for further orders.

MANOJ KUMAR TIWARI, J.

24.8.2023
Pr

Reserved

HIGH COURT OF UTTARAKHAND AT NAINITAL

HON'BLE THE CHIEF JUSTICE SRI VIPIN SANGHI

AND

HON'BLE SRI JUSTICE MANOJ KUMAR TIWARI

AND

HON'BLE SRI JUSTICE RAVINDRA MAITHANI

Anticipatory Bail Application No. 76 of 2021

Saubhagya Bhagat ...Applicant

Versus

State of Uttarakhand And Another ....Respondents

Present:-

Counsel for the applicant : Mr. G.C. Lakhchaura, Advocate.

Counsel for the State : Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 34 of 2021

Devansh Khandelwal and Another ...Applicants

Versus

State of Uttarakhand ....Respondent

Present:-

Counsel for the applicant: Mr. Navneet Kaushik, Advocate.

Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 188 of 2021

Praveen Tyagi ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-

Counsel for the applicant: Mr. Parikshit Saini, Advocate.

Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 215 of 2021

Sudhanshu Mehta ..Applicant

Versus

State of Uttarakhand ....Respondent

Present:-

Counsel for the applicant: Mr. Vipul Sharma, Advocate.

Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Counsel for the informant: Ms. Prabha Naithani, Advocate.

Anticipatory Bail Application No. 244 of 2021

Prarthana Asthana ...Applicant

Versus

State of Uttarakhand And Another ....Respondents

Present:-

Counsel for the applicant: Mr. Rohit Arora, Advocate.

Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 245 of 2021

Prarthana Asthana ...Applicant

Versus

State of Uttarakhand And Another ....Respondents

Present:-
Counsel for the applicant: Mr. Rohit Arora, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 256 of 2021

Khimanand Dani ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Dharmendra Barthwal, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 259 of 2021

Badri Prasad Arya ...Applicant

Versus

State of Uttarakhand And Another ....Respondents

Present:-
Counsel for the applicant: Mr. Dharmendra Barthwal, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 261 of 2021

Vikas Kumar Sharma ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Aditya Singh, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 268 of 2021

Deepak Kumar Rao ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Ms. Pushpa Joshi, Senior Advocate assisted by Ms. Chetna Latwal, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 281 of 2022

Neeraj Kumar ...Applicant

Versus

State of Uttarakhand and Others ....Respondents

Present:-

Counsel for the petitioner: Mr. Tajhar Qayyum, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 29 of 2022

Yogesh Kumar Gautam ...Applicant

Versus

State of Uttarakhand and Another ....Respondents

Present:-
Counsel for the applicant: Mr. Nagesh Aggarwal, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 63 of 2022

Rahul Kumar Yadav ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Arvind Vashistha, Senior Advocate assisted by Ms. Disha Vashistha and Mr. Hemant Singh Mahar, Advocates.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 101 of 2022

Piyush Baliyan and Another ...Applicants

Versus

State of Uttarakhand and Others ....Respondents

Present:-
Counsel for the applicants: Mr. Sandeep Kothari, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 150 of 2022

Lal Bahadur Kushwaha ...Applicant

Versus

State of Uttarakhand and Others ....Respondents

Present:-
Counsel for the applicant: Mr. Amit Kapri, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 156 of 2022

Reshama ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Gaurav Singh, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 159 of 2022

Bhaguli Devi ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Pooran Singh Rawat, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 161 of 2022

Naseem and Another ...Applicants

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicants: Mr. Mohd. Safdar, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 189 of 2022

Furkan ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Rajveer Singh, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 195 of 2022

Pranav Obrai and Others ...Applicants

Versus

State of Uttarakhand ....Respondent

Present:-

Counsel for the applicants:	Mr. Abhishek Verma, Advocate.
Counsel for the State:	Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 198 of 2022

Neeraj Kumar Loshali ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-

Counsel for the applicant:	Mr. Ganesh Kandpal, Advocate.
Counsel for the State:	Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.
Counsel for the informant:	Mr. B.D. Jha, Ms. Preeti Jha and Ms. Priyanka Jha, Advocates.

Anticipatory Bail Application No. 213 of 2022

Nayima ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-

Counsel for the applicant:	Mr. Bhuwnesh Joshi, Advocate.
Counsel for the State:	Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 219 of 2022

Ranjeet Kaur alias Geeta ...Applicant

Versus

State of Uttarakhand and Another ....Respondents

Present:-
Counsel for the applicant: Mr. Raj Kumar Singh, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 253 of 2022

Raja Bhatt and Others ...Applicants

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Vikas Bahuguna, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 254 of 2022

Shadab ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Rajat Mittal, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 256 of 2022

Kamlesh Singh Chauhan ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Rajat Mittal, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 288 of 2022

Amit Kumar Singh ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Raj Kumar Singh, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 304 of 2022

Shubham Kumar ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Gaurav Singh, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 310 of 2022

Sandeep Singh Kandari and Another ...Applicants

Versus

State of Uttarakhand and Others ....Respondents

Present:-
Counsel for the applicants: Mr. B.S. Adhikari, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 329 of 2022

Sayyaz ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Bilal Ahmed, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 348 of 2022

Danish Raza ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Sanjeev Singh, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 26 of 2023

Kiran Rana ...Applicant

Versus

State of Uttarakhand and Another ....Respondents

Present:-
Counsel for the applicant: Mr. C.K. Sharma, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 164 of 2023

Deshraj Saini ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Navneet Kaushik, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

Anticipatory Bail Application No. 176 of 2023

Sanjay Bhalla ...Applicant

Versus

State of Uttarakhand ....Respondent

Present:-
Counsel for the applicant: Mr. Abhishek Verma, Advocate.
Counsel for the State: Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi, and Mr. Pankaj Joshi, learned Brief Holders for the State.

The Court made the following:

Judgment: (per: Hon'ble Ravindra Maithani, J.)

INTRODUCTION

I have read the draft judgment authored by Manoj Kumar Tiwari, J. I regret my inability to agree with it in answering the present reference.

2. The following question of law has been referred to the Larger Bench for consideration:-

> "**Whether an application for anticipatory bail is maintainable after the charge sheet has been filed in the court?"**

3. Instant reference has been made on the ground that in the case of Sushila Aggarwal[1], the Constitution Bench of the Hon'ble Supreme Court has held that the anticipatory bail may be entertained till the charge sheet has not been filed, but a Coordinate Bench of this Court had considered anticipatory bail even after filing of the charge sheet. Initially, the reference was made on 17.08.2022, by a Single Judge in ABA No.76 of 2021, Saubhagya Bhagat Vs. State of Uttarakhand and Another, and connected matters. It was answered by a Division Bench of this Court on 07.09.2022 holding that an anticipatory bail is maintainable even after filing of the charge sheet. But, the matter has further been referred by the Single Judge, on 28.09.2022, to the Larger Bench observing as follows:-

---

[1] *Sushila Aggarwal and others v. State (NCT of Delhi) and another*, (2020) 5 SCC 1

> "6. This Bench is faced with a difficult situation. On the one hand, there is answer to the reference and, on the other hand, there are observations of the Hon'ble Supreme Court in the case of Sushila Aggarwal (*supra*). Instead of finding a way out within the parameters of law, this Court deems it disciplined action under law to refer the matter to the Larger Bench, so that the issue may be resolved."

4. Heard learned counsel for the parties and perused the record.

RIGHT TO LIFE AND PERSONAL LIBERTY

5. The existence of a human being is directly connected to his Right to Life. The social existence of a human being is directly connected to his personal liberty. The right to life and personal liberty may be termed as natural rights, inalienable rights and basic human rights and so they are engrafted under Article 21 of the Constitution of India guaranteeing these rights. This Article reads as hereunder:-

> "**21.** No person shall be deprived of his life or personal liberty except according to procedure established by law."

6. The right to life and personal liberty, as guaranteed, is also not absolute. A person may be deprived of it, but according to "procedure established by law." The Constituent Assembly debates reflect that deliberately "due process of law" has been avoided into it.

7. Right to Life and Liberty may, in fact, be traced back to Magna Carta, wherein it was recorded that No free man shall be

seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land. Whether the phrase "law of land" as written in the Magna Carta, is equivalent to the word "procedure established by law", as mentioned in Article 21 of the Constitution, this Court refrains to go deeper into that aspect.

8. But, it would be apt to briefly discuss as to how the liberty clause in Article 21 of the Constitution was debated in our Constituent Assembly. On 06.12.1948, Article 15 (Article 21 of the Constitution) was discussed in the Constituent Assembly. This Article 15 then was in the following words, **"No person shall be deprived of his life or liberty without due process of law."** The Drafting Committee made certain changes in it and in the discussion that was held on 06.12.1948, one of the Members argued, **".....the Advisory Committee on Fundamental Rights appointed by the Constituent Assembly had suggested that no person shall be deprived of his life or liberty without due process of law; and I really do not understand how the word "personal" and "according to procedure established by law" have been brought into article 15 by the Drafting Committee."** There was a lot of discussion on this Article.

9. On 13.12.1948, finally, the issue was addressed by the Chairman of the Drafting Committee:-

> "One point of view says that "due process of law" must be there in this article; otherwise the article is a nugatory one. The other point of view is that the existing phraseology is

quite sufficient for the purpose. Let me explain what exactly "due process" involves.

The question of "due process" raises, in my judgment, the question of the relationship between the legislature and the judiciary. In a federal Constitution, it is always open to the judiciary to decide whether any particular law passed by the legislature is ultra vires or intra vires in reference to the powers of legislation which are granted by the Constitution to the particular legislature. If the law made by a particular legislature exceeds the authority of the power given to it by the Constitution, such law would be ultra vires and invalid. That is the normal thing that happens in all federal Constitutions. Every law in a federal Constitution, whether made by the Parliament at the Centre or made by the legislature of a State, is always subject to examination by the judiciary from the point of view of the authority of the legislature making the law. The 'due process' clause, in my judgment, would give the judiciary the power to question the law made by the legislature on another ground. That ground would be whether that law is in keeping with certain fundamental principles relating to the rights of the individual. In other words, the judiciary would be endowed with the authority to question the law not merely on the ground whether it was in excess of the authority of the legislature, but also on the ground whether the law was good law, apart from the question of the powers of the legislature making the law."

10. The journey of the interpretation of Article 21 from the case of A.K Gopalan[2] to Maneka Gandhi[3], proves that the Constitution of India is an organic and dynamic document and it evolves with the change of time. It also settles and proves that the interpretation of the Constitution is quite different than the interpretation of a statute. [(i) Cross-Statutory Interpretation (1976)- "No one would suggest that a written constitution should be

---

[2] *A.K Gopalan v. State of Madras*, 1950 SCC 228
[3] *Maneka Gandhi v.. Union of India,* (1978) 1 SCC 248

construed for all times as if the court was sitting the day it was enacted.", and (ii) - In re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938 (Central Provinces and Berar Act No. XIV of 1938), 1938 SCC OnLine FC 2- "A Federal Court will not strengthen, but only derogate from, its position; if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of government is living an organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat.*"]

11. In the case of A.K. Gopalan (*supra*), the Hon'ble Supreme Court then observed that, **"No extrinsic aid is needed to interpret the words of Article 21, which in my opinion, are not ambiguous. Normally read, and without thinking of other Constitutions, the expression "procedure established by law" must mean procedure prescribed by the law of the State. If the Indian Constitution wanted to preserve to every person the protection given by the due process clause of the American Constitution there was nothing to prevent the Assembly from adopting the phrase, or if they wanted to limit the same to procedure only, to adopt that expression with only the word "procedural" prefixed to "law."** But, in the case of Maneka Gandhi (*supra*), the Hon'ble Supreme Court observed that, **"Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by**

Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

12. The "due process of law" clause that was avoided by the Constituent Assembly has, by interpretation, been read into Article 21 by the Hon'ble Supreme Court in the case of Maneka Gandhi (*supra*).

STATUTORY PROVISIONS

13. Code of Criminal Procedure, 1973 ("the Code") provides procedure for criminal cases unless some specific statutes provide otherwise. The Code classifies the offences into cognizable and non-cognizable category as hereunder:-

> "**2. Definitions.—**In this Code, unless the context otherwise requires,—
>
> (l) "non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant;....."

14. The classification of offences under cognizable and non-cognizable offence is based on heinousness of the offence. In case, the offences that were considered by the Legislature a little more serious, they are classified as cognizable offences, in which case a police officer may arrest without warrant.

Arrest Or Not To Arrest

15. There are various provisions relating to arrest in the Code, viz, Sections 41 (when Police may arrest without warrant), 42 (Arrest on refusal to give name and address), 43 (Arrest by private person and procedure on such arrest) and Section 44 (Arrest by Magistrate).

16. How the arrest is made, is defined under Section 46 of the Code. It reads as follows:-

> **"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.

17. Does it mean that since a police officer has an authority to arrest without warrant, he should invariably arrest a person as soon as allegations are levelled against some person for commission of some cognizable offences? The answer is in NEGATIVE.

18. In the case of Joginder Kumar[4], the Hon'ble Supreme Court discussed the law on arrest and observed "**The quality of a nation's civilisation can be largely measured by the methods it uses in the enforcement of criminal law"....." The horizon of human rights is expanding."** The Hon'ble Supreme Court further emphasized that "**No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person."**

19. In the case of Arnesh Kumar[5], also, the Hon'ble Supreme Court was engaged on the question of arrest, the attitude of police and observed that "**Arrest brings humiliation, curtails freedom and casts scars forever.**"

20. In the case of Arnesh Kumar (*supra*), the Hon'ble Supreme Court discussed the provisions of Section 41 and 41-A of the Code. After examining the essence of these two provisions, the

---

[4] *Joginder Kumar v. State of U.P.*, (1994) 4 SCC 260
[5] *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273

Hon'ble Supreme Court viewed that if these provisions are scrupulously enforced, the wrong committed by the police officers intentionally or unwittingly would be reversed and the number of cases which come to the Court for grant of anticipatory bail will substantially reduce. The Hon'ble Supreme Court thereafter laid down guidelines to be followed by the police officers or the Magistrates in the matters of arrest. It was so done that every arrest should be based on necessity, reason and logic and indiscriminate arrests may be avoided.

Remand And Bail

21. Arrest is the curtailment of personal liberty. If a person is lawfully arrested by the police, he is detained by the police to a permissible limit, which is 24 hours. Thereafter, such person is produced before the Magistrate or court concerned.

22. If the investigation in any offence pertaining to a non-bailable offence could not be completed within twenty-four hours and the accused is in custody, he is required to be produced before the Magistrate. This is the mandate of Article 22(2) of the Constitution. Sections 57 and 167 of the Code also mandate it. If there are grounds for believing that the accusations are well-founded, further detention of an accused person may be ordered. This detention may either be in judicial custody or police custody. This exercise, which is done by a Magistrate, when an accused is produced before him for the first time, in real sense is a kind of judicial scrutiny as to whether accusation or allegation is well

founded or whether further detention is necessary. In fact, remand is essentially the first judicial scrutiny of arrest.

23. Once arrested, how a person may restore his liberty? There are provisions in the Code relating to bail. What is bail? What are bailable and non-bailable offences? The Code classifies the offences into bailable and non-bailable offences. The Schedule given in the Code makes the distinction. This categorization is also based on various factors, predominantly based on gravity of offences, they are classified as bailable and non-bailable. Heinous offences are generally classified as a non-bailable offence. It is not that in a non-bailable offence a person may not be released on bail, but then such a bail application is considered by the court, whereas in the case of bailable offences, as a matter of right, bail is claimed by the arrestee. It is governed by Section 436 of the Code.

24. In non-bailable offences, the bail may be granted. Sections 437 and 439 of the Code mainly make provisions in this regard. In non-bailable cases, though bail may not be claimed as a matter of right.

25. It is settled law that bail is a rule and jail is an exception. In the case of Moti Ram[6], the Hon'ble Supreme Court traced the history of the concept of bail as follows:-

> "**9.** The concept of bail has a long history briefly set out in the publication on 'Programme in Criminal Justice Reform':
>
> "The concept of bail has a long history and deep roots in English and American law. In medieval England, the

[6] *Moti Ram and Others V. State of Madhya Pradesh*, (1978) 4 SCC 47

> custom grew out of the need to free untried prisoners from disease-ridden jails while they were waiting for the delayed trials conducted by travelling justices. Prisoners were bailed, or delivered, to reputable third parties of their own choosing who accepted responsibility for assuring their appearance at trial. If the accused did not appear, his bailor would stand trial in his place.
>
> Eventually it became the practice for property owners who accepted responsibility for accused persons to forfeit money when their charges failed to appear for trial. From this grew the modern practice of posting a money bond through a commercial bondsman who receives a cash premium for his service, and usually demands some collateral as well. In the event of non-appearance the bond is forfeited, after a grace period of a number of days during which the bondsman may produce the accused in court. Vera Institute of Justice Ten-year Report 1961-71, p.20"

26. How a Court should view the bail law and interpret the question relating to liberties have very succinctly been narrated by the Hon'ble Supreme Court in the case of Moti Ram (*supra*), when the Supreme Court, in Para 23, observed as follows:-

> "**23.** A semantic smog overlays the provisions of bail in the Code and prisoners' rights, when cast in ambiguous language become precarious. Where doubts arise the Gandhian talisman becomes a tool of interpretation:
>
> > "Whenever you are in doubt. . . apply the following test. Recall the face of the poorest and the weakest man whom you may have seen, and ask yourself, if the step you contemplate is going to be of any use to him." Law, at the service of life, must respond interpretatively to raw realities and make for liberties."

27. When an accused is arrested and he seeks bail, what would be the consideration? In the case of Rao Harnarain Singh[7], the Court had discussed this concept and observed that, **"There cannot be inflexible rules governing a subject which rests principally with the Courts discretion in the matter of allowance or refusal of bail."** Thereafter, the Court has illustratively enumerated certain factors for consideration of bail. In the case of State of U.P. through CBI[8], the Hon'ble Supreme Court discussed the law as to what are the factors that are to be considered while considering an application for bail.

28. It may be noted that there are other provisions in law, which relate to grant of bail. For example, under Section 167 of the Code; if within the stipulated time the investigation has not been completed, an arrestee becomes entitled to default bail. Such a provision is contained under Section 167(2) of the Code.

ANTICIPATORY BAIL

29. There is another aspect of the matter. If a person apprehends his arrest in the non-bailable offences, Section 438 of the Code provides for filing of an anticipatory bail application. Section 438 of the Code is as follows:-

> "**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; and that

---

[7] *Rao Harnarain Singh and Others v. The State*, AIR 1958 P&H 123
[8] *State of U.P. v. Amarmani Tripathi*, (2005) 8 SCC 21

Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(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 confirmity 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 (45 of 1860).”

30. A bare perusal of Section 438 of the Code reveals that it does not use the words "anticipatory bail". The only difference between a regular bail and an anticipatory bail is that whereas the ordinary bail is granted after arrest and therefore means release from the custody, an anticipatory bail is granted in anticipation of arrest and it becomes effective at the very moment of arrest. The anticipatory bail means "bail in anticipation of arrest".

31. In the case of Balchand Jain[9], the Hon'ble Supreme Court observed that, **"In fact "anticipatory bail" is a misnomer. It is not as if bail is presently granted by the court in anticipation of arrest. When the court grants "anticipatory bail", what it does is to make an order that in the event of arrest, a person shall be released on bail. Manifestly there is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting "anticipatory bail" becomes operative."**

32. The scope and application of Section 438 of the Code has come up for interpretation on various occasions before the Hon'ble Supreme Court. On two points, the discussions have been made on multiple occasions. They are :-

(i) Whether for anticipatory bail, an accused has to make out a "special case"?

(ii) What is the life of anticipatory bail? In other words, whether anticipatory bail may expire the moment when charge sheet is filed? Or the anticipatory bail shall continue till the conclusion of trial?

---

[9] *Balchand Jain v. State of M.P.*, (1976) 4 SCC 572

Special Case

33. In the case of Gurbaksh Singh Sibbia[10], the Hon'ble Supreme Court observed that "**An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned**." While observing this, the Hon'ble Supreme Court in the case of Sibbia (*supra*) observed that if a person is required to make out a special case for grant of anticipatory bail, it would reduce the statutory power conferred by Section 438 to a dead letter. The Hon'ble Supreme Court observed that "**To say that the applicant must make out a "special case" for the exercise of the power to grant anticipatory bail is really to say nothing. The applicant has undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a "special case"."**

34. In the case of Siddharam Satlingappa Mhetre[11], the Hon'ble Supreme Court followed the principles as laid down in the case of Sibbia (*supra*) and observed that "**there is no requirement that the accused must make out a "special case" for exercise of the power to grant anticipatory bail."** This has further been affirmed in the case of Sushila Aggarwal (*supra*).

---

[10] *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565
[11] *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694

Life Of Anticipatory Bail

35. Section 438 of the Code merely enables a person, who apprehends his arrest in a non-bailable offence, to apply for anticipatory bail. The question that had fallen for consideration on multiple occasions is as to what would be the life of anticipatory bail that has been granted during investigation. In the case of Sibbia (*supra*), the Hon'ble Supreme Court posed a question that **"should the operation of an order passed under Section 438 (1) of the Code be limited to point of time?"** The answer given was "not necessarily". The Hon'ble Supreme Court further observed that "**The court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an FIR in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the FIR as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time."**

36. In the case of Salauddin Abdulsamad Shaikh[12], the Hon'ble Supreme Court held that "**anticipatory bail should be granted only for limited period and after that it should be left to the regular court**". This was not upheld by the Hon'ble Supreme Court in the case of Mhetre (*supra*). In the case of Mhetre (*supra*) the Hon'ble Supreme Court observed that, **"Section 438 CrPC does not mention anything about the duration to which a**

---

[12] *Salauddin Abdulsamad Shaikh v. State of Maharashtra*, (1996) 1 SCC 667

direction for release on bail in the event of arrest can be granted.....once the accused is released on bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail." The finding, in fact, in the case of Salauddin (*supra*) was held in contradiction to the law declared by the Constitution Bench in the case of Sibbia (*supra*).

37. In the case of Sushila Aggarwal (*supra*) also, the Hon'ble Supreme Court upheld that the anticipatory bail once granted continues until conclusion of trial, unless otherwise the duration is restricted by the court.

STAGE OF ANTICIPATORY BAIL

38. In the case of Sibbia(*supra*), the Hon'ble Supreme Court discussed the nature of anticipatory bail. The Hon'ble Supreme Court discussed as to what does "bail" mean and what is the nature of anticipatory bail. In para 7 of the judgment, the Hon'ble Supreme Court observed as hereunder:-

> "**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."
>
> (emphasis supplied)

39. The above observation of the Hon'ble Supreme Court makes it abundantly clear that the anticipatory bail is an apprehension against police custody, which the Hon'ble Supreme Court recorded as "**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.**"

40. In the same paragraph above, the Hon'ble Supreme Court also discussed as to what the word "arrest" means. The Hon'ble Supreme Court in the case of Sibbia (*supra*), also discussed the 41st Law Commission Report, which for the first time pointed out the necessity of introducing a provision in the Code enabling the High Court and the Court of Sessions to grant "anticipatory bail". In para 39.9 of the Report, it is observed as follows:-

> "The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. **The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase.** Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail....."
>
> (emphasis supplied)

41. The legislative history of Section 438 of the Code has been given by the Hon'ble Supreme Court in paragraphs 4, 5 and 6 of the judgment, which read as hereunder:-

> **"4.** The Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present Section 438. 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 preponderance of view

being that it did not have such power. The need for extensive amendments to the Code of Criminal Procedure was felt for a long time and various suggestions were made in different quarters in order to make the Code more effective and comprehensive. The Law Commission of India, in its 41st Report dated September 24, 1969 pointed out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant "anticipatory bail". It observed in para 39.9 of its report (Volume I):

"The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.

We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter.

In order to settle the details of this suggestion, the following draft of a new section is placed for consideration:

'497-A. (1) When any person has a reasonable apprehension that he would 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 court may, in its

discretion, direct that in the event of his arrest, he shall be released on bail.

(2) A Magistrate taking cognizance of an offence against that person shall, while taking steps under Section 204(1), either issue summons or a bailable warrant as indicated in the direction of the court under sub-section (1).

(3) If any person in respect of whom such a direction is made is arrested without warrant by an officer in charge of a police station on an accusation of having committed that offence, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, such person shall be released on bail.'

We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion of the court and prefer not to fetter such discretion in the statutory provision itself. Superior courts will, undoubtedly, exercise their discretion properly, and not make any observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused."

"5. The suggestion made by the Law Commission was, in principle, accepted by the Central Government which introduced clause 447 in the Draft Bill of the Code of Criminal Procedure, 1970 with a view to conferring an express power on the High Court and the Court of Session to grant anticipatory bail. That clause read thus:

"447. (1) When any person has reason to believe that he would 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; and that court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) 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 issue 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)."

"6. The Law Commission, in para 31 of its 48th Report (1972), made the following comments on the aforesaid clause:

"The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith."

Clause 447 of the Draft Bill of 1970 was enacted with certain modifications and became Section 438 of the Code of Criminal Procedure, 1973 which we have extracted at the outset of this judgment."

42. The question that has been posed is with regard to the stage at which the anticipatory bail application may be entertained.

43. Subsequent to the judgment in the case of Sibbia (*supra*), in the cases of Adil[13], Shivam[14] and Dr. Kartikey[15], the Hon'ble Allahabad High Court entertained the anticipatory bail application even after filing of the charge sheet.

44. In the case of Shamim Ahmed[16], the Hon'ble Calcutta High Court also held that there is no bar in filing of the application under Section 438 of the Code after filing of the charge sheet or after issuance of the process under Section 204 of the Code or after issuance of the warrant in a complaint case.

45. Not only this, the Hon'ble Supreme Court in the cases of Bharat Chaudhary[17], Ravindra Saxena[18], Vinod Kumar Sharma[19], Bhadresh Bipinbhai[20] and Mahdoom Bava[21] considered anticipatory bail application despite charge sheet having been filed.

46. In the case of Bharat Chaudhary (*supra*), the Hon'ble Supreme Court observed that "**This judgment in our opinion does not support the extreme argument addressed on behalf of the learned counsel for the respondent State that the courts specified in Section 438 of CrPC are denuded of their power under the said section where either the cognizance is taken by the court concerned or a charge-sheet is filed before the appropriate court.**"

---

[13] *Adil v. State of U.P.*, 2020 SCC OnLine All 1429
[14] *Shivam v. State of U.P.*, 2021 SCC OnLine All 264
[15] *Dr. Kartikeya Sharma v. State,* Criminal Misc. Anticipatory Bail Application No. 3107 of 2023
[16] *Shamim Ahmed v. State*, 2003 SCC OnLine Cal 148
[17] *Bharat Chaudhary v. State of Bihar*, (2003) 8 SCC 77
[18] *Ravindra Saxena v. State of Rajasthan*, (2010) 1 SCC 684
[19] *Vinod Kumar Sharma v. State of Uttar Pradesh*, 2021 SCC OnLine SC 3225
[20] *Bhadresh Bipinbhai Sheth v. State of Gujarat*, (2016) 1 SCC 152
[21] *Mahdoom Bava v. Central Bureau of Investigation*, 2023 SCC OnLine SC 299

47. In the case of Ravindra Saxena (*supra*), the Hon'ble Supreme Court observed that "**In our opinion, the High Court ought not to have left the matter to the Magistrate only on the ground that the challan has now been presented**."

48. In the case of Vinod Kumar Sharma (*supra*), the Hon'ble Supreme Court observed that "**Merely because it was kept open for the petitioners to surrender and apply for Regular Bail after filing of the charge sheet, the same does not preclude the petitioners to apply for anticipatory bail under Section 438 Cr.P.C. after filing of the chargesheet."**

49. In the case of Bhadresh Bipinbhai Sheth (*supra*), the Hon'ble Supreme Court, in fact, upheld the grant of anticipatory bail during trial, when the accused was additionally charged for an offence under Section 376 IPC.

50. In the case of Mahdoom Bava (*supra*), the Hon'ble Supreme Court allowed the anticipatory bail even after filing of a charge sheet while observing "**More importantly, the appellants apprehend arrest, not at the behest of the CBI but at the behest of the Trial Court. This is for the reason that in some parts of the country, there seems to be a practice followed by Courts to remand the accused to custody, the moment they appear in response to the summoning order. The correctness of such a practice has to be tested in an appropriate case.**"

51. But, in the case of HDFC Bank Limited[22], the Hon'ble Supreme Court held that after filing of chargesheet, anticipatory bail may not be entertained. In Para 19 of the judgment, the Hon'ble Supreme Court observed as follows:-

> **"19.** The object of Section 438 CrPC has been repeatedly **explained by this Court and the High Courts to mean that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta of the complainant.** But at the same time the provisions of Section 438 CrPC cannot also be invoked to exempt the accused from surrendering to the court after the investigation is complete and if charge-sheet is filed against him. Such an interpretation would amount to violence to the provisions of Section 438 CrPC, since even though a charge-sheet may be filed against an accused and charge is framed against him, he may still not appear before the court at all even during the trial."
>
> (emphasis supplied)

52. The question that arises for consideration is that if the Hon'ble Supreme Court in some cases has already entertained anticipatory bail post filing of charge sheet, why this matter should be referred to and considered by the Larger Bench? The reasons are as follows:

> (i) In the cases of Bharat Chaudhary (*supra*), Bhadresh Bipinbhai Sheth (*supra*) and Ravindra Saxena (*supra*), while entertaining anticipatory bail application after filing of the charge sheet, although the Hon'ble Supreme Court referred to the provisions of Section 438 of the Code, and the judgment in the case of Sibbia (*supra*), but the attention of the Hon'ble Supreme Court, in those cases, was not invited to the

---

[22] *HDFC Bank Limited v. J.J. Mannan alias J.M. John Paul*, (2010) 1 SCC 679

principles as laid down in the case of Sibbia (*supra)* while interpreting the word "arrest" and the necessity/legislative intent behind enacting Section 438 of the Code.

(ii) In the case of Vinod Kumar Sharma (*supra*) and Mahdoom Bava (*supra*), the Hon'ble Supreme Court did not interpret Section 438 of the Code. In the case of NHAI[23], the Hon'ble Supreme Court in such situation observed that, **"Likewise, in Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445, the learned Single Judge correctly observed that the Supreme Court did not specifically address the issue as to whether the court has the power under Section 34 to modify the award. In stating that the Supreme Court affixed a seal of approval on the decision of the trial court modifying the award would not be wholly correct. In para 12 only one ground was argued in the appeal, which ground found favour with this Court. In any case, a modification of an award upheld on facts without any discussion on the law does not carry the matter very much further."**

(iii) In the case of HDFC (*supra*), the Hon'ble Supreme Court has held that Anticipatory bail application may not be entertained post filing of chargesheet because if it is done, it would amount to violence to the provisions of Section 438 Cr.P.C.

(iv) In the case of Sushila Aggarwal (*supra*), in Para 7.1, the Hon'ble Supreme Court categorically observed that an anticipatory bail application could be moved during investigation, but till the chargesheet has not been filed. The Hon'ble Supreme Court, in this context, observed as hereunder:-

---

[23] *NHAI v. M. Hakeem*, (2021) 9 SCC 1

> **"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 [Balchand Jain v. State of M.P., (1976) 4 SCC 572 : 1976 SCC (Cri) 689] , "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 CrPC vests only with the Court of Session 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……."
>
> (emphasis supplied)

(v) At this stage only, it may be noted that at one place, in the case of Sushila Aggarwal (*supra*) itself, the Hon'ble Supreme Court recorded the words, 'and the chargesheet is filed', but this is so done while in Para 7.6 of the judgment, the Hon'ble Supreme Court was considering the conditions that may be imposed while granting an anticipatory bail. In that context, the Hon'ble Supreme Court observed that the conditions depend on the stage at which the bail application is being considered. The context in Para 7.6 has not been as to uptil which stage, an application for anticipatory bail may be moved. The context was the conditions that may be imposed while granting pre-arrest bail. Whereas, in Para 7.1 of the judgment, categorically, the

Hon'ble Supreme Court, in the case of Sushila Aggrawal (*supra*) held that anticipatory bail application may be entertained till the chargesheet has not been filed.

(vi) It is pertinent to note that in Para 7.1 of the judgment in the case of Sushila Aggarwal (*supra*), the Hon'ble Supreme Court, has also recorded that anticipatory bail application could be moved at a stage after the investigation is concluded. But, as stated, the Court had also observed that such an application could be moved uptil the stage when the chargesheet has not been filed. For the following reasons, completion of investigation, *per se*, does not mean that the chargesheet has been filed.

(a) Once chargesheet is filed, the police may not proceed against the person chargesheeted, although, further investigation may be done under Section 173 (8) of the Code. Investigation is done by the Investigating Officer. After conclusion of the investigation, the Investigating Officer, on his own, does not go to the court to submit the chargesheet. There are some more stages after completion of investigation and filing of the chargesheet. From the Investigating Officer, the chargesheet moves in the hands of various persons. In the State of Uttarakhand, the U.P. Police Regulations that are applicable, make provisions in that context. Para 122 of the Regulations, is important to note in this aspect. It is as follows:-

"**122.** *(i)* An investigation should be completed as soon as possible and when complete the investigating officer must comply with the provisions of Section 161-171 and 173 of the Code of Criminal Procedure, 1898. The report prescribed by Section 173 must under that section be **submitted by the officer**

incharge of the police station under **intimation to the Superintendent of Police** and should be in the form of charge-sheet (Police Form No.339), if the case is sent for trial and in the form of final report (Police Form No.340), if the case is not sent for trial. The **charge-sheet with the final diary in the cases shall be submitted to the Court through the circle officer and the public prosecutor** and should reach the Court within four weeks of the date of lodging of the first information report in summons and warrants cases and eight weeks in Sessions cases. **None of the circle officer and the public prosecutor should normally retain the charge-sheet for more than a week and** the latter should submit it to the Court concerned within the time-limit prescribed. The prescribed time-limit should not be allowed to exceed except for very special reasons."

(b) The stages that follows after completion of investigation are as follows:-

- The Investigating Officer shall submit the chargesheet through the Officer In-charge of the Police Station under intimation to the Superintendent of Police

- The chargesheet with the final diary in the case is submitted to the court through the Circle Officer and the public prosecutor, which means that the Investigating Officer shall submit the chargesheet to the Officer In-charge of the Police Station. The Officer In-charge of Police Station, under intimation to the Superintendant of Police, submits the chargesheet along with the final diary to the Circle Officer.

The Circle Officer shall submit the chargesheet to the public prosecutor

(c) Para 122 of the Police Regulations, as stated hereinabove, further makes it abundantly clear that the Circle Officer and the Public Prosecutor should not retain the chargesheet for more than a week. There is a time limit prescribed at various stages. It further establishes that at the termination of the investigation, immediately chargesheet is not filed. There are various steps. There is a huge gap in between. Therefore, Para 7.1 of the judgment in the case of Sushila Aggarwal (*supra*) is clear that after completion of the investigation, an application for anticipatory bail may be entertained, but once chargesheet is filed, an application for anticipatory bail may not be entertained.

53. In order to ascertain the stage at which an application for anticipatory bail may be entertained, the scope, meaning and extent of the word "arrest" in Section 438 of the Code needs to be examined. The contours of interpreting the word "arrest" as finds place in Section 438 of the Code is required to be defined. How far can this Court go to gather its meaning? What Rules have to be applied? What would be the impact of Law Commission's Report, statements, objects and reasons of the Act?

INTERPRETATION OF STATUTE

54. The principles of interpretation of statutes are settled that a section in the statute should not be read in isolation. It should be read along with other sections of the statute.

55. In the case of Assessing Authority-Cum-Excise and Taxation Officer, Gurgaon[24], the Hon'ble Supreme Court observed that "**for it is well settled rule of interpretation that not one section should be construed in isolation, but statute shall be read as a whole on each part throwing meaning on the other.**"

56. In the case of Nyadar Singh[25], the Hon'ble Supreme Court observed as hereunder:-

> **"23.** It is true that where statutory language should be given its most obvious meaning — 'to accord with how a man in the street might answer the problems posed by the words' — the statute must be taken as one finds it. Considerations relevant to interpretation are not whether a differently conceived or worded statute would have yielded results more consonant with fairness and reasonableness. Consequences do not alter the statutory language, but may only help to fix its meaning."

57. The Rule of Interpretation has many facets. The Rule of Literal Interpretation, Purposive or Harmonious Construction and Mischief Rule, all are relevant for the purpose of the instant matter.

58. In the case of Gwalior Rayon Silk MFG. (WVG) Co. Ltd.[26], the Hon'ble Supreme Court observed that, **"It is said, indeed rightly, that in seeking legislative intention, judges not only listen to the voice of the legislature but also listen attentively to what the legislature does not say."** How the words are to be interpreted in an Act and how to gather the intention of legislature, that has also been discussed by the Hon'ble Supreme

---

[24] *Assessing Authority-Cum-Excise and Taxation Officer, Gurgaon v. East India Cotton MFG. Co. Ltd., Faridabad*, (1981) 3 SCC 531
[25] *Nyadar Singh v. Union of India*, (1988) 4 SCC 170
[26] *Gwalior Rayon Silk MFG. (WVG) Co. Ltd. v. Custodian of Vested Forests, Palghat*, 1990 Supp SCC 785

Court in the case of Gwalior Rayon (*supra*), in Para 8 of the judgment, which reads as hereunder:-

> **"8.** This whole line of argument with respect, is hard to accept. As Felix Frankfurter, J. said: "Legislation is a form of literary composition. But construction is not an abstract process equally valid for every composition, not even for every composition whose meaning must be judicially ascertained. The nature of the composition demands awareness of certain presuppositions.... And so, the significance of an enactment, its antecedents as well as its later history, its relation to other enactments, all may be relevant to the construction of words for one purpose and in one setting but not for another. Some words are confined to their history; some are starting points for history. Words are intellectual and moral currency. They come from the legislative mint with some intrinsic meaning. Sometimes it remains unchanged. Like currency, words sometimes appreciate or depreciate in value." The learned Judge further stated: "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, not of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate."

59. In the case of SP Gupta[27], the Hon'ble Supreme Court, on that aspect, observed that the Report of Law Commission can be looked into to understand the history of the legislation, and the object with which the law was enacted. In Para 1235 of the judgment, the Hon'ble Supreme Court observed as hereunder:-

> **"1235.** The Report of the Committees of the Law Commission are entitled to great respect as they are prepared by experienced persons after taking into consideration all relevant aspects and sometimes the evidence collected by them from several sources. If they are

[27] *SP Gupta v. Union of India*, 1981 Supp SCC 87

> to be excluded many opinions expressed in many of the books relied on by the petitioners themselves have to be excluded. Reports of the Law Commission can be looked into to understand the history of the legislation, the object with which certain legal provisions are enacted and what advantages may be derived by adopting a particular policy. Reports of the Law Commission have been made use of by this Court earlier to understand the history of the legislation which was under consideration and the object with which it was passed (vide Balchand Jain v. State of M.P., (1976) 4 SCC 572)……."

60. In the case of A. Manjula Bhashini[28], the Hon'ble Supreme Court observed that, in fact, the statement of object and reasons can be referred to for understanding the background of the Act. In Para 40 of the judgment, the Hon'ble Supreme Court observed as hereunder:-

> **"40**. The proposition which can be culled out from the aforementioned judgments is that although the Statement of Objects and Reasons contained in the Bill leading to enactment of the particular Act cannot be made the sole basis for construing the provisions contained therein, the same can be referred to for understanding the background, the antecedent state of affairs and the mischief sought to be remedied by the statute. The Statement of Objects and Reasons can also be looked into as an external aid for appreciating the true intent of the legislature and/or the object sought to be achieved by enactment of the particular Act or for judging reasonableness of the classification made by such Act."

61. The Code came into force with effect from 01.04.1974. Prior to it, the Code of Criminal Procedure, 1898, was applicable. There was no provision in the Code of Criminal Procedure, 1898,

---

[28] *A. Manjula Bhashini and Others v. Managing Director, Andhra Pradesh Women's Cooperative Finance Corporation Limited*, (2009) 8 SCC 431

for anticipatory bail. The question is why then the provision of anticipatory bail has been incorporated under Section 438 of the Code? It may help this Court to understand the necessity of bringing the law relating to pre-arrest bail in the statute. What was the deficiency that Section 438 of the Code had tried to remove? This is another mode of interpreting the statute as a Mischief Rule also known as Heydon's Rule.

62. In the case of Bengal Immunity Company Limited[29], in Para 23, the Hon'ble Supreme Court has discussed the Heydon's case and the Rules of Interpretation, which originated therefrom. It reads as follows:-

> **"23.** It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon's case [3 Co. Rep 7a : 76 ER 637] was decided that—
>
> > "... for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:
> >
> > 1st. What was the common law before the making of the Act.
> >
> > 2nd. What was the mischief and defect for which the common law did not provide.
> >
> > 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth., and
> >
> > 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure

---

[29] *Bengal Immunity Company Limited v. State of Bihar*, AIR 1955 SC 661

> and remedy, according to the true intent of the makers of the Act, pro bona publico."
>
> In In re Mayfair Property Company [LR (1898) 2 Ch 28 at p. 35] Lindley, M.R. in 1898 found the rule "as necessary now as it was when Lord Coke reported Heydon case". In Eastman Photographic Material Company v. Comptroller General of Patents, Designs and Trade Marks [LR (1898) AC 571 at 576] Earl of Halsbury reaffirmed the Rule as follows:
>
> > "My Lords, it appears to me that to construe the Statute in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. These three being compared I cannot doubt the conclusion."
>
> It appears to us that this rule is equally applicable to the construction of Article 286 of our Constitution. In order to properly interpret the provisions of that article it is, therefore, necessary to consider how the matter stood immediately before the Constitution came into force, what the mischief was for which the old law did not provide and the remedy which has been provided by the Constitution to cure that mischief."

63. In the case of Attorney General for India[30], the Hon'ble Supreme Court also discussed the Mischief Rule, as originated from Heydon's case (*supra*). In Para 63 and 64 of the judgment, the Hon'ble Supreme Court observed as hereunder:-

> **"63.** One time-tested and well-accepted mode of interpreting a statute, especially a new statute, is to apply the "mischief rule" — first spoken of in Heydon case [Heydon case, (1584) 3 Co Rep 7a : 76 ER 637] which contains a four-points formula, acting as an aid in construing a new law or provision. These are **firstly, what was the common law before the making of the Act; secondly what was the**

[30] *Attorney General for India v. Satish*, (2022) 5 SCC 545

> **mischief and defect for which the common law did not provide; thirdly what remedy Parliament resolved and appointed to cure the disease plaguing the society; and lastly the true reason of the remedy.** The judgment in Heydon case [Heydon case, (1584) 3 Co Rep 7a : 76 ER 637] also emphasised that courts always have to interpret the law so as to suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico. This rule was approved, and its purport explained, in Kanwar Singh v. Delhi Admn., (1965) 1 SCR 7 : AIR 1965 SC 871 : (1965) 2 Cri LJ 1, thus : Kanwar Singh v. Delhi Admn., (1965) 1 SCR 7 : AIR 1965 SC 871 : (1965) 2 Cri LJ 1, AIR p. 874, para 10)
>
> > "10. ... It is the duty of the court in construing a statute to give effect to the intention of the legislature. If, therefore, giving a literal meaning to a word used by the draftsman, particularly in a penal statute, would defeat the object of the legislature, which is to suppress a mischief, the court can depart from the dictionary meaning or even the popular meaning of the word and instead give it a meaning which will advance the remedy and suppress the mischief."
>
> **"64.** The aim of such statutory construction was put, pithily and simply in Swantraj v. State of Maharashtra, (1975) 3 SCC 322 : 1974 SCC (Cri) 930: (SCC p. 323, para 1)
>
> > "1. Every legislation is a social document and judicial construction seeks to decipher the statutory mission, language permitting, taking the one from the rule in Heydon case, (1584) 3 Co Rep 7a : 76 ER 637, Maxwell on the Interpretation of Statutes, 12th Edn. (1969) pp. 40, 96. of suppressing the evil and advancing the remedy."

64. The four steps to understand and interpret the law, as per the Mischief Rule, is – Firstly, what was the law prior to introduction of Section 438 of the Code in the statute book?

Secondly, what was the mischief and defect, for which the then existing law did not provide? Thirdly, the remedy resolved and appointed to cure the disease plaguing the society and, finally, the true reasons of the remedy. These all questions are answered in Para 4, 5 and 6 of the judgment in the case of Sibbia (*supra*), as referred hereinabove.

65. In the year 1969, the Law Commission, for the first time, in its 41st report, recommended for pre-arrest bail, and in Paragraph 39.9 of the Report, as quoted hereinabove, the Law Commission noted the reasons that, **"The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days."** It also refers to the false cases and the report records, **"there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail."** It is this defect in the existing law in the year 1969, which the Law Commission noted in its 41st Report and proposed Section 497A in the Code of Criminal Procedure, 1898. The Report was in principle accepted and finally it got enacted as Section 438 of the Code. Therefore, the defect was that if there is false case or false, mala fide reports, a person may be arrested. It was essentially against police arrest. This defect or mischief was to be rectified by way of provision as anticipatory bail. This Court, at the cost of repetition reproduces what the Hon'ble Supreme Court in the case of Sibbia (*supra*) observed, **"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." It may be noted that in the same paragraph, in the case of Sibbia (*supra*) the Hon'ble Supreme Court has discussed the provisions of Section 46 of the Code. In view of this settled position, now the proposition of "arrest" *qua* applicability of Section 438 of the Code will be discussed. And while doing so, the Rule of Harmonious Interpretation of the statute shall also come into play.

"ARREST" IN SECTION 438 OF THE CODE AND CUSTODY

66. Section 438 of the Code speaks of anticipatory bail in a situation when arrest is contemplated. Does the word "arrest" means "custody" or in other words whether "arrest" and "custody" are synonymous to each other? In the case of Directorate of Enforcement[31], the Hon'ble Supreme Court observed that "**in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences**." In para 46 and 48 of the judgment, the Hon'ble Supreme Court further observed as follows:-

> **"46.** The word 'arrest' is derived from the French word 'Arreter' meaning "to stop or stay" and signifies a restraint of the person. Lexicologically, the meaning of the word 'arrest'

[31] *Directorate of Enforcement v. Deepak Mahajan*, (1994) 3 SCC 440

is given in various dictionaries depending upon the circumstances in which the said expression is used. One of us, (S. Ratnavel Pandian, J. as he then was being the Judge of the High Court of Madras) in *Roshan Beevi* v. *Joint Secretary, Government of T.N.* [1984 Cri LJ 134 : (1984) 15 ELT 289 : 1983 MLW (Cri) 289 (Mad)] had an occasion to go into the gamut of the meaning of the word 'arrest' with reference to various textbooks and dictionaries, the *New Encyclopaedia Britannica, Halsbury's Laws of England, A Dictionary of Law* by L.B. Curzon, *Black's Law Dictionary* and *Words and Phrases*. On the basis of the meaning given in those textbooks and lexicons, it has been held that:

"[T]he word 'arrest' when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested."

"48. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on

> appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide Roshan Beevi,1984 Cri LJ 134 : (1984) 15 ELT 289 : 1983 MLW (Cri) 289 (Mad)."

67. In the case of State of Haryana[32], the Hon'ble Supreme Court interpreted the words "arrest" and "custody" and in para 27 observed as follows:-

> "27. The interpretation of "arrest" and "custody" rendered by the Full Bench in Roshan Beevi case [1984 Cri LJ 134 (Mad)] may be relevant in the context of Sections 107 and 108 of the Customs Act where summons in respect of an enquiry may amount to "custody" but not to "arrest", but such custody could subsequently materialise into arrest. The position is different as far as proceedings in the court are concerned in relation to enquiry into offences under the Penal Code and other criminal enactments. In the latter set of cases, in order to obtain the benefit of bail an accused has to surrender to the custody of the court or the police authorities before he can be granted the benefit thereunder. In Vol. 11 of the 4th Edn. of Halsbury's Laws of England the term "arrest" has been defined in Para 99 in the following terms:
>
> > "99. Meaning of arrest.—Arrest consists in the seizure or touching of a person's body with a view to his restraint; words may, however, amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion."

---

[32] *State of Haryana and others v. Dinesh Kumar*, (2008) 3 SCC 222

68. According to Section 438 of the Code, anticipatory bail may be applied by a person who has reason to believe that he may be arrested in a non-bailable offence. As observed hereinabove, and as interpreted in the case of Sibbia (*supra*), arrest has been defined under Section 46 of the Code. Who can arrest, it has also been provided in the Code. The arrest may be made by the police, by a private person or by a Magistrate.

69. Provisions regarding arrest by a Magistrate have been given under Section 44 of the Code. It is in two parts. If in the presence of a Magistrate, offence is committed, such Magistrate may himself arrest or order any person to arrest, as per Sub-Section 1 to Section 44 of the Code. Sub-Section 2 to Section 44 of the Code also empowers a Magistrate to arrest any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

70. In the case of Deepak Mahajan (*supra*), the Hon'ble Supreme Court has, in Para 46 discussed the word "arrest" and in Para 48, made a co-relation between arrest and "appearance" or "surrender" of a person. The Hon'ble Supreme Court observed that, **" To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender.."** It definitely means that when a person appears before a court of Magistrate or a court and surrenders and the court takes such person into custody, according to the Hon'ble Supreme Court, such taking into custody precedes by implied arrest. The question is whether this implied arrest is that arrest, which is contemplated under Section 438 of

the Code? Now there are two kinds of "arrests" that have come up for the purpose of present discussion:-

(i) Arrest by the police during investigation.

(ii) Appearance of an accused and his submission to the custody of the Court, after filing of the chargesheet, in response to the processes issued by the court. In such case, in view of the case of Deepak Mahajan (*supra*), there is implied arrest before such accused is taken into custody.

71. In case there is an apprehension of arrest by police, in such matters, definitely an application for anticipatory bail may be entertained.

72. The question that falls for consideration is whether the word "arrest" as finds place under Section 438 of the Code also includes the (ii) situation, as stated hereinabove. It requires interpretation of Section 438 of the Code.

73. In cases when an accused appears after issuance of process by a court on chargesheet, the situation is different. After filing of chargesheet, cognizance is taken and summons or other processes are issued. Thereafter, the exercise of taking cognizance is not a mechanical or routine exercise. The court has to apply its judicial mind before taking cognizance.

74. In the case of Pepsi Foods Ltd.[33], the Hon'ble Supreme Court, in Para 28 of the judgment, observed that, **"Summoning of an accused in a criminal case is a serious matter. Criminal law**

---

[33] *Pepsi Foods Ltd. and Another v. Special Judicial Magistrate*, (1998) 5 SCC 749

cannot be set into motion as a matter of course ..... The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto." Similar view has also been expressed in the cases of Narsingh Das Tapadia[34], S.K. Sinha, Chief Enforcement Officer[35], Bhushan Kumar[36] and S.R. Sukumar[37].

75. Taking cognizance ensures that the action thereafter is taken by a court or Magistrate after examining the material before him.

76. In the case of State of Bihar[37], the Hon'ble Supreme Court discussed the aspects of mala fide and observed that, **"an information is lodged at the police station and an offence is registered, the mala fide of the informant would be of secondary importance if the investigation produces unimpeachable evidence disclosing the offence."**

77. The discussion on cognizance has been made *qua* understanding the necessity of introducing Section 438 of the Code in the statute book. The necessity was felt because there were instances of false cases by the influential persons so as to lodging their rivals into jail. As stated, the question of initial *mala fide* becomes secondary importance on filing of the chargesheet. In similar manner, if after investigation in an FIR, chargesheet is filed or on a complaint processes are issued by the Magistrate, that is

---

[34] *Narsingh Das Tapadia v. Goverdhan Das Partani*, (2000) 7 SCC 183
[35] *S.K. Sinha, Chief Enforcement Officer v. Videocon International Ltd.*, (2008) 2 SCC 492
[36] *Bhushan Kumar and Another v. State (NCT of Delhi)*, (2012) 5 SCC 424
[37] *S.R. Sukumar v. S. Sunaad Raghuram*, (2015) 9 SCC 609
[37] *State of Bihar v. J.A.C. Saldanha*, (1980) 1 SCC 554

done only after cognizance is taken; after application of judicial mind by the court of Magistrate on the allegations and materials in support thereof. The processes are not issued at the behest of any influential person so as to lodging their rivals to jail. Section 438 of the Code was not enacted to meet this situation when an accused appears before the court, in response to a process issued after the chargesheet has been submitted. In the case of Deepak Mahajan (*supra*), the Hon'ble Supreme Court has, though, observed that when an accused appears for surrender before the court of Magistrate and he is taken into custody, it precedes with arrest. That arrest is implied. That is not the arrest in apprehension of which anticipatory bail application may be filed under Section 438 of the Code.

78. Right to Life and Personal Liberty has to be given much extended meaning, but, as stated, the "Right to Life and Personal Liberty" as enshrined under Article 21 of the Constitution is not as such absolute. A person may be deprived of his Right to Life and Personal Liberty according to the "procedure established by law." Chargesheet is filed in the court after completion of an investigation. After filing of the chargesheet/complaint, the court examines the matter and while taking cognizance issues process. An accused appears before the Court in response to such process. This all is according to the "process established by law." At this stage, it cannot be said that such person has been falsely implicated for sending him behind bars by some influential persons. Taking such person into custody is not "arrest", as used under Section 438 of

the Code. The meaning of “arrest” cannot be construed to bring such accused within the provisions of Section 438 of the Code.

79. Therefore, in view of the foregoing discussion, this Court is of the view that the word “arrest”, as finds place under Section 438 of the Code, does not relate to the situation when after filing of the chargesheet, an accused appears before the Court in response to the process issued by the Court.

80. The word “arrest”, as used under Section 438 of the Code is not attracted to the cases when an accused appears and surrenders before the court after filing of the chargesheet. It means that post filing of a chargesheet, if an accused is summoned or required to appear before the court by any process of the Code, in such a situation, the provisions of Section 438 of the Code shall not be applicable.

81. There is another aspect of the matter. Anticipatory bail, as such, is not a total substitute of regular bail. It is another principle of interpretation that the provision of the statute should not be read in a manner so as to make some other provision of the statute redundant. There should be harmonious construction of the different provisions of the enactment. It is the principle of harmonious construction.

82. In the case of Managing Director, Chhattisgarh State Co-Operative Bank Maryadit[38], the Hon'ble Supreme Court, in Para 33, observed as follows:-

> **"33.** It is a settled principle of law that where two provisions of an enactment appear to conflict, courts must adopt an interpretation which harmonises, to the best extent possible, both provisions. Justice G.P. Singh in his seminal work Principles of Statutory Interpretation states:
>
> > "To harmonise is not to destroy. A familiar approach in all such cases is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific… The principle is expressed in the maxims generalia specialibus non derogant and generalibus specialia."
> >
> > Similarly, Craies in Statute Law states:
> >
> > > "The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."
>
> Where two provisions conflict, courts may enquire which of the two provisions is specific in nature and whether it was intended that the specific provision is carved out from the application of the general provision. The general provision operates, save and except in situations covered by the specific provision. The rationale behind this principle of statutory construction is that were there appears a conflict between two provisions, it must be presumed that the legislature did not intend a conflict and a subject-specific provision governs those situations in exclusion to the operation of the general provision."

---

[38] *Managing Director, Chhattisgarh State Co-Operative Bank Maryadit v. Zila Sahkari Kendriya Bank Maryadit*, (2020) 6 SCC 411

83. As discussed hereinabove, there are various provisions of bail in the Code. Sections 437 and 439 of the Code are general and broad principles. Section 438 of the Code comes into play only when there is apprehension of arrest in a non-bailable offence. Now, if the word "arrest" as occurs in Section 438 of the Code is taken to cover all situations of arrest or all situations under which an accused may be taken into custody by a court, it may make various other provisions of the Code redundant and may be a kind of violence to the provisions of Section 438 of the Code.

84. Suppose an accused is facing trial and he does not repeatedly appear during trial, his bail is cancelled, sureties are notified and after hearing them, penalties are imposed and non-bailable warrants are issued against him. In such a situation, if an application for anticipatory bail is permitted, it would have an implied impact on the judicial order passed by the court by which non-bailable warrants were issued against him.

85. In the case of Bhadresh Bipinbhai Sheth (*supra*), the Hon'ble Supreme Court though considered anticipatory bail during the trial when additional charge was framed, but in that case, the Hon'ble Supreme Court was not invited to discuss the aspect of "arrest" as occurs in Section 438 of the Code and the proposition of law, on "arrest", as laid down by the Hon'ble Supreme Court in the case of Sibbia (*supra*).

86. If it is construed that the word "arrest", as used under Section 438 of the Code may include any arrest or any custody during trial or during appeal, etc., it may definitely bring it in

conflict with Section 389 of the Code. Section 389 of the Code makes provisions with regard to bail during pendency of an appeal. Can an accused, who is facing trial in a criminal case, move an application for anticipatory bail prior to judgment on the ground that he has apprehension that he may be convicted and may be taken into custody? If it is answered in affirmative, it would make Section 389 of the Code redundant.

87. There may be many more such instances, viz, if in a criminal appeal before the Hon'ble Supreme Court, the appellant does not appear and for any reason, his warrant of arrest is issued, can an application for anticipatory bail in such a situation be entertained? If the word "arrest" as occurs in Section 438 is stretched to every situation, the answer would be in affirmative. But, in such matter, anticipatory bail application may not be entertained. If in such a situation, an anticipatory bail application is permitted to be entertained, it would be a kind of interference in the judicial proceedings of the Hon'ble Supreme Court. Such application may not be entertained because there is a distinct provision provided post judgment or bail in appeal.

88. The word "arrest", as used under Section 438 of the Code, may not be stretched beyond the purpose, for which it was enacted, i.e., insurance against police custody. It is arrest by police during investigation alone, not beyond that. If in the name of personal liberty, the word "arrest", as used under Section 438 of the Code, is extended to any arrest, it may again create difficult situations. For example, if on the date of judgment, one of the accused does not appear and he is convicted with a sentence, in

that eventuality, the Court would issue a non-bailable warrant for ensuring his presence, so as to serve out the sentence. Can it be said that because the convict is apprehending his arrest, he may file an anticipatory bail application? Can an anticipatory bail application filed by such convict be entertained? Definitely it cannot be. Section 438 of the Code has not contemplated such a situation.

89. In the case of Sibbia (*supra*), the Hon'ble Supreme Court has held that anticipatory bail can be applied so long as the applicant has not been arrested (Para 38). This arrest is till chargesheet is filed, as observed by the Hon'ble Supreme Court in the case of Sushila Aggarwal (*supra*).

90. In the case of Mahdoom Bava (*supra*), the Hon'ble Supreme Court entertained an anticipatory bail application observing that, **" in some parts of the country, there seems to be a practice followed by Courts to remand the accused to custody, the moment they appear in response to the summoning order."** This practice of deferring hearing of bail application by the courts when an accused appears before them in response to a summoning order, has been streamlined by the Hon'ble Supreme Court in the case of Satender Kumar Antil[39]. In the case of Satender Kumar Antil (*supra*), the Hon'ble Supreme Court laid down the guidelines for hearing of bail application. In Para 3, 4 and 5, the Hon'ble Supreme Court observed as hereunder:-

---

[39] *Satender Kumar Antil v. Central Bureau of Investigation*, (2021) 10 SCC 773

"3. We are inclined to accept the guidelines and make them a part of the order of the Court for the benefit of the courts below. The guidelines are as under:

"***Categories/Types of Offences***

(A) Offences punishable with imprisonment of 7 years or less not falling in Categories B and D.

(B) Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.

(C) Offences punishable under Special Acts containing stringent provisions for bail like NDPS (Section 37), PMLA (Section 45), UAPA [Section 43-D(5)], Companies Act [Section 212(6)], etc.

(D) Economic offences not covered by Special Acts.

Requisite Conditions

(1) Not arrested during investigation.

(2) Cooperated throughout in the investigation including appearing before investigating officer whenever called.

(No need to forward such an accused along with the charge-sheet Siddharth v. State of U.P. [Siddharth v. State of U.P., (2022) 1 SCC 676])

Category A

After filing of charge-sheet/complaint taking of cognizance

(a) Ordinary summons at the 1st instance/including permitting appearance through lawyer.

(b) If such an accused does not appear despite service of summons, then bailable warrant for physical appearance may be issued.

(c) NBW on failure to appear despite issuance of bailable warrant.

(d) NBW may be cancelled or converted into a bailable warrant/summons without insisting physical appearance of the accused, if such an application is moved on behalf of the accused before execution of the NBW on an undertaking of the accused to appear physically on the next date/s of hearing.

(e) Bail applications of such accused on appearance may be decided without the accused being taken in physical custody or by granting interim bail till the bail application is decided.

Category B/D

On appearance of the accused in court pursuant to process issued bail application to be decided on merits.

Category C

Same as Categories B and D with the additional condition of compliance of the provisions of bail under NDPS (Section 37), Section 45 of the PMLA, Section 212(6) of the Companies Act, Section 43-D(5) of the UAPA, POCSO, etc."

"4. Needless to say that the Category A deals with both police cases and complaint cases."

"5. The trial courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by the learned ASG is that where the accused have not cooperated in the investigation nor appeared before the investigating officers, nor answered summons when the court feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid sapproach cannot give them benefit, something we agree with."

91. This has been further clarified by the Hon'ble Supreme Court in the case of Satender Kumar Antil (*supra*) on 21.03.2023, when the Hon'ble Supreme Court observed that, **"we would like to clarify that what we have enunciated *qua* bail would equally apply to anticipatory bail cases. Anticipatory bail is after all one of the species of bail."** It may be noted that in the case of Satender Kumar Antil (*supra*) in category-A cases, when an accused is not arrested during investigation, if such an accused appears

before the court, he is not to be taken into custody. Which means, by virtue of the directions of the Hon'ble Supreme Court, an accused falling in category-A cases, does not apprehend his arrest. The provisions of Section 438 of the Code come into play when a person apprehends his arrest in non-bailable cases. It means that for category-A cases, as classified in the case of Satender Kumar Antil (*supra*), an application for anticipatory bail may not at all be entertained because as stated, such a person is not to be taken into custody. He cannot be said to be carrying any apprehension of arrest. While clarifying its order on 21.03.2023, the Hon'ble Supreme Court, in the case of Satender Kumar Antil (*supra*) was not invited to interpret the word "arrest", as occurs in Section 438 of the Code and the principle of law laid down by the Hon'ble Supreme Court in the case of Sushila Aggarwal (*supra*) on anticipatory bail.

92. In view of the foregoing discussion, I am of the view that an application for anticipatory bail is not maintainable after the chargesheet has been filed in the court.

CONCLUSION

93. An application for anticipatory bail is not maintainable after the chargesheet has been filed in the Court.

94. The Reference is answered accordingly.

RAVINDRA MAITHANI, J.

Avneet/Ravi Bisht
24.08.2023

Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

THE HON'BLE THE CHIEF JUSTICE SRI VIPIN SANGHI
AND
THE HON'BLE SRI JUSTICE MANOJ KUMAR TIWARI
AND
THE HON'BLE SRI JUSTICE RAVINDRA MAITHANI

Reserved on : 05.07.2023
Delivered on : 24.08.2023

Anticipatory Bail Application No. 76 of 2021

Saubhagya Bhagat ... Applicant

Versus

State of Uttarakhand & Anr. ... Respondents

With

Anticipatory Bail Application No. 34 of 2021

Devansh Khandelwal & Anr. ... Applicants

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 188 of 2021

Praveen Tyagi ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 215 of 2021

Sudhanshu Mehta ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 244 of 2021

Prarthana Asthana ... Applicant

Versus

State of Uttarakhand & Anr. ... Respondents

Anticipatory Bail Application No. 245 of 2021

Prarthana Asthana ... Applicant

Versus

State of Uttarakhand & Anr. ... Respondents

Anticipatory Bail Application No. 256 of 2021

Khimanand Dani ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 259 of 2021

Badri Prasad Arya ... Applicant

Versus

State of Uttarakhand & Anr. ... Respondents

Anticipatory Bail Application No. 261 of 2021

Vikas Kumar Sharma ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 268 of 2021

Deepak Kumar Rao ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 29 of 2022

Yogesh Kumar Gautam ... Applicant

Versus

State of Uttarakhand & Anr. ... Respondents

Anticipatory Bail Application No. 63 of 2022

Rahul Kumar Yadav ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 101 of 2022

Piyush Baliyan & Anr. ... Applicants

Versus

State of Uttarakhand & Others ... Respondents

Anticipatory Bail Application No. 150 of 2022

Lal Bahadur Kushwaha ... Applicant

Versus

State of Uttarakhand & Others ... Respondents

Anticipatory Bail Application No. 156 of 2022

Reshma ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 159 of 2022

Bhaguli Devi ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 161 of 2022

Naseem & Anr. ... Applicants

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 189 of 2022

Furkan ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 195 of 2022

Pranav Obrai & Others ... Applicants

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 198 of 2022

Neeraj Kumar Loshali ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 213 of 2022

Nayima ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 219 of 2022

Ranjeet Kaur *alias* Geeta ... Applicant

Versus

State of Uttarakhand & Anr. ...Respondents

Anticipatory Bail Application No. 253 of 2022

Raja Bhatt & Others ... Applicants

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 254 of 2022

Shadab ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 256 of 2022

Kamlesh Singh Chauhan ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 281 of 2022

Neeraj Kumar ... Applicant

Versus

State of Uttarakhand & Others ... Respondents

Anticipatory Bail Application No. 288 of 2022

Amit Kumar Singh ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 304 of 2022

Shubham Kumar ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 310 of 2022

Sandeep Singh Kandari & Anr. ...Applicants

Versus

State of Uttarakhand & Others ... Respondents

Anticipatory Bail Application No. 329 of 2022

Sayyaz ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 348 of 2022

Danish Raza ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 26 of 2023

Kiran Rana ... Applicant

Versus

State of Uttarakhand & Anr. ... Respondents

Anticipatory Bail Application No. 164 of 2023

Deshraj Saini ... Applicant

Versus

State of Uttarakhand ... Respondent

Anticipatory Bail Application No. 176 of 2023

Sanjay Bhalla ... Applicant

Versus

State of Uttarakhand ... Respondent

Presence:-

Mr. Girish Chandra Lakchaura and Mr. Dushyant Mainali, learned counsels for the applicant in ABA No. 76 of 2021.

Mr. Arvind Vashistha, learned Senior Counsel assisted by Ms. Disha Vashistha and Mr. Hemant Singh Mahar, learned counsels for the applicant in ABA No. 63 of 2022.

Mr. Alok Kumar, learned counsel for the applicants in ABA No. 101 of 2022.

Mr. Amit Kapri, learned counsel for the applicant in ABA No. 150 of 2022.

Mr. Ganesh Kandpal, learned counsel for the applicant in ABA No. 198 of 2022.

Mr. Bhuwnesh Joshi, learned counsel for the applicant in ABA No. 213 of 2022.

Mr. Tajhar Qayyum, learned counsel for the applicant in ABA No. 281 of 2022.

Mr. C.K. Sharma, learned counsel for the applicant in ABA No. 26 of 2023.

Mr. J.S. Virk, learned Deputy Advocate General, Mr. Rakesh Kumar Joshi and Mr. Pankaj Joshi, learned Brief Holders for the State of Uttarakhand.

Ms. Prabha Naithani, learned counsel for the complainant in ABA No. 215 of 2021.

Mr. B.D. Jha, Ms. Preeti Jha and Ms. Priyanka Jha, learned counsels for the complainant in ABA No. 198 of 2022.

The Court made the following:

JUDGMENT: (per Hon'ble The Chief Justice Sri Vipin Sanghi)

I have perused the opinions prepared by my brothers Manoj Kumar Tiwari, J., and Ravindra Maithani, J.

2) I agree with the view taken by Manoj Kumar Tiwari, J. – that an application seeking anticipatory bail would be maintainable even after the filing of the charge-sheet in the court.

3) I may, briefly, record my reasons for agreeing with the opinion of Manoj Kumar Tiwari, J. Right to life

and personal liberty is a valuable right available to a person, guaranteed under Article 21 of the Constitution of India, and it is one of the most precious and cherished rights. The said right to life and personal liberty cannot be curtained, or deprived, except without following the due process of law.

4) Section 438 of the Code of Criminal Procedure, which deals with what is popularly known as "*anticipatory bail*", seeks to prevent the apprehended infraction of this right to life and personal liberty of a person, by providing that where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court, or to the Court of Session, for a direction under the said provision and the Court may, if it thinks fit, direct that in the event of such an arrest, he shall be released on bail.

5) In ***Gurbaksh Singh Sibba and others Vs State of Punjab, (1980) 2 SCC 565***, the Supreme Court considered the issue – whether the operation of an order passed under Section 438(1) of the Code should be limited in point of time. While recognizing the power of the Court to limit the operation of such an order to a shorter period, for reasons to be recorded, the Supreme Court observed

that the normal rule should be not to limit the operation of the order in relation to a period of time.

6) In ***Sushila Aggarwal and others Vs State (NCT of Delhi) and another, (2020) 5 SCC 1***, the same view has been taken by the Supreme Court, as noticed by both my learned brothers.

7) Brother Maithani, J. has also noticed several judgments of the Supreme Court, in his opinion, wherein the Supreme Court considered the anticipatory bail applications moved, despite the charge-sheet having been filed. These cases are the following:

1. *Bharat Chaudhary Vs State of Bihar, (2003) 8 SCC 77*
2. *Ravindra Saxena Vs State of Rajasthan, (2010) 1 SCC 684*
3. *Vinod Kumar Sharma Vs State of Uttar Pradesh, 2021 SCC Online SC 3225*
4. *Bhadresh Bipinbhai Sheth Vs State of Gajarat, (2016) 1 SCC 152*
5. *Mahdoom Bava Vs Central Bureau of Investigation, 2023 SCC Online SC 299?*

8) The Law Commission in its 41st report, while recommending pre-arrest bail, observed that - their seems to be no justification to require the accused to first submit to custody, remain in prison for some days, and then apply for bail.

9) In ***Mahdoom Bava***, the Supreme Court took notice of the practice being followed by the Courts in some parts of the country, to remand an accused to custody, the moment he appeared in response to the summoning order.

10) I agree with the view of my brother Manoj Kumar Tiwari, J. that the legislation has not imposed any restriction as regards the stage upto which an application for anticipatory bail can be entertained.

11) That being the position, an interpretation of Section 438 Cr.P.C. which curtails the remedy available to an accused – to preserve his right to life and personal liberty, should be eschewed.

12) For the aforesaid reasons, I completely agree with the view taken by my brother Manoj Kumar Tiwari, J.

VIPIN SANGHI, C.J.

Dt: 24TH AUGUST, 2023
Negi