HIGH COURT OF MADHYA PRADESH : JABALPUR

Endt. No. C/904/ III-2-57/19 Jabalpur, dt 29/02/2020

The copy of the order passed by Hon'ble the Supreme Court of India, New Delhi dated 29-01-2020 in Criminal appellate Jurisdiction Special Leave Petition(Criminal) Nos. 7281-7282/2017 in the case of Sushila Aggarwal & Ors Vs. State (NCT of Delhi) & another passed by Hon'ble Shri Justice Arun Mishra, Honble Miss Justice Indira Banerjee , Hon'ble Shri Justice Vineet Saran, Hon'ble Shri Justice M.R. Shah & Hon'ble Shri Justice S.Ravindra Bhat is forwarded to :-

(i) The District & Sessions Judge ....., with a request to bring the same into the knowledge of all the Judicial Officers under their kind control for information and necessary action.
(ii) The District & Sessions Judge (Inspection & Vigilance), Jabalpur / Indore / Gwalior;
(iii) The Director MPSJA for needful,
(iv) The Member Secretary, SALSA, 54, South Civil Lines, Jabalpur
(v) The Principal Registrar, Bench at Indore/Gwalior High Court of M.P., Jabalpur.
(vi) P.S. to Hon'ble the Chief Justice ,High Court of Madhya Pradesh Jabalpur for placing the matter before His Lordships,
(vii) P.S. to Registrar General/ Principal Registrar(Judl)/ Principal Registrar (Inspection & Vigilance),/ Principal Registrar (Examination) / Principal Registrar (ILR) High court of Madhya Pradesh Jabalpur,
(viii) P.A. to Director/Additional Director/JOTRI, High Court of Madhya Pradesh Jabalpur,
(x) Registrar(J.)/(D.E.)/(A)/ (Vig.)/ (Vl.)/ Member Secretary SCMS, High Court of Madhya Pradesh, Jabalpur.
(x) Server Room (Computer) for making available in the official website of the High Court under the hyperlink circular/orders etc. in compliance of the orders of Registrar General dated 01-03-2018 & endt No. Reg(IT)/SA/2018/368 dated 01-03-2018.

for information & appropriate action.

29.02.2020
(SANAT KUMAR KASHYAP)
REGISTRAR(I & W)

R-87/20

REPORTABLE

IN THE SUPREME COURT OF INDIA 871663

CRIMINAL APPELLATE JURISDICTIO

SPECIAL LEAVE PETITION (CRIMINAL) NOS.7281-7282/2017

Sushila Aggarwal and others ...Petitioners

Versus

State (NCT of Delhi) and another ...Respondents

JUDGMENT

M.R. SHAH, J.

In the light of the conflicting views of the different Benches of varying strength, more particularly in the cases of *Shri Gurbaksh Singh Sibbia and others v. State of Punjab (1980) 2 SCC 565; Siddharam Satlingappa Mhetre v. State of Maharashtra (2011) 1 SCC 694; Bhadresh Bipinbhai Sheth v. State of Gujarat (2016) 1 SCC 152* on one side and in the cases of *Salauddin Abdulsamad*

Shaikh v. State of Maharashtra (1996) 1 SCC 667, subsequently followed in the case of *K.L. Verma v. State and another (1998) 9 SCC 348; Sunita Devi v. State of Bihar (2005) 1 SCC 608; Nirmal Jeet Kaur v. State of M.P. (2004) 7 SCC 558; HDFC Bank Limited v. J.J. Mannan (2010) 1 SCC 679; and Satpal Singh v. State of Punjab (2018) 4 SCC 303*, the following questions are referred for consideration by a larger Bench:

> "(1) Whether the protection granted to a person under Section 438 Cr.P.C. should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.
>
> (2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court."

2. Shri Harin P. Raval, learned Senior Advocate appearing as Amicus Curiae relying upon the decision of this Court in the case of *Balchand Jain v. State of M.P. (1976) 4 SCC 572* has submitted that though the expression "anticipatory bail" has not been defined in the Code, as observed by this Court in the aforesaid decision, "anticipatory bail" means "bail in anticipation of arrest". It is submitted that in the aforesaid decision, this Court has further observed that 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. It is submitted that when a competent court grants "anticipatory bail", it makes an order that in the event of arrest, a person shall be released on bail. It is submitted that 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.

2.1. Shri Raval, learned Amicus Curiae has taken us to the historical perspective on the inclusion of Section 438 of the Cr. P.C. It is submitted that on the recommendation of the Law Commission of India in its 41st Report dated 24.09.1969, the Parliament introduced a new provision in the form of "anticipatory bail" under Section 438 of the Cr.P.C. It is submitted that the Law Commission of India in its 41st Report stated in paragraph 39.9 the justification for power to grant "anticipatory bail". It is submitted that as per the Law Commission 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 is submitted that the Law Commission further observed that 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 to be no justification to require him to first submit to custody, remain in prison for some days, and then apply for bail.

2.2 It is further submitted that power to grant "anticipatory bail" vests only in the High Courts or the Courts of Sessions. It is submitted that the "anticipatory bail" can be applied at different stages. It is submitted that even in a case where no FIR is lodged and a person is apprehending his arrest in case the FIR is lodged, in that case, he can apply for "anticipatory bail" and after notice to the Public Prosecutor the Court can grant "anticipatory bail". It is submitted that even in a case where the FIR is lodged but the investigation has not yet begun, i.e., pre investigation stage, the "anticipatory bail" can be applied. It is submitted that "anticipatory bail" can also be applied at post investigation stage. It is submitted that after exercising the discretion judiciously, the High Court or the Sessions Court grants "anticipatory bail" and that too after hearing the Public Prosecutor. It is submitted that therefore once the bail is granted in anticipation of the arrest, there is no reason

to limit the same till the summon is issued by the Court and/or there is no reason to limit the period of bail in anticipation granted.

2.3 Shri Harin P. Raval, learned Senior Advocate appearing as Amicus Curiae has further submitted that in the case of *Gurbaksh Singh Sibbia (supra)*, a Constitution Bench of this Court has observed and held that the facility which Section 438, Cr. P.C. 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. It is submitted that any order of bail can, of course, be effective only from the date 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". It is submitted that thus, bail is basically release from restraint, more particularly, release from the custody of the police. It is submitted that 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. Taking a surety, 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 the offence or offences of which he is charged and for which he was arrested. It is submitted 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. It is submitted that 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.

2.4 Shri Harin P. Raval, learned Senior Advocate appearing as Amicus Curiae has further submitted that however the core questions before this Court are, (a) what is the life or currency of an anticipatory bail once the same has been granted by the competent court?; (b) once an order granting anticipatory bail has been passed, whether the said anticipatory bail only survives till the stage of filing of charge sheet/challan/final report or whether it subsists during the entire duration of trial?. It is further

submitted by Shri Raval that one another question may arise, namely, in a case where if new incriminating materials are found during the course of investigation, whether they could be relied on by the Court to cancel anticipatory bail which has already been granted?

2.5 It is submitted that, as such, the aforesaid questions are not *res integra* in view of the decision of the Constitution Bench of this Court in the case of *Gurbaksh Singh Sibbia (supra)*. It is submitted that in the case of *Gurbaksh Singh Sibbia (supra)*, a Constitution Bench of this Court has held that there is no limit to the currency of an order of anticipatory bail. The Court is vested with absolute discretion to direct the duration of the trial which can vary from a few weeks to even such duration until charge sheet has been filed and which may also extend to the entire duration of the trial. It is submitted that it is further observed that the sole consideration must be with a view to balance the two competing interests, viz., protecting the liberty of the accused and the sovereign power of the police to conduct a fair investigation. Shri Raval, learned Amicus Curiae has heavily relied upon the observations made by the Constitution Bench of this Court in paragraphs 42 & 43 of *Gurbaksh Singh Sibbia (supra)*.

2.6 It is further submitted by Shri Raval that in the subsequent decision of this Court in the case of *Siddharam Satlingappa Mhetre (supra)*, this Court has taken the view that the order of anticipatory bail once granted ordinarily subsists during the entire duration of the trial. It is submitted that it is further observed that by that the power of the Sessions Court or that of the High Court to re-visit its order granting anticipatory bail is curtailed, in case circumstances exist or new exigencies arise which merit interference. Heavy reliance is placed upon observations made by this Court in the case of *Siddharam Satlingappa Mhetre (supra)* in paragraphs 94, 95, 98, 100, 122 and 123.

It is submitted by Shri Raval that however, the judgment rendered in *Siddharam Satlingappa Mhetre (supra)* particularly in paragraphs 95, 108, 122 and 123 does not take into consideration the observations of the Constitution Bench in *Gurbaksh Singh Sibbia (supra)* in paragraphs 42 & 43, which clearly cull out that the discretion of the Sessions Court or a High Court is wide enough to limit as well as specify the duration of the anticipatory bail taking into account all relevant factors which may persuade the discretion of the Court. It is submitted that *Siddharam Satlingappa Mhetre (supra)* proceeded to hold that the anticipatory bail shall

subsists during the entire currency of the trial and specifically rejected the notion that anticipatory bail could be for a limited time as well, on the expiry of which the accused must surrender and apply for a regular bail. It is submitted that in view of the conflicting approach, the decision rendered in the case of *Siddharam Satlingappa Mhetre (supra)* particularly the observations made in paragraphs 95, 108, 122 & 123 need to be revisited.

2.7 It is further submitted by Shri Raval, learned Amicus Curiae that the discretion of the Sessions Court and the High Court is absolute, and no limitations whatsoever have been imposed by the legislature. It is submitted that the discretion therefore can be exercised to even limit the duration of the anticipatory bail, in order to ensure that the accused also cooperates with the investigation, or that relevant discoveries to secure incriminating material could be made under Section 27 of the Evidence Act, or in view of new incriminating circumstances which establish complicity of the accused. It is submitted that therefore the view taken by this Court in *Siddharam Satlingappa Mhetre (supra)* that the anticipatory bail to subsist for the entire duration of the trial, curtails the discretion of the Sessions Court or the High Court to limit such duration of

anticipatory bail. It is submitted that such an interpretation is in absolute contravention of the law declared by the Constitution Bench in the case of *Gurbaksh Singh Sibia (supra).*

2.8 Making the above submissions and relying upon the aforesaid decisions of the Constitution Bench of this Court, Shri Raval, learned Amicus Curiae has concluded as under:

1) that the power vested by the Parliament on superior criminal courts in the order of hierarchy, such as Sessions Court and High Court, is a power entailing conferment of absolute discretion in deciding whether an application for anticipatory bail may be allowed or rejected, and also inheres in this discretion, the additional power to limit the duration of anticipatory bail to any point in time, or to any stage as the Courts may deem fit in the facts and circumstances of the case, and in view of all the attending circumstances;

2) that the order granting anticipatory bail will not interdict the power of the investigating agency to continue investigation of the case or would prevent the investigating agency to ask for and be granted, respectively, Police Custody of the accused for the purposes of the investigation and where the investigating officer feels that the custody of the accused is necessary.

Further since police custody can be granted only in the first 14 days of the arrest, the decision to restrict the duration of the bail would balance the twin competing interest, viz., the individual liberty and the sovereign power of the police to investigate the case;

3) that the life of the order granting anticipatory bail can be restricted, which may be at a stage till either the FIR is filed in cases where such order is granted on an reasonable apprehension of being arrested in relation to a cognizable case, where the FIR or Complaint is yet not filed; in cases where FIR or complaint is filed, it may be restricted to a period of ten days after arrest (since it leaves a period of 4 days for the investigation agency to get police custody, within the outer limit of 14 days) and then leave it open for the accused so released on anticipatory bail to apply for regular bail under Section 437/439; alternatively such order may endure till filing of charge sheet which has to be filed within 90 days of the arrest. It may be remembered here that non-filing of charge sheet within 90 days of arrest entitles the accused, statutory bail or default bail, as a matter of right, in view of express stipulation contained in Section 167 of the Code of Criminal

Procedure, 1973. Also, in case where an accused is released on anticipatory bail, the investigation authorities may not be subjected to adherence to filing of charge sheet within 90 days as there would be no consequence as the accused is already enlarged on bail. It may therefore be safer to adhere to the earlier practice evolved by judicial precedents to restrict the operation of life of the order granting anticipatory bail for 10 days of arrest, leaving it open to the accused to apply for regular bail under Section 437/439 of the Code and equally leaving it open for the Court to consider such an application without in any way being influenced by the fact of grant of anticipatory bail, as at that stage the considerations are at a very early stage where the investigation itself may be in nascent stage or the materials are yet to be gathered and the accused is yet to be interrogated; and

4) that anticipatory bail once granted can also be cancelled, either in appeal to a superior forum on challenge being made or by the same court on establishment of well accepted and legally enshrined principles relating to cancellation of bail.

3. Shri K.V. Vishwanathan, learned Senior Advocate who was also requested to assist us as an Amicus Curiae has submitted that the exercise of power under Section 438 is exactly like the exercise of power under Sections 437 and 439 of the Cr.P.C. It is submitted therefore, the pre-arrest bail granted in anticipation of arrest under Section 438 ought to operate like any other order granting bail till an order of conviction or till an affirmative direction is passed under Section 439(2) of the Cr.P.C. It is submitted that therefore the law laid down by this Court in the cases of *Gurbaksh Singh Sibbia (supra)* and *Siddharam Satlingappa Mhetre (supra)* lay down the correct law. It is submitted that the exceptions carved out in *Gurbaksh Singh Sibbia (supra)* particularly in paras 19, 42 and 43 are well within the scheme of the Code.

3.1 It is further submitted by Shri Vishwanathan, learned Amicus Curiae that the power of arrest of the police is under Section 41 of the Cr.P.C. It is submitted that this Section has two essential parts. One, relating to offences in which the maximum punishment can extend to imprisonment for seven years. Second, relating to offences in which the maximum punishment can extent to imprisonment above seven years or

death penalty. It is submitted that though they have different conditions and thresholds, in both cases it is clear from a bare reading of the section that the power of arrest cannot be exercised in every FIR that is registered under Section 154 Cr.P.C. It is submitted that this power is circumscribed by the conditions laid down in this Section. Moreover, this principle that the power of arrest is not required to be exercised in every case was recognised in the cases of *Joginder Kumar v. State of U.P. (1994) 4 SCC 260 (para 20); Lalitha Kumari v. State of U.P. (2014) 2 SCC 1 (paras 107-108); and Arnesh Kumar v. State of Bihar (2014) 8 SCC 273 (paras 5 and 6).* It is submitted that, in fact, this Court in the case of *M.C. Abraham v. State of Maharashtra (2003) 2 SCC 649 (para 15)* has held that it was not mandatory for the police to arrest a person only because his/her anticipatory bail had been rejected.

3.2 It is further submitted by Shri Vishwanathan, learned Amicus Curiae that the power of arrest is then further circumscribed by Section 438 Cr.P.C. It is submitted that as recognized by the Law Commission, there are cases where the power of arrest is not required or allowed to be exercised. It is submitted that exercising power of arrest in such cases would

be a grave violation of a person's right and liberty. It is submitted that such exercise of power would amount to misuse of Section 41. It is submitted that the check on the power of arrest and custody provided by Sections 437 or 439 is limited as the check is only *post facto*. It is submitted that by then the person arrested has already suffered the trauma and humiliation of arrest.

3.3 It is further submitted that to safeguard this situation, Section 438 was introduced so as to provide for judicial intervention in necessary cases. It is submitted that this judicial intervention is to ensure that the power of arrest is regulated under the scrutiny of the courts. It is submitted that to strike a further balance between the power of arrest and the rights of the accused, this power was specifically given to the Court of Session and the High Court so as to ensure that this judicial intervention is done at the supervisory level and not at the magisterial level. It is submitted that it is in this light that the two questions raised in the present reference need to be addressed.

3.4 Taking us to the recommendations in the 41st Report of the Law Commission and the observations made in the Report

of the Committee on Reforms of the Criminal Justice system, headed by Dr. Justice V.S. Malimath, it is submitted by Shri Vishwanathan that Section 438 is a check on the power of arrest of the police. It is submitted that as stated in the above Law Commission Report, it is a check not only against false cases, but also in cases where the need to arrest does not arise.

3.5 It is further submitted that even otherwise a bare reading of the Section shows that there is nothing in the language of the Section which goes to show that the pre-arrest bail granted under Section 438 has to be time-bound. It is submitted that the position is the same as in Sections 437 and 439. It is submitted that at this stage Section 438(3) is relevant to be taken into consideration. It is submitted that there are two very important aspects in Section 438(3) Cr.P.C. which are relevant to be considered to understand the scheme of the Code, viz., (a) a person in whose favour a pre-arrest bail order has been made under Section 438 has first to be arrested. Such a person is then released on bail on the basis of the pre-arrest bail order. For such release the person has to comply with the requirement of Section 441 of giving a bond or surety; and (b) where the magistrate taking cognizance under Section

204 is of the view that a warrant is required to be issued at the first instance, such magistrate is only empowered to issue only a bailable warrant and not a non-bailable warrant. This curtailment of power of the magistrate clearly shows the intent of the legislature that a person who has been granted bail under Section 438 ought not to be arrested at the stage of cognizance because of the said pre-arrest bail order. It is submitted that in light of this express provision, no other interpretation is possible to be given to the said section. It is submitted that the second question referred herein is squarely covered by this sub-section.

3.6 It is further submitted by Shri Vishwanathan, learned Amicus Curiae that the order passed under Section 438, which is in the nature of a pre-arrest bail order, is however subject to the power granted to the Court of Session and the High Court under Section 439(2), Cr.P.C., which gives power to the Court of Session or the High Court to direct the arrest of the accused at any time. It is submitted that this ensures that through judicial intervention the balance between the two competing principles can again be revisited if the need arises. It is submitted that the only difference is that the power of arrest

in these cases is exercised only after judicial scrutiny. It is submitted that in any case and as observed by this Court in *Gurbaksh Singh Sibbia (supra),* the orders once passed under Section 438 will continue till the trial unless in exercise of judicial discretion the Sessions Court or the High Court limits the same, looking to the facts and circumstances of the case and the stages at which the power under Section 438 Cr.P.C. is exercised. It is submitted that the Code presupposes that the order passed under Sections 438 or 439 are not or cannot be temporary time bound. It is submitted that a person in whose favour an order of pre-arrest bail is passed can be taken into custody thereafter only when a specific direction is passed under Section 439(2) of the Code.

3.7 Shri Vishwanathan, learned Amicus Curiae, while making the aforesaid submissions and relying upon the aforesaid decisions of this Court, has concluded that the pre-arrest bail granted under Section 438 of the Code is exactly like the orders of bail passed under Sections 437 and 439 of the Code; the Code does not contemplate any power in the hands of the Courts to pass time-bound orders under Section 438 for good reason; on the other hand, the investigating

agency can approach the Court under Section 439(2) and in the event of the police making out a case, the Court has all the powers to direct the accused to be taken into custody.

4. Shri Tushar Mehta, learned Solicitor General of India has heavily relied upon paras 42 and 43 of *Gurbaksh Singh Sibbia (supra)* and has submitted that as observed and held by the Constitution Bench of this Court that the Court can in a given case and for justifiable reasons limit the period of anticipatory bail. It is submitted that this Court in the case of *Siddharam Satlingappa Mhetre (supra)* has misread the judgment in *Gurbaksh Singh Sibbia (supra)* to a limited extent. It is submitted that to the extent *Siddharam Satlingappa Mhetre (supra)* states that "in view of the clear declaration of the law by the Constitution Bench, the life of the order under Section 438 Cr.P.C. granting bail cannot be curtailed", may not be correct law in light of the observations made in para 42 by the Constitution Bench in *Gurbaksh Singh Sibbia (supra)*. It is submitted that the Constitution Bench in *Gurbaksh Singh Sibbia (supra)* has not categorically barred anticipatory bail order for limited time period, and at the same time, merely stated that "normal rule" should be not to limit the time period.

It is submitted that at the same time, the decision of this Court in the case of *Salauddin Abdulsamad Shaikh (supra)*, to the extent it states that the order of the anticipatory bail has to be necessarily limited in time frame is against the decision of the Constitution Bench in *Gurbaksh Singh Sibbia (supra)*, which specifically states that the "normal rule" to not limit the order of anticipatory bail. It is submitted that therefore the extreme views on both side in *Siddharam Satlingappa Mhetre (supra)* and *Salauddin Abdulsamad Shaikh (supra)*, to that limited extent, do not consider the observations in *Gurbaksh Singh Sibbia (supra)*, in the correct light. It is submitted that in a case, with justifiable reasons, to be recorded in writing, indicating reasons to deviate from the "normal rule", the anticipatory bail can be granted for a limited time period, the life of which, would extinguish accordingly.

4.1 It is further submitted by Shri Tushar Mehta, learned Solicitor General of India that so far as the second reference, namely, whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court is concerned, it is submitted that there cannot be a straightjacket formula. It is submitted that in a case wherein

the anticipatory bail is granted for a limited time period, the life would extinguish accordingly. It is submitted that in a case wherein the anticipatory bail is granted without conditions, the life may terminate upon the circumstances warranting cancellation of such bail or such interference. It is submitted that the statute does not contemplate an automatic cancellation upon filing of charge sheet and therefore the judgment of this Court in the case of *HDFC Bank Limited (supra)*, to that extent, may not lay down the correct law. It is submitted that, at the same time, the Hon'ble Courts have deprecated the practice of blanket orders of bail/anticipatory bail. It is submitted that there are eventualities arising in every case may be different and therefore are required to be dealt with accordingly, in the facts and circumstances of each case. It is submitted that even while granting the anticipatory bail, the right of the investigating agency to seek custodial interrogation cannot be hampered mechanically.

5. Relying upon the decisions of this Court in the cases of *HDFC Bank Ltd. (supra)* and *Satpal Singh (supra)*, it is submitted by Shri Vikramjit Banerjee, learned Additional Solicitor General of India that as held by this Court in the

aforesaid decisions, the purpose of Section 438 is providing protection only during the process of investigation and the accused should seek regular bail upon submission of the charge sheet against him from the court where entire material is placed. It is submitted that in any case grant of the pre-arrest bail under Section 438 Cr.P.C. shall not affect the right of the investigating agency to seek custodial interrogation and in conducting further investigation.

5.1 It is further submitted by Shri Banerjee, learned ASG that as held by this Court in the case of *Uday Mohanlal Acharya v. State of Maharashtra (2001) 5 SCC 453*, that even when accused is found to be on bail at the stage of committal proceedings, the committing Magistrate has the power to cancel the bail and commit him to custody, if he considers it necessary to do so. It is submitted that as observed and held by this Court in the aforesaid decisions that an interpretation that an order of protection from arrest under Section 438 will remain operational till the end of the trial will effectively make Section 209 (b) of Cr.P.C. otiose.

5.2 At the end, Shri Banerjee, learned ASG has submitted that there should necessarily be conditions imposed in

granting a pre-arrest bail order and it cannot be a blanket order; in terms of the Cr.P.C. under Section 209(b) and Section 240(2), the accused can be remanded to custody by the Magistrate during the stage of inquiry, if he considers it necessary to do so at the stage of the submission of the final report/ charge sheet or committal proceedings. It is submitted that it is imperative therefore that if the accused takes pre-arrest bail during the earlier state of criminal investigation, the power of the Magistrate under the said provisions of Cr.P.C. should be maintained including the power of the Magistrate to send the accused to the custody.

6. Shri C.S.N. Mohan Rao, learned Advocate appearing on behalf of respondent no.2 has vehemently submitted that the Constitution Bench judgment in *Gurbaksh Singh Sibbia (supra)* has dealt with various aspects of anticipatory bail and preserved the discretionary power granted by the legislature on the courts while considering application for anticipatory bail. It is submitted that the Constitution Bench has refused to impose any limitation or conditions, which are not imposed by the Parliament.

6.1 It is further submitted by the learned Counsel appearing on behalf of respondent no.2 that the decision of the Constitution Bench regarding duration of anticipatory bail is not called in question by any judgment. It is submitted that there is a clear conflict regarding the duration of anticipatory bail as enunciated by the Constitution Bench and the order in *Salauddin Abdulsamad Shaikh (supra)*, which was followed in number of subsequent judgments. It is submitted that the decision of this Court in *Salauddin Abdulsamad Shaikh (supra)* and subsequent judgments following *Salauddin Abdulsamad Shaikh (supra)* are all *per incuriam.*

6.2 It is further submitted by the learned Counsel appearing on behalf of respondent no.2 that as a normal rule, it is not required to limit the duration of anticipatory bail. It is submitted that however, court while granting anticipatory bail may, keeping in view the peculiar facts and circumstances of the case, limit the duration of anticipatory bail. It is submitted that the life of anticipatory bail would not end on filing of charge sheet.

6.3 It is further submitted by the learned counsel appearing on behalf of respondent no.2 that both the questions of law

framed for consideration by the larger Bench does not arise for consideration. It is submitted that considering the elaborate reasons given by the Constitution Bench in not putting any fetters or limitations on the discretionary power of a court to grant anticipatory bail and as there is no ambiguity in the judgment of the Constitution Bench, this Court may reiterate the judgment of the Constitution Bench in *Gurbaksh Singh Sibbia (supra)*.

7. We have heard the learned counsel for the respective parties at length.

In the light of the conflicting views of the different Benches of varying strength, the following questions are referred for consideration by a larger Bench:

> "(1) Whether the protection granted to a person under Section 438 Cr.P.C. should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.
>
> (2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court."

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 the case of *Balchand Jain (supra)*, "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 of the Cr.P.C. vests only with the Court of Sessions or the High Court. Therefore, ultimately it is for the concerned court to consider the application for "anticipatory bail" and while granting the "anticipatory bail" it is ultimately for the concerned court to impose conditions including the limited period of "anticipatory bail", depends upon the stages at which the application for anticipatory bail is moved. A person in whose favour a pre-arrest bail order is made under Section 438 of the Cr.P.C. has to be arrested. However, once there is an order of pre-arrest bail/anticipatory bail, as and when he is arrested he has to be released on bail. Otherwise,

there is no distinction or difference between the pre-arrest bail order under Section 438 and the bail order under Section 437 & 439 of the Cr.P.C. The only difference between the pre-arrest bail order under Section 438 and the bail order under Sections 437 and 439 is the stages at which the bail order is passed. The bail order under Section 438 of the Cr.P.C. is prior to his arrest and in anticipation of his arrest and the order of bail under Sections 437 and 439 is after a person is arrested. A bare reading of Section 438 of the Cr.P.C. shows that there is nothing in the language of the Section which goes to show that the pre-arrest bail granted under Section 438 has to be time bound. The position is the same as in Section 437 and Section 439 of the Cr.P.C.

7.2 While considering the issues referred to a larger Bench, referred to hereinabove, the decision of the Constitution Bench of this Court in *Gurbaksh Singh Sibbia (supra)* is required to be referred to and considered in detail. The matter before the Constitution Bench in the case of *Gurbaksh Singh Sibbia (supra)* was arising out of the decision of the Full Bench of the Punjab and Haryana High Court. The High Court rejected the

application for bail after summarising, what according to it was the true legal position, thus,

> "(1) The power under Section 438, Criminal Procedure Code, is of an extraordinary character and must be exercised sparingly in exceptional cases only;
>
> (2) Neither Section 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled.
>
> (3) The said power is not unguided or uncanalised but all the limitations imposed in the preceding Section 437, are implicit therein and must be read into Section 438.
>
> (4) In addition to the limitations mentioned in Section 437, the petitioner must make out a special case for the exercise of the power to grant anticipatory bail.
>
> (5) Where a legitimate case for the remand of the offender to the police custody under Section 167(2) can be made out by the investigating agency or a reasonable claim to secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act can be made out, the power under Section 438 should not be exercised.
>
> (6) The discretion under Section 438 cannot be exercised with regard to offences punishable with death or imprisonment for life unless the court at that very stage is satisfied that such a charge appears to be false or groundless.
>
> (7) The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the

higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised; and

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

7.3 After considering the scheme of "anticipatory bail" under Section 438, Cr.P.C. and while not agreeing with the Full Bench, this Court has observed and held as under:

> ***"12.*** *.....By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence. Though the right to apply for anticipatory bail was conferred for the first time by Section 438, while enacting that provision the legislature was not writing on a clean slate in the sense of taking an unprecedented step, insofar as the right to apply for bail is concerned. It had before it two cognate provisions of the Code: Section 437 which deals with the power of courts other than the Court of Session and the High Court to grant bail in non-bailable cases and Section 439 which deals with the "special powers" of the High Court and the Court of Session regarding bail.....*
>
> *The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the*

departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully: Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in para 39.9 that it had "considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in clauses (i) to (iv) of sub-section (2). The proof of legislative intent can best be found in the language which the legislature uses. Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, especially when to refuse

to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non- bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail if generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437.

***13.** This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of Section 438. Though sub-section (1) of that section says that the court "may, if it thinks fit" issue the necessary direction for bail, sub-section (2) confers on the court the power to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in clauses (i) to (iv) of that sub-section. The controversy therefore is not whether the court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The*

High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code.

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18. *According to the sixth proposition framed by the High Court, the discretion under Section 438 cannot be exercised in regard to offences punishable with death or imprisonment for life unless, the court at the stage of granting anticipatory bail, is satisfied that such a charge appears to be false or groundless. Now, Section 438 confers on the High Court and the Court of Session the power to grant anticipatory bail if the applicant has reason to believe that he may be arrested on an accusation of having committed "a non-bailable offence". We see no warrant for reading into this provision the conditions subject to which bail can be granted under Section 437(1) of the Code. That section, while conferring the power to grant bail in cases of non-bailable offences, provides by way of an exception that a person accused or suspected of the commission of a non-bailable offence "shall not be so released" if there appear to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. If it was intended that the exception contained in Section 437(1) should govern the grant of relief under Section 438(1), nothing would have been easier for the legislature than to introduce into the latter section a similar provision. We have already pointed out the basic distinction between these two sections. Section 437 applies only after a person, who is alleged to have committed a non-bailable offence, is arrested*

or detained without warrant or appears or is brought before a court. Section 438 applies before the arrest is made and, in fact, one of the pre-conditions of its application is that the person, who applies for relief under it, must be able to show that he has reason to believe that "he may be arrested", which plainly means that he is not yet arrested. The nexus which this distinction bears with the grant or refusal of bail is that in cases falling under Section 437, there is some concrete data on the basis of which it is possible to show that there appear to be reasonable grounds for believing that the applicant has been guilty of an offence punishable with death or imprisonment for life. In cases falling under Section 438 that stage is still to arrive and, in the generality of cases thereunder, it would be premature and indeed difficult to predicate that there are or are not reasonable grounds for so believing. The foundation of the belief spoken of in Section 437(1), by reason of which the court cannot release the applicant on bail is, normally, the credibility of the allegations contained in the first information report. In the majority of cases falling under Section 438, that data will be lacking for forming the requisite belief. If at all the conditions mentioned in Section 437 are to be read into the provisions of Section 438, the transplantation shall have to be done without amputation. That is to say, on the reasoning of the High Court, Section 438(1) shall have to be read as containing the clause that the applicant "shall not" be released on bail "if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life". In this process one shall have overlooked that whereas, the power under Section 438(1) can be exercised if the High Court or the Court of Session "thinks fit" to do so, Section 437(1) does not confer the power to grant bail in the same wide terms The expression "if it thinks fit", which occurs in Section 438(1) in relation to the power of the High Court or the Court of Session, is conspicuously absent in Section 437(1). We see no valid reason for rewriting Section 438 with a view, not to expanding the scope and ambit of the discretion conferred on

the High Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

19. *A great deal has been said by the High Court on the fifth proposition framed by it, according to which, inter alia, the power under Section 438 should not be exercised if the investigating agency can make a reasonable claim that it can secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act. According to the High Court, it is the right and the duty of the police to investigate into offences brought to their notice and therefore, courts should be careful not to exercise their powers in a manner which is calculated to cause interference therewith. ..... An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. In fact, two of the usual conditions incorporated in a direction issued under Section 438(1) are those recommended in sub-section (2)(i) and (ii) which require the applicant to cooperate with the police and to assure that he shall not tamper with the witnesses during and after the investigation. While granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard*

to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya [AIR 1960 SC 1125 : (1961) 1 SCR 14, 26 : 1960 Cri LJ 1504] to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under Section 167(2) of the Code is made out by the investigating agency.

20. *It is unnecessary to consider the third proposition of the High Court in any great details because we have already indicated that there is no justification for reading into Section 438 the limitations mentioned in Section 437. The High Court says that such limitations are implicit in Section 438 but, with respect, no such implications arise or can be read into that section. The plenitude of the section must be given its full play.*

21. *The High Court says in its fourth proposition that in addition to the limitations mentioned in Section 437, the petitioner must make out a "special case" for the exercise of the power to grant anticipatory bail. This, virtually, reduces the salutary power conferred by Section 438 to a dead letter. In its anxiety, otherwise just, to show that the power conferred by Section 438 is not "unguided or uncanalised", the High Court has subjected that power to a restraint which will have the effect of making the power utterly unguided. 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". We do not see why the provisions of Section 438 should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable. A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

22. *By proposition No. 1 the High Court says that the power conferred by Section 438 is "of an extraordinary character and must be exercised sparingly in exceptional cases only". It may perhaps be right to describe the power as of an extraordinary character because ordinarily the bail is applied for under Section 437 or Section 439. These sections deal with the power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for. But this does not justify the conclusion that the power must be exercised in exceptional cases only, because it is of an extraordinary character. We will really be saying once too often that all discretion has to be exercised with care and circumspection, depending on circumstances justifying its exercise. It is unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self-imposed limitations.*

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25. *..... We agree, with respect, that the power conferred by Section 438 is of an extraordinary character in the sense indicated above, namely, that it is not ordinarily resorted to like the power conferred by Sections 437 and 439. We also agree that the power to grant anticipatory bail*

should be exercised with due care and circumspection but beyond that, it is not possible to agree with the observations made in Balchand Jain [(1976) 4 SCC 572 : 1976 SCC (Cri) 689 : (1977) 2 SCR 52] in an altogether different context on an altogether different point.

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33. *We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the ground that, after all, "the legislature in its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected.*

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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.

40. *We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition (2). We agree that a 'blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.*

41. *Apart from the fact that the very language of the statute compels this construction, there is an important*

principle involved in the insistence that facts, on the basis of which a direction under Section 438(1) is sought, must be clear and specific, not vague and general. It is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them can be avoided. A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a vacuum.

42. *There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can an order of bail be passed under the section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. 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.***

43. *During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in Section 438(2) (i), (ii) and (iii). The court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made under Section 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the FIR in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various courts have long since been released by this Court under Section 438(1) of the Code."*

7.4 The aforesaid decision of the Constitution Bench in the case of *Gurbaksh Singh Sibbia (supra)* holds the field for number of years and the same has been followed by all the Courts in the country. While granting anticipatory bail, normally following conditions are imposed by the court/courts

which as such are in consonance with the decision of the Constitution Bench in the case of *Gurbaksh Singh Sibbia (supra)* and Section 438(2) read with Section 437(3) of the Cr.P.C:

1. the applicant namely_____ shall furnish personal bond of Rs._____ with his recent self-attested photograph and surety of the like amount on the following conditions at the satisfaction of the Investigating Officer;

2. the applicant shall remain present before the concerned police station on _____ between _____;

3. the applicant shall co-operate with the investigation and make himself available for interrogation whenever required;

4. the applicant shall not directly or indirectly make any inducement, threat or promise to any witness acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer;

5. the applicant shall not obstruct or hamper the police investigation and not to play mischief with the evidence collected or yet to be collected by the police;

6. the applicant shall not leave the territory of _____, without prior permission of the court, till trial is over;

7. the applicant shall mark his presence before concerned police station on _____ between _____ for the period of six months, from the date of this order;

8. the applicant shall maintain law and order;

9. the applicant shall, at the time of execution of the Bond, furnish his address and mobile number to the Investigating Officer, and the Court concerned, and shall not change the residence till the final disposal of the case;

10. the applicant shall surrender his passport, if any, before the Investigating Officer within a week and, if he does not possess any passport, he shall file an affidavit to that effect before the Investigating Officer;

11. the applicant shall regularly remain present during the trial, and co-operate the Honourable Court to complete the trial for the above offences.

If breach of any of the above conditions is committed, the order of anticipatory bail would be cancelled. It would be open to the Investigating Officer to file an application for remand,

and the concerned Magistrate would decide it on merits, without influenced by the grant of anticipatory bail order.

However, in the case of *Siddharam Satlingappa Mhetre (supra)*, despite the specific observations by the Constitution Bench of this Court in *Gurbaksh Singh Sibbia (supra)* that the normal rule should be not to limit the operation of the order in relation to a period of time, in other words in an appropriate case and looking to the facts and circumstances of the case and the stage at which the pre-arrest bail application was made, the court concerned can limit the operation of the order in relation to a period of time, on absolute misreading of the judgment in the case of *Gurbaksh Singh Sibbia (supra)* and just contrary to the observations made in paragraphs 42 and 43, an absolute proposition of law is laid down that the life of the order under Section 438, Cr. P.C. granting bail cannot be curtailed. Despite the clear cut observations made by the Constitution Bench in *Gurbaksh Singh Sibbia (supra)* made in paragraphs 42 and 43, in the case of *Salauddin Abdulsamad Shaikh (supra)*, a three Judge Bench of this Court has observed and held that the order of "anticipatory bail" has to be necessarily limit in time frame. In many cases subsequently

the decision in the case of *Salauddin Abdulsamad Shaikh (supra)* has been followed, despite the specific observations made by the Constitution Bench in *Gurbaksh Singh Sibbia (supra)* made in paragraphs 42 and 43 which, as such, are just contrary to the view taken in subsequent decisions in the cases of *Siddharam Satlingappa Mhetre (supra) and Salauddin Abdulsamad Shaikh (supra).* At this stage, it is required to be noted that in the case of *Salauddin Abdulsamad Shaikh (supra),* this Court had not at all considered the decision of the Constitution Bench in the case of *Gurbaksh Singh Sibbia (supra).* It cannot be disputed that the decision of this Court in the case of *Gurbaksh Singh Sibbia(supra)* is a Constitution Bench decision which is binding unless it is upset by a larger Bench than the Constitution Bench. Therefore, considering the decision of the Constitution Bench of this Court in the case of *Gurbaksh Singh Sibbia (supra)* and the relevant observations, reproduced hereinabove, the decision of this Court in the case of *Siddharam Satlingappa Mhetre (supra)* to the extent it takes the view that the life of the order under Section 438 Cr.P.C. cannot be curtailed is not a correct law in light of the observations made by the Constitution Bench in

paragraphs 42 and 43 in *Gurbaksh Singh Sibbia (supra)*. The decision of this Court in the case of *Salauddin Abdulsamad Shaikh (supra)* which takes an extreme view that the order of "anticipatory bail" has to be necessarily limited in time frame is also not a good law and is against and just contrary to the decision of this Court in the case of *Gurbaksh Singh Sibbia (supra)*, which is a Constitution Bench judgment.

7.5 Thus, considering the observations made by the Constitution Bench of this Court in the case of *Gurbaksh Singh Sibbia (supra)*, the court may, if there are reasons for doing so, limit the operation of the order to a short period only after filing of an FIR in respect of the matter covered by order and the applicant may in such case be directed to obtain an order of bail under Sections 437 or 439 of the Code within a reasonable short period after the filing of the FIR. The Constitution Bench has further observed that the same need not be followed as an invariable rule. It is further observed and held that normal rule should be not to limit the operation of the order in relation to a period of time. We are of the opinion that the conditions can be imposed by the concerned court 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. However, as observed hereinabove, the normal rule should be not to limit the order in relation to a period of time.

New Delhi;
January 29, 2020

.....J.
[M.R. SHAH]

SPECIAL LEAVE PETITION (CRIMINAL) NO (s). 7281-7282 OF 2017

SUSHILA AGGARWAL & ORS. ...APPELLANT(S)

VERSUS

STATE (NCT OF DELHI) & ANR. ...RESPONDENT(S)

JUDGMENT

S. RAVINDRA BHAT, J.

1. I have gone through the reasoning and conclusions of Justice M.R. Shah. I am in agreement with his judgment. However, I am supplementing the conclusions arrived at by Shah, J with this separate judgment since I am of the view that while there is no disagreement on the essential reasoning, some aspects need to be discussed, in addition.

2. The following questions have been referred to this larger bench of five judges:

(1) Whether the protection granted to a person under Section 438 Cr. PC should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.

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

Background

3. First, a background. The judgment of a five-judge bench of this court in *Shri Gurbaksh Singh Sibbia and others v. State of Punjab*[1] considered the available views on the provision for anticipatory bail (a concept not in existence till the enactment of the Criminal Procedure Code, 1973- hereafter "Cr. PC" or "the Code"). Section 438 enables two classes of courts- a Court of Sessions and High Court, to issue directions

[1] 1980 (2) SCC 565

not to arrest a person, who apprehends arrest. *Sibbia* comprehensively dealt with the history of the provision, the felt need which resulted in its enactment, the observations and comments of the 41st Report of the Law Commission, which had suggested introduction of such a provision, and the efficacy of prevailing practices. In brief, *Sibbia* (which this court would analyze in greater detail later) held that the power (to grant anticipatory bail) is cast in wide terms and should not be hedged in through narrow judicial interpretation. At the same time, the larger bench (of five judges, which decided *Sibbia*) ruled that in given individual cases, courts could impose conditions which were appropriate, having regard to the circumstances.

4. This reference is necessitated, because in the present case, a bench of three judges, on 15th May 2018, noticed conflicting views regarding interpretation of the provision- Section 438. The court noticed, *prima facie,* that one line of judgments (*Salauddin Abdulsamad Shaikh v. State of Maharashtra*[2]; *K.L. Verma v. State & Anr*[3]; *Sunita Devi v. State of Bihar & Anr*[4]; *Adri Dharan Das v. State of West Bengal*[5]; *Nirmal Jeet Kaur v. State of M.P. & Anr*[6]; *HDFC Bank Limited v. J.J. Mannan*[7]; *Satpal Singh v. the State of Punjab*[8] and *Naresh Kumar Yadav v Ravindra Kumar*[9] held that anticipatory bail orders should invariably contain conditions, either with reference to time, or occurrence of an event, such as filing of a charge sheet, in criminal proceedings, that would define its time of operation, after which the individual concerned would have to secure regular bail, under Section 439 Cr. PC. The court also noticed, that on the other hand, the observations in *Sibbia* did not suggest such an inflexible approach. The second line of cases included *Siddharam Satlingappa Mhetre v. State of Maharashtra*

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[2] (1996 (1) SCC 667)

[3] 1998 (9) SCC 348

[4] 2005 (1) SCC 608

[5] 2005 (4) SCC 303

[6] 2004 (7) SCC 558

[7] 2010 (1) SCC 679

[8] 2018 SCC Online (SC 415

[9] 2008 (1) SCC 632

& Ors[10] and *Bhadresh Bipinbhai Sheth v. State of Gujarat & Anr*[11]; these held that no conditions ought to be imposed by the court, whilst granting anticipatory bail, which was to inure and protect the individual indefinitely- even when charges were framed in a given criminal case, leading to trial- till the end of the trial.

5. The court, in *Sibbia,* elaborately dealt with the background which led to the introduction of the provision for anticipatory bail. It took note of the forty first report of the Law Commission, on whose recommendations the provision was introduced. *Sibbia* traced the history of the provision, from the stage of the recommendation, to the draft bill and later its enactment, observing as follows:

> *"4. The CrPC, 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 CrPC 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 put the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant "anticipate; bail". It observed in paragraph 39.9 of its report (Volume I) :*
>
> *39.9. 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.*

[10] 2011 (1) SCC 694

[11] 2016 (1) SCC 152

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 :

> *'497A. (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 CrPC, 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 lime 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 paragraph 31 of its 48th Report (1972), made the following comments on the aforesaid Clause.

'31. 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 CrPC, 1973 which we have extracted at the outset of this judgment."

6. The context of *Sibbia* was the correctness of a decision of the Full Bench of the Punjab and Haryana High Court, which restrictively interpreted Section 438 and held that the power under Section 438, *"is extra-ordinary"* and must be exercised sparingly in exceptional cases only; that it does not empower the grant of anticipatory bail in a blanket manner, in respect of offences not yet committed or with regard to accusations not yet levelled; that it is not an unguided power, but subject to limitations in Section 437 – which are implicit and must be read into Section 438. The Full Bench also held

that the petitioner must *"must make out a special case for the exercise of the power to grant anticipatory bail"*; and further that where a legitimate case for remand to police custody is made or a reasonable claim to secure incriminating material from information likely to be received from the offender *"under Section 27 of the Evidence Act can be made out, the power Under Section 438 should not be exercised."* The full bench held that Section 438 cannot be availed in respect of offences punishable with death or life imprisonment *"unless the court at that very stage is satisfied that such a charge appears to be false or groundless."* Likewise, in larger public interest and the state's interest Section 438 cannot be resorted to in *"economic offences involving blatant corruption at the higher rungs of the executive and political power"* and that

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

7. *Sibbia* discussed this issue and held that the narrow, restricted interpretation of Section 438 was not warranted. The court disapproved the Punjab High Court Full Bench decision; the five judge Bench ruled as follows:

> *"...The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully: Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in para 39.9 that it had "considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing*

from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Sub-section (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in clauses (i) to (iv) of sub-section (2). The proof of legislative intent can best be found in the language which the legislature uses. Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non- bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail if generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a non-bailable offence asks for bail. In the latter situation, adequate data is available to the court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437.

***13.** This is not to say that anticipatory bail, if granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of Section 438. Though sub-section (1) of that section says that the court "may, if it thinks fit" issue the necessary direction for bail, sub-section (2) confers on the court the power to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in clauses (i) to (iv) of that sub-section. The controversy therefore is not whether the court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse*

bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code.

***14**. Generalizations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion unhampered by rules of general application.*

***19.** A great deal has been said by the High Court on the fifth proposition framed by it, according to which, inter alia, the power under Section 438 should not be exercised if the investigating agency can make a reasonable claim that it can secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act. According to the High Court, it is the right and the duty of the police to investigate into offences brought to their notice and therefore, courts should be careful not to exercise their powers in a manner which is calculated to cause interference therewith. It is true that the functions of the judiciary and the police are in a sense complementary and not overlapping. And, as observed by the Privy Council in King-Emperor v. Khwaja Nazir Ahmed [AIR 1945 PC 18 : (1943-44) 71 IA 203 : 46 Cri LJ 413] :*

> *"Just as it is essential that every one accused of a crime should have free access to a Court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry .... The functions of the judiciary and the police are complementary, not overlapping, and the combination of the individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function,..."*

But these remarks, may it be remembered, were made by the Privy Council while rejecting the view of the Lahore High Court that it had inherent jurisdiction under the old Section 561-A of the Criminal Procedure Code, to quash all proceedings taken by the police in pursuance of two first information reports made to them. An order quashing such proceedings puts an end to the proceedings with the inevitable result that all investigation into the accusation comes to a halt. Therefore, it was held that the court cannot, in the exercise of its inherent powers, virtually direct that the police shall not investigate into the charges contained in the FIR. We are concerned here with a situation of an altogether different kind. An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. In fact, two of the usual conditions incorporated in a direction issued under Section 438(1) are those recommended in sub-section (2)(i) and (ii) which require the applicant to cooperate with the police and to assure that he shall not tamper with the witnesses during and after the investigation. While granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v. Deoman Upadhyaya [AIR 1960 SC 1125 : (1961) 1 SCR 14, 26 : 1960 Cri LJ 1504] to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under Section 167(2) of the Code is made out by the investigating agency.

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21. The High Court says in its fourth proposition that in addition to the limitations mentioned in Section 437, the petitioner must make out a "special case" for the exercise of the power to grant anticipatory bail. This, virtually, reduces the salutary power conferred by Section 438 to a dead letter. In its anxiety, otherwise just, to show that the power conferred by Section 438 is not "unguided or uncanalised", the High Court has subjected that power to a restraint which will have the effect of making the power utterly unguided.

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". We do not see why the provisions of Section 438 should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable. A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

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22. *By proposition No. 1 the High Court says that the power conferred by Section 438 is "of an extraordinary character and must be exercised sparingly in exceptional cases only". It may perhaps be right to describe the power as of an extraordinary character because ordinarily the bail is applied for under Section 437 or Section 439. These sections deal with the power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for. But this does not justify the conclusion that the power must be exercised in exceptional cases only, because it is of an extraordinary character. We will really be saying once too often that all discretion has to be exercised with care and circumspection, depending on circumstances justifying its exercise. It is unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self-imposed limitations.*

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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 [Maneka Gandhi*

v. Union of India, (1978) 1 SCC 248] , 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.

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33. *We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the ground that, after all, "the legislature in its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected.*

34. *This should be the end of the matter, but it is necessary to clarify a few points which have given rise to certain misgivings.*

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.

***40.** We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition (2). We agree that a 'blanket order' of anticipatory bail should not generally be passed. This flows from the very language of the section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue under Section 438(1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which, no concrete information can possibly be had. The rationale of a direction under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.*

***41.** Apart from the fact that the very language of the statute compels this construction, there is an important principle involved in the insistence that facts, on the basis of which a direction under Section 438(1) is sought, must be clear and specific, not vague and general. It is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them*

can be avoided. A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a vacuum.

42. *There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can an order of bail be passed under the section without notice to the Public Prosecutor? It can be. But notice should issue to the Public Prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. 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.*

43. *During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in Section 438(2) (i), (ii) and (iii). The court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made under Section 27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the FIR in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various courts have long since been released by this Court under Section 438(1) of the Code."*

8. The judgment in *Sibbia* was understood and no apprehensions were reflected about the duration of anticipatory bail orders, in the next decade and a half. While so, in *Salauddin Abdulsamad Shaikh V. State of Maharashtra,* (1996) 1 SCC 667 for the first time, a discordant note appears to have been struck. It was stated in *Salauddin* (supra) that grant of anticipatory bail should not mean that the regular court, which is to try the offender, would be *"bypassed"*. This court approved the approach of the High Court, which had fixed the outer date for the continuance of the bail and further directed that the petitioner, upon expiry, should move the regular court of bail. *Salauddin* further held that the procedure followed by the High Court was correct, because:

> *"it must be realised that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offender. It is therefore, necessary that such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it 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 submitted"."*

9. The approach and reasoning in *Salauddin* was applied and reiterated by this Court, in *K.L. Verma v. State*[12]. That decision (*K.L. Verma*) further explained the scope of the provision that till the regular bail application of an accused, enjoying protection under Section 438 is pending before the regular court he need not surrender and his protection will continue till the disposal of the regular bail application under Section 437 or Section 439, and that she or he has to move an application (for regular bail) after expiry of a certain duration as directed by the Court or if the Charge-sheet is submitted because regular courts cannot be bypassed. It was held, in *K.L. Verma* that:

> *"3....This Court further observed that 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...By this, what the Court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration as the regular court cannot be bypassed. The limited duration must be determined*

[12] 1998 (9) SCC 348

having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. ..... This decision was not intended to convey that as soon as the accused persons are produced before the regular court the anticipatory bail ends even if the court is yet to decide the question of bail on merits. The decision in Salauddin case [(1996) 1 SCC 667] has to be so understood."

10. Again, *Sunita Devi; Nirmal Jeet Kaur* and *Adri Dharan Das* (supra) are three later decisions where this court applied the *ratio* in *Salauddin* and echoed the concern that the " protective umbrella" of Section 438 cannot be extended beyond the time period indicated in the previous case (*Salauddin*) or *till the applicant avails remedies up to high courts* and that doing so would mean that the regular court would be bypassed. The court reiterated that Section 439 would be rendered a dead letter if the applicant is allowed the benefit of an order under Section 438 till, he avails the remedy of regular bail up to higher courts. In *HDFC Bank Ltd. v. J.J. Mannan,*[13]this court followed and applied the reasoning in *Salauddin,* to the extent that certain limitations must be imposed, while granting anticipatory bail. A new axiom too was added, that if the police "made out" a case against the applicant and his name was 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.."* The court observed that:

***"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 Cr PC 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 Cr PC, 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.*

[13] 2010 (1) SCC 679

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."

11. In the light of these decisions, which narrowed the scope and jurisdiction under Section 438, the judgment in *Mhetre* noticed that *Sibbia* was by a Bench of five judges, which indicated that imposition of restrictions for granting anticipatory bail was not always necessary. The court, in *Mhetre* observed as follows:

"... Those orders are contrary to the law laid down by the judgment of the Constitution Bench in Sibbia's case (supra). According to the report of the National Police Commission, the power of arrest is grossly abused and clearly violates the personal liberty of the people, as enshrined under Article 21 of the Constitution, then the courts need to take serious notice of it. When conviction rate is admittedly less than 10%, then the police should be slow in arresting the accused. The courts considering the bail application should try to maintain fine balance between the societal interest vis-à-vis personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused that the accused is presumed to be innocent till he is found guilty by the competent court.

***94.** The complaint filed against the accused needs to be thoroughly examined including the aspect whether the complainant has filed false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.*

***95.** The gravity of charge and exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.*

***96.** It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where*

the court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.

97. *A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage. Whether the powers under section 438 Cr.P.C. are subject to limitation of section 437 Cr.P.C.?*

98. *The question which arises for consideration is whether the powers under section 438 Cr.P.C. are unguided or uncanalised or are subject to all the limitations of section 437 Cr.P.C.? The Constitution Bench in Sibbia's case (supra) has clearly observed that there is no justification for reading into section 438 Cr.P.C. and the limitations mentioned in section 437 Cr.P.C. The Court further observed that the plentitude of the section must be given its full play. The Constitution Bench has also observed that the High Court is not right in observing that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by section 438 Cr.P.C. to a dead letter. The Court observed that "We do not see why the provisions of Section 438 Cr.P.C. should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable."*

99. *As aptly observed in Sibbia's case (supra) that a wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.*

100. *The Constitution Bench in the same judgment also observed that a person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall enlarged on bail.*

101. *The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the public prosecutor. After hearing the public prosecutor the court may either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The public prosecutor or complainant would be at liberty to move the*

same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.

102. *The order granting anticipatory bail for a limited duration and thereafter directing the accused to surrender and apply before a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in Sibbia's case (supra).*

103. *It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the public prosecutor or the complainant on finding new material or circumstances at any point of time.*

104. *The intention of the legislature is quite clear that the power of grant or refusal of bail is entirely discretionary. The Constitution Bench in Sibbia's case (supra) has clearly stated that grant and refusal is discretionary and it should depend on the facts and circumstances of each case. The Constitution Bench in the said case has aptly observed that we must respect the wisdom of the Legislature entrusting this power to the superior courts namely, the High Court and the Court of Session. The Constitution Bench observed as under:*

> *"We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognized over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the grounds that, after all "the legislature in, its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected."*

GRANT OF BAIL FOR LIMITED PERIOD IS CONTRARY TO THE LEGISLATIVE INTENTION AND LAW DECLARED BY THE CONSTITUTION BENCH:

105. *The court which grants the bail has the right to cancel the bail according to the provisions of the General Clauses Act but ordinarily after hearing the public prosecutor when the bail order is confirmed then the benefit of the grant of the bail should continue till the end of the trial of that case.*

106. *The judgment in Salauddin Abdulsamad Shaikh (supra) is contrary to legislative intent and the spirit of the very provisions of the anticipatory bail itself and has resulted in an artificial and unreasonable restriction on the scope of enactment contrary to the legislative intention.*

107. *The restriction on the provision of anticipatory bail under section 438 Cr.P.C. limits the personal liberty of the accused granted under Article 21 of the constitution. The added observation is nowhere found in the enactment and bringing in restrictions which are not found in the enactment is again an unreasonable restriction. It would not stand the test of fairness and reasonableness which is implicit in Article 21 of the Constitution after the decision in Maneka Gandhi's case (supra) in which the court observed 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.*

108. *Section 438 Cr.P.C. does not mention anything about the duration to which a direction for release on bail in the event of arrest can be granted. The order granting anticipatory bail is a direction specifically to release the accused on bail in the event of his arrest. Once such a direction of anticipatory bail is executed by the accused and he is released on bail, the concerned court would be fully justified in imposing conditions including direction of joining investigation.*

109. *The court does not use the expression 'anticipatory bail' but it provides for issuance of direction for the release on bail by the High Court or the Court of Sessions in the event of arrest. According to the aforesaid judgment of Salauddin's case, the accused has to surrender before the trial court and only thereafter he/she can make prayer for grant of bail by the trial court. The trial court would release the accused only after he has surrendered.*

110. *In pursuance to the order of the Court of Sessions or the High Court, 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.*

111. *The court must bear in mind that at times the applicant would approach the court for grant of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. In fact, the investigating or concerned agency may not otherwise arrest that applicant who has applied for anticipatory bail but just because he makes an application before the court and gets the relief from the court for a limited period and thereafter he has to surrender before the trial court and only thereafter his bail application can be considered and life of anticipatory bail comes to an end. This may lead to disastrous and unfortunate consequences. The applicant who may not have otherwise lost his liberty loses it because he chose to file application of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. No arrest should be made because it is lawful for the police*

officer to do so. The existence of power to arrest is one thing and 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. This finding of the said judgment (supra) is contrary to the legislative intention and law which has been declared by a Constitution Bench of this court in Sibbia's case (supra).

112. *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 Cr.P.C. 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.*

113. *It is a settled legal position crystallized by the Constitution Bench of this court in Sibbia's case (supra) that the courts should not impose restrictions on the ambit and scope of section 438 Cr.P.C. which are not envisaged by the Legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it.*

114. *It is unreasonable to lay down strict, inflexible and rigid rules for exercise of such discretion by limiting the period of which an order under this section could be granted. We deem it appropriate to reproduce some observations of the judgment of the Constitution Bench of this court in the Sibbia's case (supra)..."*

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121. *No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.*

122. *The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:*

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

ii. The antecedents of the applicant including the fact as to whether the accused 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;

iv. The possibility of the accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

***123.** The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.*

***124.** The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.*

***125.** These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The*

legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available."

12. These seemingly incongruent strands of reasoning- stemming from the two distinct line of precedents, spawning divergent approaches to the scope of jurisdiction under Section 438 have impelled the reference to this larger Bench.

The provisions

13. For completeness, it is essential to set out the relevant provisions: to wit, Sections 437, 438 and 439 of the Code of Criminal Procedure, 1974 (hereafter variously "Cr.PC" and "the Code"). They are reproduced in the footnote below.[14]

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[14] *"437. **When bail may be taken in case of non- bailable offence.***

(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years.

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm.

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason.

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and

gives an undertaking that he shall comply with such directions as may be given by the Court.

Provided also that no person shall if the offence alleged to have been committed by him is punishable with death imprisonment for life or imprisonment for seven years or more be released on bail by the Court under this sub-section without giving an opportunity of hearing to the public prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non- bailable offence, but that there are sufficient grounds for further inquiry into his guilt the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail or at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court shall impose the conditions-

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) that such person shall not commit an offence similar to the offence of which he is accused or suspected of the commission of which he is suspected, and

(c) that such 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 for disclosing such facts to the Court or to any police officer or tamper with the evidence,

and may also impose in the interest of justice such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under sub- section (1) or sub- section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under sub- section (1) or sub- section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non- bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the

Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

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

*** By amendment, made in 2005, Subsection (1) has been substituted as follows (the amended portion is brackets; <u>the amendment has not yet been brought into force</u>):**

["(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 the 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 police station to arrest without warrant the applicant on the basis of the accusation apprehended in such application

(IA) Where the Courts grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with the

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

(IB) 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.]

The unamended portion- Section 438 (2) and (3), and the newly introduced sub-section (4) read as follows:

(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).

439. Special powers of High Court or Court of Session regarding bail.

(1) A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in subsection (3) of Section 437, may

Contentions of parties

14. Mr. Abhay Kumar, for the petitioner, argued that it is not correct to find any limitation on the life span of an order of anticipatory bail in terms of its duration by reading the para 42 of *Sibbia Case;* and that the life of anticipatory bail is coterminous with the life of criminal case, whether the criminal case gets over either at the stage of trial or before it, in a given case. He further urged that personal liberty is a cherished freedom, even more important than the other freedoms guaranteed under the Constitution. The Constitution framers therefore enacted safeguards in Article 22 in the Constitution to limit the power of the State to detain a person without trial, which may otherwise pass the test of Article 21, by humanizing the harsh authority over individual liberty.

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impose any condition which it considers necessary for the purposes mentioned in that sub- section;

(b) that any condition imposed by a Magistrate when releasing an person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

Provided further that the High Court or the Court of Session shall before granting bail to a person who is an accused of an offence triable 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) give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.

(IA) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub-Section (3) of the Section 376 or Section 376 AB or Section 376 DA or Section 376 DB of the Indian Penal Code (45 of 1860) (2). A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

15. It is submitted, therefore that the substantive constitutional right of personal liberty can be denied or curtailed only in accordance with the procedure established by a law that is fair, just and reasonable. That substantial right is procedurally enforced, apart from others, in terms of grant of Bail to an accused in a criminal case. Chapter XXXIII of the Code contains elaborate provisions relating to grant of bail. Bail is granted to one who is arrested in a non-bailable offence or has been convicted of an offence after trail. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. "Bail" literally means surety.

16. The literal meaning of the word "bail" is surety. Counsel referred to the meaning of "bail" in *Halsbury's Laws of England(Halsbury's Laws of England, 4th Edn., Vol. 11, para 166),* and submitted that it is aimed at placing the accused in the custody of his sureties who are bound to produce him to appear at his trial.[15]Upon grant of bail, the accused is mandated to furnish bond and bail-bond for attendance before officer in charge of police station or Court in terms of prescribes format of Form No. 45 of Schedule 2 of the Code by giving necessary details. Bail, it was highlighted, can be given at any stage: pre-trial, during trial and even after completion of trial. Counsel submitted that apart from provisions in Chapter XXXII of Cr.PC (Sections 436-450), there are other provisions relevant on the issue, i.e. Section 360 (Order to release on probation of good conduct or after admonition, a post-conviction stage and Section389 (Suspension of sentence pending the appeal and release of appellant on bail - postconviction and during pendency of Appeal). Section 438 manifests the principle of liberty.—

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[15] Halsbury's Laws of England (4th Edn., Vol. 11, para 166): *"The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned."*

17. Counsel highlighted that anticipatory bail is panacea for apprehension of arrest in false case. Anticipatory bail protects from trauma and stigma of arrest of an innocent (in most of the cases, full of various responsibilities and even being sole bread earner of her/his family members), consequently prohibiting in creating reverse victims by way of dependent upon the said accused. An elementary postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus is placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Counsel relied on *Dataram Singh v. State of U.P* (2018) 3 SCC 22).

18. Counsel submitted that the provision in Section 438 read with Section 439 (2) of the Code, contain clear guidelines and limitations. It was highlighted that the discretion to impose (or not impose) condition is left to the concerned court and the Code therefore cannot be interpreted to cut short its duration either till filing of charge-sheet or unearthing of alleged fresh materials during investigation. It is submitted that the power to curtail or to diminish, the duration of anticipatory bail, in a suitable case, is governed by Section 439(2) of the Code in the same manner which is enumerated in Section 437 of the Code (which is applicable to a Court other than High Court or Court of Session). The counsel urged that there have been instances of courts passing orders, including in some of the orders/judgments of this Court, wherein denial of anticipatory bail is followed by direction to accused to surrender and seek regular bail. This, counsel highlighted, is not based on any sound *rationale*.

19. Mr. C.S.N. Mohan Rao, learned counsel, emphasized that arrest of an accused, is governed, by Sections 41-46 of the Code. The arrest of an accused, is required, if at all, broadly for unearthing the truth of the case during investigation (a choice of the investigating agency) and to secure the presence of accused during trial, for free and fair trial including exclusion of any possibility of influencing of witnesses/and

tampering of evidence or aborting a trial by absconding (prerogative of the trail court) or any other means or method known or unknown. Therefore, whether an accused has to be arrested and kept in custody and remains in that state of physical confinement, ideally is to be the domain of the prosecuting agency and /or of trying Court. There are sufficient methods enlisted in the Code to ensure this end by both i.e. the prosecuting agency including complainant/victim and also to the concerned court- by filing of cancellation of bail by former and issuance of bailable and non-bailable warrant by the latter. Counsel argued that in any case, rejection of an application for anticipatory bail, at first instance, does not automatically give rise to evil consequences for an accused to surrender and seek regular bail. The filing of subsequent anticipatory bail and grant of the relief by a competent court of law in a suitable case, upon showing proper and inspiring subsequent chance in circumstances in favour of accused, is sufficient indicative factor of the proposition that a rejection of anticipatory will generate no automatic warrant for an accused to surrender and seek regular bail. If subsequent and material change or circumstance can be a plausible reason for cancellation of bail, is should definitely, considering the valuable right of an accused, equally there can be a reason for applying fresh application for anticipatory bail in a suitable case. Having regard to all these factors, counsel urged this court to endorse the reasoning in *Mhetre* which according to him is conformity with the larger bench ruling in *Sibbia,* and accommodates the flexibilities in the Code.

20. Mr. Rao relied on the observations in *Gurcharan Singh v State (Delhi Admn)*[16] to say that cancellation of anticipatory bail, when warranted by the facts, is the answer

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[16] 1978 (1) SCC 118. The observations are as follows:

"under Section 439 (2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any Court including the Court of Session to custody, if it thinks appropriate to do so. It must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court. If, however, a Court of Session had admitted an accused person to bail, the State has two options. it may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under Section 439 (2) to commit the accused to custody.

where the fact situation requires the applicant (who is beneficiary of an order under Section 438 CrPC) rather than limiting the order of anticipatory bail. He also pointed out observations in *Gurcharan Singh* (supra) to say that statutory bail (i.e. where charge sheet is not filed in a case within the prescribed period of 60 or 90 days, leading to release by operation of Section 167 (2) of the Code[17]) amounts to deemed bail under Chapter XXXIII of the Code:

> *"Under the first proviso to S.167 (2) no Magistrate shall authorise the detention of an accused in custody under that section for a total period exceeding 60 days on the expiry of which the accused shall be released on bail if he is prepared to furnish the same- This type of release under*

When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that leave copied up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a- vis the High Court."

[17] Section 167 (2) CrPC reads as follows:

"(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and ***every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;.."***

the proviso shall be deemed to be a release under the provisions of Chapter XXXIII relating to bail."

21. It was submitted that the decisions in *Aslam Babalal Desai v State of Maharastra*[18] is an authority for the proposition that there can be no cancellation of the bail granted, or deemed to be granted, under Section 167 (2) merely upon the later filing of a charge sheet. The court had observed as follows, in *Aslam Babalal Desai* (supra) in this context:

> *"It will thus be seen that once an accused person has been released on bail by the thrust of the proviso to Section 167 (2), the mere fact that subsequent to his release a challan has been filed is not sufficient to cancel his bail. In such a situation his bail can be cancelled only if considerations germane to cancellation of bail under Section 437 (5) or for that matter Section 439 (2) exist. That is because the release of a person under Section Section 167 (2) is equated to his release under Chapter XXXIII of the Code."*

It was submitted that therefore, the mere filing of a charge sheet *per se* cannot be an event which compels an accused who has the benefit of anticipatory bail, to surrender and seek regular bail. The grounds for cancellation of bail are to be made out, separately.

22. Mr. K.V. Vishwanathan, learned Senior Counsel emphasised that the exercise of power under Section 438 is identical to the exercise of power under Sections 437 and 439 Cr. P.C. Consequently, pre arrest bail granted in anticipation of arrest- under Section 438, in his submission, operates like any other order of bail i.e. till an order of conviction or affirmative direction is passed to arrest the individuals, is made under Section 439 (2). Mr. Vishwanathan highlighted that Section 438 has an intrinsic link with Article 21 in as much as it seeks to balance state's power and responsibility to investigate offence, with its duty to protect individual rights and liberties of citizens. It was submitted that Article 21 raises the presumption of innocence in favour of other accused; consequently, this has to be at the centre of every consideration of penal statutes and their interpretation.

23. It was also submitted that Section 438 being part of procedure established by law is to be construed in a fair, just and reasonable manner. Learned counsel reiterated that

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[18] 1992 (4) SCC 272

this was what the Court highlighted in *Sibbia*. Mr. Vishwanathan, after outlining the background of Section 438 - in the context of the observations of the 41st Law Commission Report submitted that those comments should also be considered in the light of the observations made in the *Report of the Committee on Reforms of the Criminal Justice System* by Dr. Justice V.S. Malimath. Reliance on para 7.26.3.[19]

24. It was urged that the power of arrest with the police is under Section 41 of the CrPC. That provision is in two parts. One, relating to offences in which the maximum punishment can extend to imprisonment for seven year. Second, relating to offences in which the maximum punishment can extend to imprisonment to above seven years or death penalty. Though they have different conditions and thresholds, in both cases it is clear from a bare reading of the section that the power of arrest cannot be exercised in ever FIR that is registered u/s 154 Cr.PC. This power is circumscribed by the conditions laid down in this section. Moreover, this principle that the power of arrest is not required to be exercised in every case was recognized in the case of *Joginder Kumar v. State of U.P*[20]; *Lalitha Kumari v. State of U.P*[21]; and *Arnesh Kumar v. State of Bihar*.[22] This Court in *M.C. Abraham v. State of Maharastra*[23] held that it was not mandatory for the police to arrest a person only because his/her anticipatory bail had been rejected. It was further stated that the power of arrest is then further circumscribed by Section 438. As recognized by the Law Commission, there are cases where the power of arrest is not required or allowed to be exercised. Exercising power of arrest in such cases would be a grave violation of a person's right and liberty. Such exercise of power would amount to misuse of Section 41. The check on the power of arrest and custody provided by

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[19] The Report remarked – after considering 3rd Report of the National Police Commission that the *"power of arrest was one of the chief sources of corruption in the police. The report suggested that by and large nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the prison department"*.

[20] 1994 (4) SCC 260

[21] 2014 (2) SCC 1

[22] 2014 (8) SCC 273

[23] 2003 (2) SCC 649

Sections 437 or 439 is limited as the check is only *post facto*. By then the person arrested has already suffered the trauma and humiliation of arrest.

25. Counsel submitted to strike a further balance between the power of arrest and the rights of the accused, the power under Section 438 is specifically given to the Court of Session and the High Court so as to ensure that this judicial intervention is done at the supervisory level and not at the magisterial level. It is in this light that the two questions raised in the present reference need to be addressed. It was urged that a bare reading of Section 438 shows that there is nothing in the language of the section which goes to show that the pre-arrest bail granted under this section has to be time-bound. The position is the same as in Sections 437 and 439. Counsel pointed to Section 438 (3) and submitted that two important aspects of this provision highlight the understanding the scheme of the Code:

a) A person in whose favour a pre-arrest bail order has been made under Section 438 has to first be arrested. Such person is then released on bail on the basis of the pre-arrest bail order. For such release the person has to comply with the requirement of Section 441 of giving a bond or surety; and

b) Where the magistrate taking cognizance u/s 204 is of the view that a warrant is required to be issued at the first instance, such magistrate is only empowered to issue only a *bailable warrant* and not a non-bailable warrant.

26. This curtailment of power of the magistrate clearly shows Parliamentary intent that one who is granted relief under Section 438 ought not to be arrested at the stage of cognizance because of the said pre-arrest bail order. Considering this express provision, no other interpretation can be given to the said section. The second question referred here squarely covered by this sub-section. This order passed under Section 438, is a pre-arrest direction (to release on bail, in the event of arrest), is subject to the power granted to the Court of Session and the High Court under Section 439(2) Cr. P.C. It is clear from the provision that a bail granted under Section 438 is further governed by Section 439(2) which gives the power to the Court of Session or the High Court to direct the arrest of the accused at any time. This ensures that through judicial intervention the balance between the two competing principles can again be revisited if the need arises.

In other words, considering any relevant change in circumstances the prosecution can seek the arrest of the accused. The only difference is that the power of arrest in these cases is exercised only after judicial scrutiny. This provision envisions that the Code presupposes that orders once passed under Sections 438 and 439 will continue till a contrary order is passed under Section 439(2). The order passed under Sections 438 or 439 are not and temporary or time bound. Therefore, a person enjoying the benefit of orders under these sections can be taken into custody only when a specific direction is passed under Section 439(2). This direction for arrest under Section 439 (2) is different from seeking cancellation of bail.

27. It was argued that undoubtedly violation of a condition imposed in an order passed under Section 438 can lead to a direction of arrest under Section 439(2). However, the scope of Section 439(2) is not limited to only cancellation of bail. Counsel stated that this proposition of law was considered by this court in *Pradeep Ram v. State of Jharkhand*[24]. In this case, this court while considering an earlier judgment in *Mithabhai Pashabhai Patel v. State of Gujarat*[25], held that by virtue of Sections 437(5) and 439(2), a direction to take a person into custody could be passed despite his being released on bail, by a previous order. The court held that under Sections 437(5) and 439(2) a person could be directed to be taken into custody without necessarily cancelling his earlier bail. The difference between cancellation of bail and a direction to take a person into custody under Section 439(2) was recognised. It was also held in this case that if a graver offence is added to the FIR or to the case after the person has been granted bail, a direction under Section 439(2) or 437(5) is required before such person can be arrested again for the new offences added to the case. Therefore, this court recognized the need for court's supervision after the bail had been granted.

28. Mr. Hiren Raval, learned *amicus curiae,* highlighted that while there are passages in *Sibbia (supra),* which support the arguments of the petitioners, that orders under Section 438 can be unconditional and not limited by time, the court equally struck a note of caution, and wished courts to be circumspect while making orders of

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[24] 2019 SCC Online (SC) 825

[25] 2009 (6) SCC 332,

anticipatory bail. In this regard, learned senior counsel highlighted paragraphs 42 and 43 of the decisions in *Sibbia.*

29. Elaborating on his submissions, the *amicus* submitted that whether to impose any conditions or limit the order of anticipatory bail in point of time undoubtedly falls within the discretion of the court seized of the application. He however submitted that this discretion should be exercised with caution and circumspection. Counsel submitted that there could be three situations when anticipatory bail applications are to be considered: one, when the application is filed in anticipation of arrest, before filing FIR; two, after filing FIR, but before the filing of the charge sheet; and three, after filing charge sheet. It was submitted that as a matter of prudence and for good reasons, articulated in *Salauddin, K.L. Verma, Adri Dharan Das* and decisions adopting their reasoning, it would be salutary and in public interest for courts to impose time limits for the life of orders of anticipatory bail. Counsel submitted that if anticipatory bail is sought before filing of an FIR the courts should grant relief, limited till the point in time, when the FIR is filed. In the second situation, i.e. after the FIR is filed, the court may limit the grant of anticipatory bail till the point of time when a charge sheet is filed; in the third situation, if the application is made after filing the charge sheet, it is up to the court, to grant or refuse it altogether, looking at the nature of the charge. Likewise, if arrest is apprehended, the court should consider the matter in an entirely discretionary manner, and impose such conditions as may be deemed appropriate.

30. Mr. Raval submitted that in every contingency, the court is not powerless after the grant of an order of anticipatory bail; it retains the discretion to revisit the matter if new material relevant to the issue, is discovered and placed on record before it. He highlighted Section 439(2) and argued that that provision exemplified the power of the court to modify its previous approach and even revoke altogether an earlier order granting anticipatory bail. It was submitted that the bar under Section 362 of the Code (against review of an order by a criminal court) is inapplicable to matters of anticipatory bail, given the nature and content of the power under Section 439(2).

31. Mr. Raval also submitted that power under Section 438 cannot be exercised to undermine any criminal investigation. He highlighted the concern that an unconditional order of anticipatory bail, would be capable of misuse to claim immunity in a blanket

manner, which was never the intent of Parliament. Counsel submitted that besides, the discretion of courts empowered to grant anticipatory bail should be understood as balancing the right to liberty and the public interest in a fair and objective investigation. Therefore, such orders should be so fashioned as to ensure that accused individuals co-operate during investigations and assist in the process of recovery of suspect or incriminating material, which they may lead the police to discover or recover and which is admissible, during the trial, *per* Section 27 of the Evidence Act. He submitted that if these concerns are taken into account, the declaration of law in *Mhetre* -- particularly in Paras 122 and 123 that no condition can be imposed by court, in regard to applications for anticipatory bail, is erroneous; it is contrary to Para 42 and 43 of the declaration of law in *Sibbia's* case (supra). It was emphasized that ever since the decision in *Salauddin* and other subsequent judgments which followed it, the practise of courts generally was to impose conditions while granting anticipatory bail: especially conditions which required the applicant/ accused to apply for bail after 90 days, or surrender once the charge sheet was filed, and apply for regular bail. Counsel relied on Section 437(3) to say that the conditions spelt out in that provision are to be considered, while granting anticipatory bail, by virtue of Section 438(2).

32. Mr. Tushar Mehta, learned Solicitor General and Mr. Vikramjit Banerjee, learned Additional Solicitor General, submitted that the decision in *Mhetre (supra)* is erroneous and should be overruled. It was submitted that though Section 438 does not *per se* pre-suppose imposition of conditions for grant of anticipatory bail, nevertheless, given Section 438(2) and Section 437(3), various factors must be taken into account. Whilst exercising power to grant (or refuse) a direction in the nature of anticipatory bail, the court is bound to strike a balance between the individual's right to personal freedom and the right of investigation of the police. For this purpose, in granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2) to ensure an unimpeded investigation. The object of imposing conditions is to avoid the possibility of the person or accused hampering investigation. Thus, any condition, which has no reference to the fairness or propriety of the investigation or trial, cannot be countenanced as permissible under the law. Consequently, courts should exercise their discretion in imposing conditions with care and restraint.

33. The law presumes an accused to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to all the fundamental rights including the right to liberty guaranteed under Article 21 of the Constitution. Counsel stated that at the same time, while granting anticipatory bail, the courts are expected to consider and keep in mind the nature and gravity of accusation, antecedents of the applicant, namely, about his previous involvement in such offence and the possibility of the applicant to flee from justice. It is also the duty of the Court to ascertain whether accusation has been made with the object of injuring or humiliating him by having him so arrested. It is needless to mention that the Courts are duty bound to impose appropriate conditions as provided under Section 438(2) of the Code.

34. Counsel argued that there is no substantial difference between Sections 438 and 439 of the Code as regards appreciation of the case while granting or refusing bail. Neither anticipatory bail nor regular bail, however, can be granted as a matter of rule. Being an extraordinary privilege, should be granted only in exceptional cases. The judicial discretion conferred upon the court must be properly exercised after proper application of mind to decide whether it is a fit case for grant of anticipatory bail. In this regard, counsel relied on *Jai Prakash Singh v State of Bihar*[26]. Counsel relied on *State of M.P. & Anr. v Ram Kishna Balothia & Anr.*[27] where this court considered the nature of the right of anticipatory bail and observed that:

> *"We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Code of Criminal Procedure.....Also anticipatory hail cannot he granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot he considered as an essential ingredient of Article 21 of the Constitution. and its non-application to a certain special category of offences cannot he considered as violative of Article 21."*

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[26] 2012 (4) SCC 325

[27] 1995 Supp (3)SCC 419

35. The decisions in *Savitri Agarwal v. State of Maharashtra & Anr*[28], and *Sibbia* were referred to, to argue that before granting an order of anticipatory bail, the court should be satisfied that the applicant seeking it has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere "fear" is not belief; it is insufficient for an applicant to show that he has some sort of vague apprehension that someone is going to accuse him, for committing an offence pursuant to which he may be arrested. An applicant's grounds on which he believes he may be arrested for a non-bailable offence, must be capable of examination by the Court objectively. Specific events and facts should be disclosed to enable the Court to judge of the reasonableness of his belief, the existence of which is the *sine qua non* of the exercise of power conferred by the Section. It was pointed out that the provisions of Section 438 cannot be invoked after the arrest of the accused. 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. The following passages in *Savitri Agarwal* (supra) were relied upon:

> *"24. While cautioning against imposition of unnecessary restrictions on the scope of the section, because, in its opinion, overgenerous infusion of constraints and conditions, which were not to be found in Section 438 of the Code, could make the provision constitutionally vulnerable, since the right of personal freedom, as enshrined in Article 21 of the Constitution, cannot be made to depend on compliance with unreasonable restrictions, the Constitution Bench laid down the following guidelines, which the courts are required to keep in mind while dealing with an application for grant of anticipatory bail:*
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> ********** ****************
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> *(iv) No blanket order of bail should be passed and the court which grants anticipatory bail must take care to specify the offence or the offences in respect of which alone the order will be effective. While granting relief under Section 438(1) of the Code, appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One such condition can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the recovery. Otherwise, such an order*

[28] 2009 (8) SCC 325

can become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possible be predicated when the order was passed.

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(ix) Though it is not necessary that the operation of an order passed under Section 438(1) of the Code be limited in point of time but 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 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 reasonable short period after the filing of the FIR."

36. It was also argued on behalf of the Govt of NCT- and the Union, that this court had expressed a serious concern, time and again, that if accused or applicants who seek anticipatory bail are equipped with an unconditional order before they are interrogated by the police it would greatly harm the investigation and would impede the prospects of unearthing all the ramifications involved in a conspiracy. Public interest also would suffer as consequence. Reference was invited to *State of A.P. v. Bimal Krishna Kundu*[29] in this context. Likewise, attention of the court was invited to *Muraleedharan v. State of Kerala*[30] which held that *"Custodial interrogation of such an accused is indispensably necessary for the investigating agency to unearth all the links involved in the criminal conspiracies committed by the person which ultimately led to the capital tragedy."* It was highlighted that statements made during custodial interrogation are qualitatively more relevant to those made otherwise. Granting an unconditional order of anticipatory bail would therefore thwart a complete and objective investigation.

37. Mr. Aman Lekhi, learned Additional Solicitor General, urged that the general drift of reasoning in *Sibbia* was not in favour of a generalized imposition of conditions- either as to the period (in terms of time, or in terms of a specific event, such as filing of charge sheet) limiting the grant of anticipatory bail. It was submitted that the text of Section 439(2) applied *per se* to all forms of orders- including an order or direction to release an applicant on bail (i.e. grant of anticipatory bail), upon the

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[29] 1997 (8) SCC 104

[30] 2001 (4) SCC 638

court's satisfaction that it is necessary to do so. Such order (of cancellation, under Section 439(2) or direction to arrest) may made be where the conditions made applicable at the time of grant of relief, are violated or not complied with, or where the larger interests of a fair investigation necessitate it.

Analysis and Conclusions

> *Re Point No 1: Whether the protection granted to a person under Section 438, CrPC should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail*

38. The concept of bail, i.e. preserving the liberty of citizen – even accused of committing offences, but subject to conditions, dates back to antiquity. Justinian I in the collections of laws and interpretations which prevailed in his times, *Codex Justinianus* (or *'Code Jus'*) in Book 9 titled Title 3(2) stipulated that "*no accused person shall under any circumstances, be confined in prison before he is convicted*". The second example of a norm of the distant past is the *Magna Carta* which by clause 44 enacted that "*people who live outside the forest need not in future appear before the Royal Justices of the forest in answer to the general summons unless they are actually involved in proceedings or are sureties for someone who has been seized for a forest offence.*" Clear Parliamentary recognition of bail took shape in later enactments in the UK through the Habeas Corpus Act 1677 and the English Bill of Rights, 1689 which prescribed that "*excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted*".

39. Bail *ipso facto* has not been defined under the Code. It is now widely recognized as a norm which includes the governing principles enabling the setting of accused person on liberty subject to safeguards, required to make sure that he is present whenever needed. The justification for bail (to one accused of commission or committing a crime is that it preserves a person who is under cloud of having transgressed law but not convicted for it, from the rigors of a detention.

40. Section 438 of the Cr.PC provides for the issuance of directions for the grant of bail to a person apprehending arrest. The Cr.PC of 1973 replaced the old code of 1898. The old code did not provide for any corresponding provision to Section 438 of the code

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

41. The Law Commission of India, in its 41st Report of 1969, noted that the necessity for granting anticipatory bail arises mainly due to influential persons attempting to implicate their rivals in false cases, or disgracing them by getting them detained in jail. The report further noted that 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 to be no justification to require him first to submit to custody, remain in prison for some days and then apply for bail. The report recommended that a provision be included for the direction to grant bail in such cases, and that this power vest in the High Courts and Courts of Session only. The report, however, did not include the conditions for grant of anticipatory bail in the suggested language for the provision. Certain conditions that courts *may* include were, however included in the provision that was enacted as Section 438 of the Cr.PC, 1973.

42. The term 'anticipatory bail' finds no place in the Cr.PC itself but was used by the Law Commission of India in its 41st Report. The term was used to convey that it was an application for bail in anticipation of arrest, i.e., before the arrest itself is made. Grant of bail, according to Wharton's Law Lexicon, and as noticed in *Sibbia (supra)*, means to *"set at liberty a person arrested or imprisoned, on security being taken for his appearance"*. *Sibbia,* observed thus:

> *"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 CrPC 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.

43. In *Sibbia (supra),* this Court considered the specific question of whether the power to grant anticipatory bail under Section 438 is limited to contingencies such as the possibility that the police may use their investigative powers to humiliate the person sought to be arrested, or pervert the course of justice and abuse their powers of investigation. One of the arguments raised in *Sibbia,* as also in the present case, was that the power to grant anticipatory bail ought to be left to the discretion of the court concerned, depending on the facts and circumstances of each case. The State, on the other hand, argued that the grant of anticipatory bail should at least be conditional upon the bail applicant showing that he is likely to be arrested for an ulterior motive - that the proposed charges are baseless or motivated by *malafides*. The State also argued that anticipatory bail is an extraordinary remedy and therefore, whenever it appears that the proposed accusations are *prima facie* plausible, the applicant should be left to the ordinary remedy of applying for bail under Section 437 or Section 439 of the Cr.PC, after being arrested.

44. Counsel for the appellants in *Sibbia*, on the other hand, argued that since the denial of bail amounts to deprivation of personal liberty, courts should lean against the imposition of unnecessary restrictions on the scope of Section 438, when no such restrictions are prescribed by the legislature under that provision. The Court observed that Section 438(1) is couched in broad and unqualified terms and was of the opinion that such broad language ought not to be infused with restraints and conditions which the legislature itself did not think proper or necessary to impose. The court laid emphasis on the primacy of the presumption of innocence in criminal jurisprudence, and observed that Section 438 was not enacted on a clean slate, but rather within the context of the existing provisions, Sections 437 (dealing with the power of courts other than the Court

of Session and the High Court to grant bail in nonbailable cases) and Section 439 (which deals with the *"special powers"* of the High Court and the Court of Session regarding bail). In the light of the relevant extracts of *Sibbia,* it would now be worthwhile to recount the relevant observations on the issue. The discussion and conclusions in *Sibbia* are summarized as follows:

45. (i) Grant of an order of unconditional anticipatory bail would be *"plainly contrary to the very terms of Section 438."* Even though the terms of Section 438(1) confer discretion, Section 438(2) *"confers on the court the power to include such conditions in the direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in clauses (i) to (iv) of that sub-section."*

(ii) Grant of an order under Section 438(1) does not *per se* hamper investigation of an offence; Section 438(1)(i) and (ii) enjoin that an accused/applicant should co-operate with investigation. *Sibbia (supra)* also stated that courts can fashion appropriate conditions governing bail, as well. One condition can be that if the police make out a case of likely recovery of objects or discovery of facts under Section 27 (of the Evidence Act, 1872), the accused may be taken into custody. Given that there is no formal method prescribed by Section 46 of the Code if recovery is made during a statement (to the police) and pursuant to the accused volunteering the fact, it would be a case of recovery during "deemed arrest" (Para 19 of *Sibbia*).

(iii) The accused is not obliged to make out a special case for grant of anticipatory bail; reading an otherwise wide power would fetter the court's discretion. Whenever an application (for relief under Section 438) is moved, discretion has to be always exercised judiciously, and with caution, having regard to the facts of every case. (Para 21, *Sibbia*).

(iv) While the power of granting anticipatory bail is not ordinary, at the same time, its use is not confined to exceptional cases (Para 22, *Sibbia*).

(v) It is not justified to require courts to only grant anticipatory bail in special cases made out by accused, since the power is extraordinary, or that several considerations –

spelt out in Section 437- or other considerations, are to be kept in mind. (Para 24-25, *Sibbia*).

(vi) Overgenerous introduction (or reading into) of constraints on the power to grant anticipatory bail would render it Constitutionally vulnerable. Since fair procedure is part of Article 21, the court should not throw the provision (i.e. Section 438) open to challenge *"by reading words in it which are not to be found therein."* (Para 26).

(vii) There is no "inexorable rule" that anticipatory bail cannot be granted unless the applicant is the target of *mala fides*. There are several relevant considerations to be factored in, by the court, while considering whether to grant or refuse anticipatory bail. Nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the accused's presence not being secured during trial; a reasonable apprehension that the witnesses might be tampered with, and "the larger interests of the public or the state" are some of the considerations. A person seeking relief (of anticipatory bail) continues to be a man presumed to be innocent. (Para 31, *Sibbia*).

(viii) There can be no presumption that any class of accused- i.e. those accused of particular crimes, or those belonging to the poorer sections, are likely to abscond. (Para 32, *Sibbia*).

(ix) Courts should exercise their discretion while considering applications for anticipatory bail (as they do in the case of bail). It would be unwise to divest or limit their discretion by prescribing *"inflexible rules of general application."*. (Para 33, *Sibbia*).

(x) The apprehension of an applicant, who seeks anticipatory bail (about his imminent or possible arrest) should be based on reasonable grounds, and rooted on objective facts or materials, capable of examination and evaluation, by the court, and not based on vague un-spelt apprehensions. (Para 35, *Sibbia*).

(xi) The grounds for seeking anticipatory bail should be examined by the High Court or Court of Session, which should not leave the question for decision by the concerned Magistrate. (Para 36, *Sibbia*).

(xii) Filing of FIR is not a condition precedent for exercising power under Section 438; it can be done on a showing of reasonable belief of imminent arrest (of the applicant). (Para 37, *Sibbia*).

(xiii) Anticipatory bail can be granted even after filing of an FIR- as long as the applicant is not arrested. However, after arrest, an application for anticipatory bail is not maintainable. (Para 38-39, *Sibbia*).

(xiv) A blanket order under Section 438, directing the police to not arrest the applicant, *"wherever arrested and for whatever offence"* should not be issued. An order based on reasonable apprehension relating to specific facts (though not spelt out with exactness) can be made. A blanket order would seriously interfere with the duties of the police to enforce the law and prevent commission of offences in the future. (Para 40-41, *Sibbia*).

(xv) The public prosecutor should be issued notice, upon considering an application under Section 438; an *ad interim* order can be made. The application *"should be re-examined in the light of the respective contentions of the parties."* The *ad interim* order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. *"Should the operation of an order passed under Section 438(1) be limited in point of time? Not necessarily. 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."* (Para 42, *Sibbia*).

46. It is quite evident, therefore, that the pre-dominant thinking of the larger, Constitution Bench, in *Sibbia (supra),* was that given the premium and the value that the Constitution and Article 21 placed on liberty- and given that a tendency was noticed, of harassment – at times by unwarranted arrests, the provision for anticipatory bail was made. It was not hedged with any conditions or limitations- either as to its duration, or as to the kind of alleged offences that an applicant was accused of having committed. The courts had the discretion to impose such limitations (likeco-operation with

investigation, not tampering with evidence, not leaving the country etc) as were reasonable and necessary in the peculiar circumstances of a given case. However, there was no invariable or inflexible rule that the applicant had to make out a special case, or that the relief was to be of limited duration, in a point of time, or was unavailable for any particular class of offences.

47. At this stage, it would be essential to clear the air on the observations made in some of the later cases about whether Section 438 is an essential element of Article 21. Some judgments, notably *Ram Kishna Balothia & Anr. (supra)* and *Jai Prakash Singh v State of Bihar*[31] held that the provision for anticipatory bail is not an essential ingredient of Article 21, particularly in the context of imposition of limitations on the discretion of the courts while granting anticipatory bail, either limiting the relief in point of time, or some other restriction in respect of the nature of the offence, or the happening of an event. We are afraid, such observations are contrary to the broad terms of the power declared by the Constitution Bench of this court in *Sibbia (supra)*. The larger bench had specifically held 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."*

48. In *Gudikanti Narasimhulu* v. *Public Prosecutor*[32] this court observed that

> *". ... Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law".*

49. The reason for enactment of Section 438 in the Code was Parliamentary acceptance of the crucial underpinning of personal liberty in a free and democratic country. Parliament wished to foster respect for personal liberty and accord primacy to

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[31] 2012 (4) SCC 379

[32] 1978 (1) SCC 240

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

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

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

51. The forty first and forty-eight reports of the Law Commission were noticed by this court in *Sibbia (supra).* Thereafter, the Law Commission, in its 154th report had occasion to deal with the subject; it recommended no substantial change, - except procedural additions to Section 438 and observed as follows:

> *"18. In the various workshops diverse views were expressed regarding the retention or deletion of the provision of anticipatory bail. One view is that it is being misused by affluent and influential sections of accused in society and hence, be deleted from the Code. The other view is that it is a salutary provision to safeguard the personal liberty and therefore be retained. Misuse of the same in some instances by itself cannot be a ground for its deletion. However, some restraints may be imposed in order to minimise such misuse. We are, however, of the opinion that the provision contained under S. 438 regarding anticipatory bail should remain in the Code but subject to the*

amendments suggested in cl. 43 of the Code of Criminal Procedure (Amendment) Bill, 1994 which lays down adequate safeguards." [33]

Interestingly, the 177th report of the Law Commission lamented that the power of arrest was being misused by police in a widespread manner.[34]

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[33] The relevant extract of Clause 43 of the proposed 1994 amendment read as follows:

"In S. 438 of the principal Act for sub-s. (1), the following sub-sections shall be substituted, namely:

(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 objection 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, if there are reasonable grounds for such arrest.

(1-A) Where the Court grants an interim order under sub-s. (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."

[34] One hundred and seventy seventh [177th] Report, submitted in December 2001 (Law Commission of India, 177th Report, Annexure-III para1.8 said that:

52. The persistence of the phenomena unwarranted arrests was sharply criticised by this court in *Arnesh Kumar(supra)*, saying that the approach of the police continued to be colonial despite six decades of independence, that the power of arrest is

> *"...is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a hand tool to the police officers who lack sensitivity or act with oblique motive."*

The latest report of the Law Commission[35] notes that *"67 per cent of the prison population is awaiting trial in India"*. Therefore, the need for a provision to ensure anticipatory bail, is as crucial, as it was at the time of its introduction, and at the time *Sibbia (supra)* was decided.

53. Various reasons- given in judgments, rendered after *Sibbia (supra)*, starting with *Salauddin (supra)*, have highlighted that anticipatory bail orders have to be constrained

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> *"Misuse of power of arrest:- Notwithstanding the safeguards contained in the Code of Criminal Procedure and the Constitution referred to above, the fact remains that the power of arrest is wrongly and illegally exercised in a large number of cases all over the country. Very often this power is utilized to extort monies and other valuable property or at the instance of an enemy of the person arrested. Even in case of civil dispute, this power is being resorted to on the basis of a false allegation against a party to a civil dispute at the instance of his opponent. The vast discretion given by the CrPC to arrest a person even in the case of a bailable offence (not only where the bailable offence is cognizable but also where it is non-cognizable) and the further power to make preventive arrests (e.g. under Section151 of the CrPC and the several city police enactments), clothe the police with extraordinary power which can easily be abused. Neither there is any inhouse mechanism in the police department to check such misuse or abuse nor does the complaint of such misuse or abuse to higher police officers bear fruit except in some exceptional cases. We must repeat that we are not dealing with the vast discretionary powers of the members of a service which is provided with firearms, which are becoming more and more sophisticated with each passing day (which is technically called a civil service for the purposes of Service Jurisprudence) and whose acts touch upon the liberty and freedom of the citizens of this country and not merely their entitlements and properties.*

[35] 268th Report, 2017.

by conditions, notably with reference to time (i.e. three months, etc) or till the happening of a certain event. The reasons, and observations, limiting the duration of grant of anticipatory bail are outlined below:

(1) *"such anticipatory bail orders should be of a limited duration only and ordinarily on the expiry of that duration or extended duration the court granting anticipatory bail should leave it 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 submitted".* (*Saluddin* and *K.L. Verma,* supra).

(2) An order of anticipatory bail can be granted in cases of *"serious nature as for example murder".* Consequently, its duration should *"be limited and ordinarily the Court granting anticipatory bail should not substitute itself for the original Court which is expected to deal with the offence." (Salauddin [supra])*

(3) Custodial interrogation of *"accused is indispensably necessary for the investigating agency"* to unearth materials in criminal conspiracies (Ref. *to unearth all the links involved in the criminal conspiracies"* (*Bimal Krishna Kundu* and *Muraleedharan,* [supra])

(4) Imposing time limits (till filing of FIR, or filing of charge-sheet etc) would enable the court- which is seized of the main case and monitors it, to consider the nature and gravity of the offence, having regard to the fresh materials unearthed and included as prosecution evidence. Therefore, it would be salutary and in public interest to require courts to impose time limits for the life of orders of anticipatory bail the event of filing of FIR or charge sheet, are essential ingredients to an order under Section 438. (*Salauddin, K.L. Verma,* and *Adri Dharan Das).* Some decisions have also stressed that economic offences need a different approach and therefore, anticipatory bail should not be granted readily.[36]

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[36] In *P. Chidambaram v. Directorate of Enforcement,* (2019) 9 SCC 24 it was held as follows:

54. A fuller consideration of the various decisions cited earlier, especially those which emphasized the need to limit the life of an order of anticipatory bail, are premised on the understanding that the grant of an unconditional order of bail would thwart investigation. In the first place, this premise is unfounded, given that *Sibbia (supra)* stated (in para 13, SCC reports) that such an order would be *"contrary to the terms"* of Section 438; and furthermore, that conditions mentioned in Section 438(2) could be imposed while granting anticipatory bail. Here, one is conscious of the fact that the requirement of imposing conditions is not compulsive (noticing the use of the term "may" which precedes the requirement of imposing conditions). Nevertheless, an unconditional order, in the sense of an order not even imposing conditions mentioned in Section 438(2) can impede or hamper investigation, *Sibbia (supra)* held that the conditions mentioned in that provision should be imposed. This requirement is more a matter of prudence, while granting relief.

55. This court cannot lose sight of the fact that the Law Commission's 41st and 48th report focused on the need to introduce the provision (for anticipatory bail) as a preventive, or curative measure, to deal with a particular problem, i.e. unwarranted arrests. *Sibbia (supra)* noticed this fact, and also that significantly, Section 438 is not hedged with any obligation on the court's power, to impose conditions. That situation remains unchanged: the provision remains unaltered-at least substantially (barring an

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"However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights—safeguarding the personal liberty of an individual and the societal interest.....

83. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation. Having regard to the materials said to have been collected by the respondent Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail."

The court cited other previous decisions, i.e. *State* v. *Anil Sharma* (1997) 7 SCC 187; *Sudhir* v. *State of Maharashtra* 2016 (1) SCC 146; and *Directorate of Enforcement* v. *Hassan Ali Khan* (2011) 12 SCC 684.

amendment in 2005 which obliged the issuance of notice to the public prosecutor before issuing any order for anticipatory bail)[37]. The 203rd Report of the Law Commission,

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[37] The amendment, i.e. Criminal Procedure Code (Amendment) Act, 2005 – which has till now, not been brought into force, reads as follows:

> *["(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 the Court may after taking into consideration inter- alia the following factors namely.*
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> *(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 police station to arrest without warrant the applicant on the basis of the accusation apprehended in such application*
>
> *(IA) Where the Courts grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with the 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*
>
> *(IB) 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.]*

which reviewed the entire law on the subject and noticed later decisions, such as *Salauddin, Adari Narain Das,* etc, recommended no change in law on this aspect relating to conditions. In this background, it is important to notice that the only bar, or restriction, imposed by Parliament upon the exercise of the power (to grant anticipatory bail) is by way of a positive restriction, i.e. in the case where accused are alleged to have committed offences punishable under Section 376(3) or Section 376AB or Section 376DA or Section 376DB of the Indian Penal Code. In other words, Parliament has now denied jurisdiction of the courts (i.e. Court of Session and High Courts) from granting anticipatory bail to those accused of such offences. The amendment (Code of Criminal Procedure Amendment Act, 2018) introduced Section 438(4)) reads as follows:

> *"(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."*

56. Clearly, therefore, where the Parliament wished to exclude or restrict the power of courts, under Seciton 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.

57. Turning now to the various concerns that impelled this court in *Salauddin, K.L. Verma, Sunita Devi; Nirmal Jeet Kaur* and *Adri Dharan Das, HDFC Bank, J.J. Manan (supra)* and other decisions which outlined the various concerns and problems faced by the prosecuting agency, or the police, or that competent courts would be deprived of oversight, thus, leading to directions that courts should impose time restrictions, or grant temporary or limited bail (e.g. filing of charge sheet etc.), this court proposes to deal with such reasoning hereafter.

58. The various reasons which led to the imposition of restrictions or limitations by the decisions noted previously, hinge upon factors such as: addition of graver offences which the applicant is alleged to have committed after the grant of anticipatory bail; unearthing of facts disclosing his or her complicity in serious offences, as for instance, a conspirator or kingpin; the accused's non-cooperation in the course of investigation, (such as, for example, difficulty in securing his person, evasion by him, reluctance to answer questions during the investigation or providing statements for purposes of recovery of articles in terms of Section 27 of the Evidence Act); involvement in very serious or grave offences such as murder, kidnapping, causing death under unusual circumstances and offences which undermine the economy; disclosure of information that the offence involves large scale fraud and several individuals or victims, and, the filing of charge-sheet. Each of or all of them put together, in the opinion of the court, neither hold insurmountable problem, nor are unforeseen situations or not anticipated in *Sibbia (supra)*.

59. The controlling expressions under Section 438(2) spell out three distinct conditions, which the court granting anticipatory bail can include as directions. These are- that the applicant makes himself available for interrogation by police officer, as and when required; that such applicant should 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; a condition that the person should not leave India without the permission of the court. Further conditions as may be deemed essential, may also be imposed by the court, under Section 437(3). The Court in *Sibbia (supra)* was alive to the necessity of imposing conditions as is evident from para 13 of its judgment. The court observed that there was nothing in law which stated that whenever anticipatory bail is granted, it should be without imposing any of those conditions. *Sibbia (supra)* went on to state that such unconditional orders would be plainly contrary to the very terms of Section 438. The court also noted that though couched in discretionary terms, which means that the courts could impose those conditions, perhaps viewed pragmatically, they should do so. What this court in *Sibbia (supra)* was concerned with, and cautioned other courts against was

that the process of construction and interpretation ought not to compel the courts to "*cut down by reading into the statute conditions which are not to be found therein.*"

60. The context and nature which *Sibbia (supra)* considered is that discretion ought to be exercised by the Full Bench judgment of the Punjab and Haryana High Court which cautioned that the power to grant anticipatory bail should be used sparingly and in exceptional cases and that all conditions under Section 437 should be read into in Section 438. Furthermore, the High Court had required that an applicant ought to make out a special case for grant of anticipatory bail; it was also stated that in cases wherever remand was sought, or a reasonable cause to secure incriminating material in terms of Section 27 of the Evidence Act could be made out, anticipatory bail ought not to be granted and that it could not be granted in regard to offences punishable with death or imprisonment for life unless the court is satisfied that the charge was false or groundless. The court in *Sibbia (supra)* frowned upon imposition of such rules after interpreting and in the course of the judgment held that the power to grant anticipatory bail is wide and that the discretion is not limited in the manner that the High Court suggested. At the same time, this court also emphasized that the discretion had to be exercised while granting or refusing to grant in given cases on due application of mind and in a judicious manner.

61. The imposition of conditions under Section 438(2) with reference to Section 437(3), in the opinion of this court, is enough safeguard for the authorities – including the police and other investigating agencies, who have to investigate into crimes and the possible complicity of the applicants who seek such relief. Taking each concern, i.e. the addition of more serious offences; presence of a large number of individuals or complainants; possibility of non-cooperation - non-cooperation in the investigation or the requirement of the accused's statement to aid the recovery of articles and incriminating articles in the course of statements made during investigations – it is noticeable, significantly, that each of these is contemplated as a condition and is invariably included in every order granting anticipatory bail. In the event of violation or alleged violation of these, the concerned authority is not remediless; recourse can be had to Section 438(2) read with Section 437(3). Any violation of these terms would

attract a direction to arrest him. This power or direction to arrest is found in Section 437(5). However, that provision has no textual application to regular bail granted by the Court of Sessions or High Courts under Section 439 or directions not to arrest, i.e. order of anticipatory bail under Section 438. Secondly, Section 439(2) which is cast in wide terms, adequately covers situations when an accused does not cooperate during the investigation or threatens to, or intimidates witness[es] or tries to tamper with other evidence.

62. 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 Uttar Pradesh & Ors*[38]). In *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. & Ors*[39], the relevance of text and context was emphasized in the following terms:

> "*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.*

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[38] 1967 (1) SCR 77

[39] 1987 (1) SCC 424

63. Likewise, in *Directorate of Enforcement v Deepak Mahajan*[40] this court referred to *Maxwell on Interpretation of Statutes, Tenth Edn.*, to the effect that if the ordinary meaning and grammatical construction, *"leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words..."*

64. This court, long back, in *State of Haryana & Ors. v. Sampuran Singh & Ors*[41]. observed that by no stretch of imagination a Judge is entitled to add something more than what is there in the statute by way of a supposed intention of the legislature. The cardinal principle of construction of statute is that the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. It is sufficient, therefore to notice that when Section 438 – in the form that exists today, (which is not substantially different from the text of what was introduced when *Sibbia* was decided, except the insertion of sub-section (4)) was enacted, Parliament was aware of the objective circumstances and prevailing facts, which impelled it to introduce that provision, without the kind of conditions that the state advocates to be intrinsically imposed in every order under it.

65. The narrower interpretation preferred by this Court - in line of decisions starting with *Salauddin (supra)* 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

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[40] 1994 (3) SCC 440

[41] 1975 (2) SCC 810

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.

66. As regards the concern expressed on behalf of the state and the Union- that unconditional orders (i.e. those unrelated to a particular time frame) would result in non-co-operation of the accused, with the investigating officer or authority, or that there would be reluctance to make statements to the prosecution, to assist in the recovery of articles that incriminate the accused (and therefore can be used under Section 27, Evidence Act), this court perceives such views to be vague and based apparently pre-conceived notions. If there is non-cooperation by an accused – in the course of investigation, the remedy of seeking assistance of the court exists. Moreover, on this aspect too, *Sibbia* had envisioned the situation; the court had cited *State of U.P. v Deoman Upadhyaya*[42], where this court had observed as follows:

> *"When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody : submission to the custody by word or action by a person in sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the "custody" of the police officer within the meaning of Section 27 of the Indian Evidence Act : Legal Remembrancer v Lalit Mohan Singh ((1921) I.L.R. 49 Cal.167),*

[42] 1961 (1) SCR 14

Santokhi Beldar v. King Emperor ((1933) I.L.R. 12 Pat. 241). Exceptional cases may certainly be imagined in which a person may give information without presenting himself before a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer."

This view was reiterated and applied in *Vallabhdas Liladhar v Asst. Collector of Customs*[43]. The observations in *Sibbia* (supra) are relevant, and are reproduced again, for facility of reference:

> *"One of such conditions can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v Deoman Upadhyaya."*

Therefore, the "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail.

67. Now, coming to the instruction in some decisions that anticipatory bail should not be given, or granted with stringent conditions, upon satisfaction that the accused is not involved, *Sibbia,* clearly disapproved the imposition of such restrictions, or ruling out of certain offences or adoption of a cautious or special approach. It was held that:

> *"A close look at some of the rules in the eight-point code formulated by the High Court will show how difficult it is to apply them in practice. The seventh proposition says :*
>
> > *"The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised."*

[43] 1965 (3) SCR 854

How can the Court, even if it had a third eye, assess the blatantness of corruption at the stage of anticipatory bail? And will it be correct to say that blatantness of the accusation will suffice for rejecting bail, even if the applicant's conduct is painted in colours too lurid to be true? The eighth proposition rule framed by the High Court says:

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

Does this rule mean, and that is the argument of the learned Additional Solicitor-General, that the anticipatory bail cannot be granted unless it is alleged (and naturally, also shown, because mere allegation is never enough) that the proposed accusations are mala fide ? It is understandable that if mala fides are shown anticipatory bail should be granted in the generality of cases. But it is not easy to appreciate why an application for anticipatory bail must be rejected unless the accusation is shown to be mala fide. This, truly, is the risk involved in framing rules by judicial construction. Discretion, therefore, ought to be permitted to remain in the domain of discretion, to be exercised objectively and open to correction by the higher courts. The safety of discretionary power lies in this twin protection which provides a safeguard against its abuse.

According to the sixth proposition framed by the High Court, the discretion under Section 438cannot be exercised in regard to offences punishable with death or imprisonment for life unless, the court at the stage of granting anticipatory bail, is satisfied that such a charge appears to be false or groundless. Now, Section 438 confers on the High Court and the Court of Session the power to grant anticipatory bail if the applicant has reason to believe that he may be arrested on an accusation of having committed "a non-bailable offence". We see no warrant for reading into this provision the conditions subject to which bail can be granted under Section 437 (1) of the Code. That section, while conferring the power to grant bail in cases of non-bailable offences, provides by way of an exception that a person accused or suspected of the commission of a non-bailable offence "shall not be so released" if there appear to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. If it was intended that the exception contained in Section 437 (1) should govern the grant of relief under Section 438 (1), nothing would have been easier for the legislature than to introduce into the latter section a similar provision. We have already pointed out the basic distinction between these two sections. Section 437 applies only after a person, who is alleged to have committed a non-bailable offence, is arrested or detained without warrant or appears or is brought before a court. Section 438 applies before the arrest is made and, in fact, one of the pre-conditions of its application is that the person, who applies for relief under it, must be able to show that he has

reason to believe that "he may be arrested", which plainly means that he is not yet arrested. The nexus which this distinction bears with the grant or refusal of bail is that in cases falling under Section 437, there is some concrete data on the basis of which it is possible to show that there appear to be reasonable grounds for believing that the applicant has been guilty of an offence punishable with death or imprisonment for life. In cases falling under Section 438 that stage is still to arrive and, in the generality of cases thereunder, it would be premature and indeed difficult to predicate that there are or are not reasonable grounds for so believing. The foundation of the belief spoken of in Section 437 (1), by reason of which the court cannot release the applicant on bail is, normally, the credibility of the allegations contained in the First Information Report."

68. For the above reasons, the answer to the first question in the reference made to this bench is that there is no offence, *per se*, which stands excluded from the purview of Section 438, - except the offences mentioned in Section 438 (4). In other words, anticipatory bail can be granted, having regard to all the circumstances, in respect of all offences. At the same time, if there are indications in any special law or statute, which exclude relief under Section 438 (1) they would have to be duly considered. Also, whether anticipatory offences should be granted, in the given facts and circumstances of any case, where the allegations relating to the commission of offences of a serious nature, with certain special conditions, is a matter of discretion to be exercised, having regard to the nature of the offences, the facts shown, the background of the applicant, the likelihood of his fleeing justice (or not fleeing justice); likelihood of co-operation or non-co-operation with the investigating agency or police, etc. There can be no inflexible time frame for which an order of anticipatory bail can continue.

69. Therefore, this court holds that the view expressed in *Salauddin Abdulsamad Shaikh, K.L. Verma, Nirmal Jeet Kaur, Satpal Singh, Adri Dharan Das, HDFC Bank, J.J. Manan* and *Naresh Kumar Yadav* (supra) about the Court of Sessions, or the High Court, being obliged to grant anticipatory bail, for a limited duration, or to await the course of investigation, so as the "normal court" not being "bye passed" or that in certain kinds of serious offences, anticipatory bail should not be granted normally-including in economic offences, etc are not good law. The observations – which indicate that such time related or investigative event related conditions, should invariably be imposed at the time of grant of anticipatory bail are therefore, overruled. Similarly, the

observations in *Mhetre* that *"the courts should not impose restrictions on the ambit and scope of section 438 Cr.P.C. which are not envisaged by the Legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it"* is too wide and cannot be considered good law. It is one thing to say that as a matter of law, ordinarily special conditions (not mentioned in Section 438 (2) read with Section 437 (3) should not be imposed; *it is an entirely different thing to say that in particular instances, having regard to the nature of the crime, the role of the accused, or some peculiar feature, special conditions should not be imposed.* The judgment in *Sibbia* itself is an authority that such conditions can be imposed, but not in a routine or ordinary manner and that such conditions then become an inflexible "formula" which the courts would have to follow. Therefore, courts and can, use their discretion, having regard to the offence, the peculiar facts, the role of the offender, circumstances relating to him, his likelihood of subverting justice (or a fair investigation), likelihood of evading or fleeing justice- to impose special conditions. Imposing such conditions, would have to be on a case to case basis, and upon exercise of discretion by the court seized of the application under Section 438. In conclusion, it is held that imposing conditions such as those stated in Section 437 (2) while granting bail, are normal; equally, the condition that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, person released on bail shall be liable to be taken in police custody for facilitating the discovery. Other conditions, which are restrictive, are not mandatory; nor is there any invariable rule that they should necessarily be imposed or that the anticipatory bail order would be for a time duration, or be valid till the filing of the FIR, or the recording of any statement under Section 161, Cr. PC, etc. Other conditions may be imposed, if the facts of the case so warrant.

> *Re Question No. 2: Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court.*

70. The question here is whether there is anything in the law which *per se* requires that upon filing of the charge-sheet, or the summoning of the accused, by the court -- (or even the addition of an offence in the charge-sheet, of which an applicant on bail is accused of freshly), his liberty ought to be forfeited and that he should be asked to

surrender and apply for regular bail. The observations about the width and amplitude of the power under Section 438, made in answer to the first question, are equally relevant here too. In the present context, further, the judgment and observations of this Court in its interpretation of Section 167(2) are telling. It was held in *Gursharan Singh (supra)*, the release by grant of bail of an accused under Section 167(2) amounts to "deemed bail". This is borne out by Section 167(2) which states that anyone released on bail under its provision "*shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.*" The judgment in *Aslam Babalal Desai (supra)* has clarified that when an accused is released by operation of Section 167(2) and subsequently, a charge-sheet is filed, there is no question of the cancellation of his bail. In these circumstances, the mere fact that an accused is given relief under Section 438 at one stage, *per se* does not mean that upon the filing of a charge-sheet, he is necessarily to surrender or/and apply for regular bail. The analogy to 'deemed bail' under Section 167(2) with anticipatory bail leads this court to conclude that the mere subsequent event of the filing of a charge-sheet cannot compel the accused to surrender and seek regular bail. As a matter of fact, interestingly, if indeed, if a charge-sheet is filed where the accused is on anticipatory bail, the normal implication would be that there was no occasion for the investigating agency or the police to require his custody, because there would have been nothing in his behavior requiring such a step. In other words, an accused, who is granted anticipatory bail would continue to be at liberty when the charge sheet is filed, the natural implication is that there is no occasion for a direction by the Court that he be arrested and further that he had cooperated with the investigation. At the same time, however, at any time during the investigation were any occasion to arise calling for intervention of the court for infraction of any of the conditions imposed under Section 437(3) read with Section 438(2) or the violation of any other condition imposed in the given facts of a case, recourse can always be had under Section 439(2).

71. Section 438 (3) states that when a person is granted anticipatory bail, is later arrested without warrant by an officer in charge of a police station *"on such accusation"*, and is willing 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)". The order granting anticipatory bail, is also- as noticed earlier, and in several previous decisions, a *"direction"* under this Section 438 *"that in the event of such arrest"* the applicant be released on bail. Therefore, when an accused in fact is granted bail, and the conditions outlined in Section 438 (2) are included as part of the direction "to release" him in the event of arrest, all the necessary conditions which he is obliged to follow exist. Section 438 (3) outlines the steps to be taken, *in the event of arrest of one who has been granted relief under Section 438 (1).* In the event of non-compliance with any or all conditions, imposed by the court, the concerned agency or the police, a direction can be sought from the court under Section 439 (2).

72. The view that this court expresses about the prosecution's option to apply for a direction to arrest the accused, finds support in *Pradeep Ram* (*supra*) where this court held as follows:

> *"21. Both Sections 437 (5) and 439 (2) empowers the Court to arrest an accused and commit him to custody, who has been released on bail under Chapter XXXIII. There may be numerous grounds for exercise of power under 437 (5) and 439 (2). The principles and grounds for cancelling a bail are well settled, but in the present case, we are concerned only with one aspect of the matter, i.e., a case where after accused has been granted the bail, new and serious offences are added in the case. A person against whom serious offences have been added, who is already on bail can very well be directed to be arrested and committed to custody by the Court in exercise of power under 437 (5) and 439 (2). Cancelling the bail granted to an accused and directing him to arrest and taken into custody can be one course of the action, which can be adopted while exercising power under 437 (5) and 439 (2), but there may be cases where without cancelling the bail granted to an accused, on relevant consideration, Court can direct the accused to be arrested and committed to custody. The addition of serious offences is one of such circumstances, under which the Court can direct the accused to be arrested and committed to custody despite the bail having been granted with regard to the offences with which he was charged at the time when bail was considered and granted.*

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25. We may have again to look into provisions of Sections 437 (5) and 439 (2) of Cr.P.C. Sub-section (5) of Sections 437 of Cr.P.C uses expression 'if it considers it necessary so to do, direct that such person be arrested and commit him to custody'. Similarly, sub-section (2) of Section 439 of Cr.P.C. provides: 'may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody'. A plain reading of the aforesaid provisions indicates that provision does not mandatorily provide that the Court before directing arrest of such accused who has already been granted bail must necessary cancel his earlier bail. A discretion has been given to the Court to pass such orders to direct for such person be arrested and commit him to the custody which direction may be with an order for cancellation of earlier bail or permission to arrest such accused due to addition of graver and non- cognizable offences. Two Judge Bench judgment in Mithabhai Pashabhai Patel (supra) uses the word 'ordinarily' in paragraph 18 of the judgment which cannot be read as that mandatorily bail earlier granted to the accused has to be cancelled before Investigating Officer to arrest him due to addition of graver and non-cognizable offences.

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27. Relying on the above said order, learned counsel for the appellant submits that respondent State ought to get first the order dated 10.03.2016 granting bail to appellant cancelled before seeking custody of the appellant. It may be true that by mere addition of an offence in a criminal case, in which accused is bailed out, investigating authorities itself may not proceed to arrest the accused and need to obtain an order from the Court, which has released the accused on the bail. It is also open for the accused, who is already on bail and with regard to whom serious offences have been added to apply for bail in respect of new offences added and the Court after applying the mind may either refuse the bail or grant the bail with regard to new offences. In a case, bail application of the accused for newly added offences is rejected, the accused can very well be arrested. In all cases, where accused is bailed out under orders of the Court and new offences are added including offences of serious nature, it is not necessary that in all cases earlier bail should be cancelled by the Court before granting permission to arrest an accused on the basis of new offences. The power under Sections 437 (5) and 439 (2) are wide powers granted to the court by the Legislature under which Court can permit an accused to be arrested and commit him to custody without even cancelling the bail with regard to earlier offences. Sections 437 (5) and 439 (2) cannot be read into restricted manner that order for arresting the accused and commit him to custody can only be passed by the Court after cancelling the earlier bail.

28. Coming back to the present case, the appellant was already into jail custody with regard to another case and the investigating agency applied before Special Judge, NIA Court to grant production warrant to produce the accused before the Court. The Special Judge having accepted the prayer of

grant of production warrant, the accused was produced before the Court on 26.06.2018 and remanded to custody. Thus, in the present case, production of the accused was with the permission of the Court. Thus, the present is not a case where investigating agency itself has taken into custody the appellant after addition of new offences rather accused was produced in the Court in pursuance of production warrant obtained from the Court by the investigating agency. We, thus do not find any error in the procedure which was adopted by the Special Judge, NIA Court with regard to production of appellant before the Court. In the facts of the present case, it was not necessary for the Special Judge to pass an order cancelling the bail dated 10.03.2016 granted to the appellant before permitting the accused appellant to be produced before it or remanding him to the judicial custody.

29. In view of the foregoing discussions, we arrive at following conclusions in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added:-

(i) The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested.

(ii) The investigating agency can seek order from the court under Sections 437 (5) or 439 (2) for arrest of the accused and his custody.

(iii) The Court, in exercise of power under Sections 437 (5) or 439 (2) of Cr.PC., can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The Court in exercise of power under Sections 437 (5) as well as 439 (2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-cognizable offences which may not be necessary always with order of cancelling of earlier bail.

(iv) In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it need to obtain an order to arrest the accused from the Court which had granted the bail."

73. Earlier, in the decision reported as *Dolat Ram v State of Haryana*[44] this court had observed that

> *"bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer*

[44] 1995 (1) SCC 349

conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial."

74. This decision was followed, and its *ratio* applied, in *Hazari Lal Das v State of West Bengal & Anr*[45]. The decision in *Bhadresh Bipinbhai Sheth v. State of Gujarat*[46] stated, after culling out the principles in *Mhetre*, as follows:

> *"25.6. It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the Public Prosecutor or the complainant, on finding new material or circumstances at any point of time.*
> *25.7. In pursuance of the order of the Court of Session or the High Court, once the accused is released on anticipatory 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.*
> *25.8. Discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under Section 438 CrPC should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.*
> *25.9. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of the anticipatory bail because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with legislative intention, the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case."*

75. The three-judge decision in *Sudhir v. Maharastra*[47] noticed the decision in *Bipin Bhadresh Sheth* (supra) and did not disapprove it. However, the court did not grant relief, given that anticipatory bail was declined initially, and the application to the High Court was withdrawn, after which a second anticipatory bail was granted. The High Court cancelled the grant of relief. This court affirmed the High Court's view. In that judgment, *Bipin Bhadresh Sheth* was noticed, while considering the scope of the power

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[45] 2009 (10) SCC 652

[46] 2016 (1) SCC 152

[47] 2016 (1) SCC 146

under Section 439 (2). In another decision, *Arvind Tiwary v. State of Bihar*[48] the issue was whether the anticipatory bail, granted subject to certain conditions, earlier, which had been considered by this court, could be cancelled. The conditions included, *inter alia,* that sums were to be secured by bank guarantee. The aggrieved corporation directed that the "defalcated sum" specified in respect of every accused should be secured through such guarantee. Upon failure to comply with that demand, an order of cancellation was sought. This court held that cancellation could not be resorted to on the assumption that the applicants were guilty. Similarly, in *Mahant Chand Yogi v. State of Haryana,*[49] *Padmakar Tukaam Bhavnagare v. State of Maharastra,*[50] *X v. State of Telangana,* [51] and several other judgments the same views were expressed.

76. Therefore, unless circumstances to the contrary: in the form of behaviour of the accused suggestive of his fleeing from justice, or evading the authority or jurisdiction of the court, or his intimidating witnesses, or trying to intimidate them, or violate any condition imposed while granting anticipatory bail, the law does not require the person to surrender to the court upon summons for trial being served on him. Subject to compliance with the conditions imposed, the anticipatory bail given to a person, can continue till end of the trial. This answers question No. 2 referred to the present Bench.

Conclusions

77. This court answers the reference in the following manner:

(1) Regarding question No. 1, it is held that the protection granted under Section 438 Cr. PC should not always or ordinarily be limited to a fixed period; it should inure in favour of the accused without any restriction as to time. Usual or standard conditions under Section 437 (3) read with Section 438 (2) should be imposed; if there are peculiar features in regard to any crime or offence (such as

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[48] 2018 (8) SCC 475

[49] 2003 (1) SCC 236

[50] 2012 (13) SCC 720

[51] (2018) 16 SCC 511

seriousness or gravity etc.), it is open to the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event or time bound) etc.

(2) The second question referred to this court is answered, by holding that the life of an anticipatory bail does not end generally at the time and stage when the accused is summoned by the court, or after framing charges, but can also continue till the end of the trial. However, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

78. Having regard to the above discussion, it is clarified that the court should keep the following points as guiding principles, in dealing with applications under Section 438, Cr. PC:

(a) As held in *Sibbia,* when a person apprehends arrest and approaches a court for anticipatory bail, his apprehension (of arrest), has to be based on concrete facts (and not vague or general allegations) relatable a specific offence or particular of offences. Applications for anticipatory bail should contain clear and essential facts relating to the offence, and why the applicant reasonably apprehends his or her arrest, as well as his version of the facts. These are important for the court which considering the application, to extent and reasonableness of the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not a necessary condition that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

(b) The court, before which an application under Section 438, is filed, depending on the seriousness of the threat (of arrest) as a measure of caution, may issue notice to the public prosecutor and obtain facts, even while granting *limited interim anticipatory bail.*

(c) Section 438 Cr. PC does not compel or oblige courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While weighing and considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified – and ought to impose conditions spelt out in Section 437 (3), Cr. PC [by virtue of Section 438 (2)]. The necessity to impose other restrictive conditions, would have to be weighed on a case by case basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

(d) Courts ought to be generally guided by the considerations such nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while assessing whether to grant anticipatory bail, or refusing it. Whether to grant or not is a matter of discretion; equally whether, and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

(e) Anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial. Also orders of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

(f) Orders of anticipatory bail do not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

(g) The observations in *Sibbia* regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e. deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. *Sibbia* (supra) had observed that *"if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v Deoman Upadhyaya."*

(h) It is open to the police or the investigating agency to move the court concerned, which granted anticipatory bail, in the first instance, for a direction under Section 439 (2) to arrest the accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc. The court – in this context is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.

(i) The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the state or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. (See *Prakash Kadam & Etc. Etc vs Ramprasad Vishwanath Gupta & Anr*[52]; *Jai Prakash Singh* (supra) *State through C.B.I.*

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[52] (2011) 6 SCC 189

vs. Amarmani Tripathi[53]). This does not amount to "cancellation" in terms of Section 439 (2), Cr. PC.

(j) The judgment in *Mhetre* (and other similar decisions) restrictive conditions cannot be imposed at all, at the time of granting anticipatory bail are hereby overruled. Likewise, the decision in *Salauddin* and subsequent decisions (including *K.L. Verma, Nirmal Jeet Kaur*) which state that such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.

79. In conclusion, it would be useful to remind oneself that the rights which the citizens cherish deeply, are fundamental- it is not the restrictions that are fundamental. Joseph Story, the great jurist and US Supreme Court judge, remarked that *"personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice."*

80. The history of our republic – and indeed, the freedom movement has shown how the likelihood of arbitrary arrest and indefinite detention and the lack of safeguards played an important role in rallying the people to demand independence. Witness the Rowlatt Act, the nationwide protests against it, the Jallianwalla Bagh massacre and several other incidents, where the general public were exercising their right to protest but were brutally suppressed and eventually jailed for long. The specter of arbitrary and heavy-handed arrests: too often, to harass and humiliate citizens, and oftentimes, at the interest of powerful individuals (and not to further any meaningful investigation into offences) led to the enactment of Section 438. Despite several Law commission reports and recommendations of several committees and commissions, arbitrary and groundless arrests continue as a pervasive phenomenon. Parliament has not thought it appropriate to curtail the power or discretion of the courts, in granting pre-arrest or anticipatory bail, especially regarding the duration, or till charge sheet is filed, or in serious crimes. Therefore, it would not be in the larger interests of society if the court, by judicial interpretation, limits the exercise of that power: the danger of such an exercise would

[53] (2005) 8 SCC 21

be that in fractions, little by little, the discretion, advisedly kept wide, would shrink to a very narrow and unrecognizably tiny portion, thus frustrating the objective behind the provision, which has stood the test of time, these 46 years.

81. The reference is hereby answered in the above terms.

.....J.
[S. RAVINDRA BHAT]

New Delhi,
January 29, 2020.

SUSHILA AGGARWAL & ORS. ...APPELLANT(S)

VERSUS

STATE (NCT OF DELHI) & ANR. ...RESPONDENT(S)

We have seen the drafts of Justice M.R. Shah and Justice S. Ravindra Bhat and are in agreement with them. Since there is no difference of opinion between the two, we are in agreement with the reasoning of Justice M.R. Shah and Justice S. Ravindra Bhat that the conclusions in *Shri Gurbaksh Singh Sibbia and others v. State of Punjab* 1980 (2) SCC 565 needs reiteration and further that the restrictive manner in which Section 438 of the Cr.PC has been interpreted in *Salauddin Abdulsamad Shaikh v. State of Maharashtra* 1996 (1) SCC 667 is incorrect. Therefore, we agree that *Salauddin (supra)* and other cases which have followed it needs to be overruled. Similarly, the wide interpretation in *Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors.* 2011 (1) SCC 694, i.e. that no conditions can be imposed while granting an order of anticipatory bail, is incorrect. *Mhetre (supra)* to that extent and other

judgments which have followed it are accordingly overruled.

In view of the said conclusions, we are in agreement with the answers to the reference made to the larger Bench.

.....J.
[ARUN MISHRA]

.....J.
[INDIRA BANERJEE]

.....J.
[VINEET SARAN]

New Delhi;
January 29, 2020.

SUSHILA AGGARWAL & ORS. ...APPELLANT(S)

VERSUS

STATE (NCT OF DELHI) & ANR. ...RESPONDENT(S)

FINAL CONCLUSIONS:

In view of the concurring judgments of Justice M.R. Shah and of Justice S. Ravindra Bhat with Justice Arun Mishra, Justice Indira Banerjee and Justice Vineet Saran agreeing with them, the following answers to the reference are set out:

(1) Regarding Question No. 1, this court holds that the protection granted to a person under Section 438 Cr. PC should not invariably be limited to a fixed period; it should inure in favour of the accused without any restriction on time. Normal conditions under Section 437 (3) read with Section 438 (2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate

condition (including fixed nature of relief, or its being tied to an event) etc.

(2) As regards the second question referred to this court, it is held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

1. This court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438, Cr. PC:

(1) Consistent with the judgment in *Shri Gurbaksh Singh Sibbia and others v. State of Punjab*[54], when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant

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54 1980 (2) SCC 565

reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

(2) It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the public prosecutor and obtain facts, even while granting *limited interim anticipatory bail.*

(3) Nothing in Section 438 Cr. PC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc.

The courts would be justified – and ought to impose conditions spelt out in Section 437 (3), Cr. PC [by virtue of Section 438 (2)]. The need to impose other restrictive conditions, would have to be judged on a case by case basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

(4) Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

(5) Anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.

(6) An order of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

(7) An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

(8) The observations in *Sibbia* regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. *Sibbia* (supra) had observed that *"if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in*

pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U.P. v Deoman Upadhyaya."

(9) It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439 (2) to arrest the accused, in the event of violation of any term, such as absconding, non-cooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc.

(10) The court referred to in para (9) above is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.

(11) The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the state or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. (See *Prakash Kadam & Etc. Etc vs Ramprasad Vishwanath Gupta & Anr*[55]; *Jai Prakash Singh* (supra) *State*

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55 (2011) 6 SCC 189

through C.B.I. vs. Amarmani Tripathi[56]). This does not amount to "cancellation" in terms of Section 439 (2), Cr. PC.

(12) The observations in *Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors*[57] (and other similar judgments) that no restrictive conditions at all can be imposed, while granting anticipatory bail are hereby overruled. Likewise, the decision in *Salauddin Abdulsamad Shaikh v. State of Maharashtra*[58] and subsequent decisions (including *K.L. Verma v. State & Anr*[59]; *Sunita Devi v. State of Bihar & Anr*[60]; *Adri Dharan Das v. State of West Bengal*[61]; *Nirmal Jeet Kaur v. State of M.P. & Anr*[62]; *HDFC Bank Limited v. J.J. Mannan*[63]; *Satpal Singh v. the State of Punjab*[64] and *Naresh Kumar Yadav v Ravindra Kumar*[65]) which lay down such restrictive conditions, or terms limiting

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56 (2005) 8 SCC 21

57 2011 (1) SCC 694

58 (1996 (1) SCC 667)

59 1998 (9) SCC 348

60 2005 (1) SCC 608

61 2005 (4) SCC 303

62 2004 (7) SCC 558

63 2010 (1) SCC 679

64 2018 SCC Online (SC 415

65 2008 (1) SCC 632

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the grant of anticipatory bail, to a period of time are hereby overruled.

2. The reference is hereby answered in the above terms.

.....J.
[ARUN MISHRA]

.....J.
[INDIRA BANERJEE]

.....J.
[VINEET SARAN]

.....J.
[M.R. SHAH]

.....J.
[S. RAVINDRA BHAT]

New Delhi;
January 29, 2020.

SEALED IN MY PRESENCE