HIGH COURT OF MADHYA PRADESH: JABALPUR

(DIVISION BENCH)

MCRC No. 24600/2017

Dr. Divya Kishore Satpathi ……. Petitioner

(Represented by Shri Surendra Singh, Senior Advocate with Shri Siddharth Gupta, Advocate)

Versus

Central Bureau of Investigation ……. Respondent

WITH

MCRC No. 24605/2017

Jai Narayan Chouksey ……. Petitioner

(Represented by Shri Pravin H. Parekh, Senior Advocate with Shri Siddharth Gupta, Shri Vishal Prasad and Shri Amit Garg, Advocates)

Versus

Central Bureau of Investigation ……. Respondent

AND

MCRC No. 24983/2017

Dr. Ajay Goenka ……. Petitioner

(Represented by Shri K.T.S. Tulsi, Senior Advocate with Shri Ajay Gupta, Shri Rajesh Ranjan, Shri Sumesh Bajaj and Shri Raj Kamal, Advocates)

Versus

Central Bureau of Investigation ……. Respondent

(Respondent – Central Bureau of Investigation represented by Shri J.K. Jain, Assistant Solicitor General, in all the cases)

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Coram:

DB: Hon'ble Shri Justice Hemant Gupta, Chief Justice

Hon'ble Shri Justice Vijay Kumar Shukla, J.

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Whether Approved for Reporting: **Yes**

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Law Laid Down: The action or inaction of the petitioners, who were running the medical colleges has denied admission to the large number of

more meritorious candidates, who were, in fact, entitled to admission and thus, leading to their frustration. The entire process would be antithesis of the rule that the students should be admitted only on merit. The petitioners may not be an accused of taking life of a person but if the allegations are proved, they cannot commit more heinous crime than of playing with the life of young students. It would be a case of mass killing of the career of numerous students. Thus, seriousness of the allegations and gravity of the accusation against the petitioners is glaring and having wide ramifications on the cause of professional education in the State. Hence, the petitioners are not entitled to concession of pre-arrest bail under Section 438 of Cr.PC.

Reliance is placed upon the Supreme Court judgment reported as **(2011) 1 SCC 694 (Siddharam Satlingappa Mhetre vs. State of Maharashtra and others).**

Significant Paragraph Nos.: **12, 13, 17 to 20, 24 to 26**

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Reserved on: 06/12/2017

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O R D E R

{ 14/12/2017 }

Per: Hemant Gupta, Chief Justice:

This order shall dispose of all three petitions for grant of anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") being MCRC No.24600/2017, MCRC No.24605/2017 and MCRC No.24983/2017 filed on behalf of the petitioners – Dr. Divya Kishore Satpathi, Jai Narayan Chouksey and Dr. Ajay Goenka respectively, who apprehend their arrest in connection with Crime No. RC2172015A0025 (formerly STF Crime No.12/2013) registered with Police Station – Central Bureau of Investigation, Bhopal (M.P.) for the

offence punishable under Sections 420, 467, 468, 471, 201 read with 120-B of IPC; Section 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988; Sections 43 read with 66 of the Information Technology Act, 2000; and Sections 3-D (1) and (2) and 4 of the M.P. Recognised Examination Act, 1937 as enumerated in the charge-sheet though in the bail applications the offence mentioned is that under Sections 409, 419, 420, 467, 468, 471, 120-B of IPC; Sections 65 and 66 of the Information Technology Act, 2000; Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 and Sections 3-D (1) and (2) and 4 of the M.P. Recognised Examination Act, 1937.

2. Petitioner – Dr. Ajay Goenka is the Chairman of Chirayu Medical College, Bhopal whereas petitioner – Jai Narayan Chouksey is the Chairman of L.N. Medical College, Bhopal and petitioner – Dr. Divya Kishore Satpathi is said to be the In-charge of Admission Committee of L.N. Medical College, Bhopal. All three petitions arise out of the same crime number and almost on similar allegations.

3. As per the prosecution, the allegations are that the petitioners and other middleman encouraged bright students of the States other than State of Madhya Pradesh to appear in Pre-Medical Test 2012 (in short as “the PMT 2012”) even though some of these students were already admitted in MBBS course in some other colleges. The allegation is that the officials of M.P. Professional Examination Board (in short as “the VYAPAM”), in furtherance of criminal conspiracy between them and three racketeers, namely, Jagdish Sagar, Sanjeev Shilpkar and Santosh Gupta generated and

allocated the roll numbers of bogie candidates in a manner so as to pair them with the roll numbers of engine candidates/solvers engaged by middleman and racketeers. These engine candidates had filled the application forms so as to get paired with the bogie candidates and to facilitate their selection by cheating/copying of the answers. The VYAPAM officials arranged seating pattern in the examination hall so as to enable the candidates to copy the answers from the scorers, who due to pairing of the roll numbers, used to sit next to the candidates. This pairing was termed as "engine-bogie pairing" whereas the scorer (engine) sitting ahead of the candidate (bogie) assisted the candidate for cheating through copying of the answers. This fraud has taken place in Indore, Bhopal and Shahdol in PMT-2012. The Central Bureau of Investigation has sent 181 (38+123+20) engine candidates; 308 (153+138+17) bogie candidates; 25 (14+11) middleman/ racketeers, 46 invigilators; four VYAPAM officials and two officials of Directorate of Medical Education, to stand trial.

4. The allegation against the four private medical colleges i.e. Index Medical College, People's Medical College, Chirayu Medical College and L.N. Medical College, is that engine candidates, who had obtained higher marks in examination were allotted private medical colleges during counselling but these students did not take actual admission and the colleges gave false information to the Director, Medical Education that these students have taken admission in their colleges. This was done to block the State quota seats by these fudged admissions. These students never reported to the college but they were given monetary benefits by the middleman for blocking the seats. Actual information/status was not disclosed to the

Director, Medical Education else these seats would have been filled during second round of counselling. The seats made vacant by these engine candidates were filled by the bogie candidates before the last date for admission i.e. 30.09.2012. It may be stated that seats in private medical colleges are filled in two ways; half of the seats are filled on the basis of examination conducted by Association of Private Medical Colleges whereas half of the other seats are filled from amongst the successful candidates of Pre-Medical Test examination, called Government quota seats. The entire allegations are in respect of Government quota seats.

5. After completion of investigation, a charge-sheet has been filed under Section 173(8) of the Code detailing the allegations against each of the accused including the present petitioners. The specific role of each of the petitioner shall be referred to at a later stage.

6. Shri K.T.S. Tulsi, learned senior counsel appearing for the petitioner – Dr. Ajay Goenka referred to a recent judgment of the Supreme Court rendered in the case of **Nikesh Tarachand Shah vs. Union of India and another** - Writ Petition (Criminal) No. 67/2017 decided on 23.11.2017 also reported as 2017 SCC OnLine SC 1355 wherein constitutional validity of Section 45 of the Prevention of Money Laundering Act, 2002 (in short "the Act of 2002") was under challenge. Section 45(1) of the said Act imposes two conditions for grant of bail that the Public Prosecutor must be given an opportunity to oppose any application for release on bail and that the Court must be satisfied, where the Public Prosecutor opposes the application, that there are reasonable grounds for believing that the accused is not guilty of

such offence and that he is not likely to commit any offence while on bail and only then the accused can be admitted to bail. The Court struck down the two conditions for release on bail in Sub-section (1) of Section 45 of the Act of 2002. The argument of the learned senior counsel for the petitioners is that the rule is bail and not jail and that no person can be deprived of his life and personal liberty except in accordance with fair, just and reasonable procedure established by valid law. It is also argued that Article 21 of the Constitution of India affords protection not only against the executive action but also against the legislative action which deprives a person of his life and personal liberty unless the law for deprivation is reasonable, just and fair.

7. Shri Tulsi, learned senior counsel also relied upon the Supreme Court judgments reported as **2010(1) SCC 679 (HDFC Bank Limited vs. J.J. Mannan alias J.M. John Paul and another**), **2010(1) SCC 684 (Ravindra Saxena vs. State of Rajasthan**), **(2011) 13 SCC 706 (Rajesh Kumar vs. State Through Government of NCT of Delhi)** and on a Full Bench judgment of this Court reported as **1995 MPLJ 296 (Nirbhay Singh and another vs. State of Madhya Pradesh**) in respect of the argument that the personal liberty of the petitioners cannot be taken away by the criminal process initiated against them.

8. Another argument of learned senior counsel for the petitioner is that the learned Special Judge has issued non-bailable warrants in the first instance, which could not have been done, therefore, the entire process is vitiated. The reliance is placed upon judgment of the Supreme Court reported as **2007 (12) SCC 1 (Inder Mohan Goswami and another vs.**

State of Uttaranchal and others) and two Single Bench judgments of Delhi High Court passed in **Crl.M(M) No.3875/2003 (Court on its Own Motion vs. Central Bureau of Investigation**) decided on 28.01.2004 and **Bail Application No.1946/2014 (Lt. Gen. Tejinder Singh vs. CBI**) which is also reported as 2014 SCC OnLine Del 4560.

9. We find that the reliance placed by Shri Tulsi, learned senior counsel on the judgment of the Supreme Court in **Nikesh Tarachand Shah (supra)** is not tenable. Firstly, it was a case where the accused were arrested and sought bail under Section 45 of the Act of 2002 read with Section 439 of the Code and not for anticipatory bail under Section 438 of Code. Secondly, the maximum punishment for the offence under the Act of 2002 is three years whereas the punishment of the offence for which the petitioners have been charged, ranges from three years to life imprisonment; such as for an offence under Sections 467 and 471 of IPC, the punishment is imprisonment for life whereas punishment for an offence under Sections 3-D (1) and (2) of the M.P. Recognised Examination Act, 1937 and Section 4 of the said Act, may extend to three years and thirdly, the offences to which the petitioners have been charged are triable by the Sessions Court as well. In **Nikesh Tarachand Shah (supra)**, the Court has struck down the provision of Section 45(1) of the Act of 2002 whereas in the present case, there is no challenge to any of the provision of the Code or the provisions of any other Statue under which the petitioners are to face trial. In the said decision, the Supreme Court has distinguished its earlier judgments reported as **(1994) 3 SCC 569 (Kartar Singh vs. State of Punjab)** and **(2005) 5 SCC 294 (Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and**

another) dealing with the provisions of the Terrorist and Disruptive Activities (Prevention) Act of 1985 and 1987 (in short as "TADA Act") and Maharashtra Control of Organised Crime Act, 1999. Similar conditions for concession of bail under Section 439 of Code were upheld in the aforesaid judgments. The Supreme Court in **Nikesh Tarachand Shah (supra)** held, which we quote, as under:-

> "**47**. The judgment in *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569 at 707 is an instance of a similar provision that was upheld only because it was necessary for the State to deal with terrorist activities which are a greater menace to modern society than any other. It needs only to be mentioned that, unlike Section 45 of the present Act, Section 20(8) of TADA, which speaks of the same twin conditions to be applied to offences under TADA, would pass constitutional muster for the reasons stated in the aforesaid judgment. Ultimately, in paragraph 349 of the judgment, this Court upheld Section 20(8) of TADA in the following terms:
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> > "349. The conditions imposed under Section 20(8)(b), as rightly pointed out by the Additional Solicitor General, are in consonance with the conditions prescribed under clauses (i) and (ii) of sub-section (1) of Section 437 and clause (b) of sub-section (3) of that section. Similar to the conditions in clause (b) of sub-section (8), there are provisions in various other enactments — such as Section 35(1) of Foreign Exchange Regulation Act and Section 104(1) of the Customs Act to the effect that any authorised or empowered officer under the respective Acts, if, has got reason to believe that any person in India or within the Indian customs waters has been guilty of an offence punishable under the respective Acts, may arrest such person. Therefore, the condition that "there are grounds for believing that he is not guilty of an offence", which condition in different form is incorporated in other Acts such as clause (i) of Section 437(1) of the Code and Section 35(1) of FERA and 104(1) of the Customs Act, cannot be

> said to be an unreasonable condition infringing the principle of Article 21 of the Constitution.

48. It is clear that this Court upheld such a condition only because the offence under TADA was a most heinous offence in which the vice of terrorism is sought to be tackled. Given the heinous nature of the offence which is punishable by death or life imprisonment, and given the fact that the Special Court in that case was a Magistrate and not a Sessions Court, unlike the present case, Section 20(8) of TADA was upheld as being in consonance with conditions prescribed under Section 437 of the Code of Criminal Procedure. In the present case, it is Section 439 and not Section 437 of the Code of Criminal Procedure that applies. Also, the offence that is spoken of in Section 20(8) is an offence under TADA itself and not an offence under some other Act. For all these reasons, the judgment in *Kartar Singh* (supra) cannot apply to Section 45 of the present Act.

49. A similar provision in the Maharashtra Control of Organised Crime Act, 1999, also dealing with the great menace of organized crime to society, was upheld somewhat grudgingly by this Court in *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Another,* (2005) 5 SCC 294 at 317, 318-319 as follows:

> 38. We are furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far. If the court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The court at the

> time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission, negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA. A person in a given situation may not do that which he ought to have done. The court may in a situation of this nature keep in mind the broad principles of law that some acts of omission and commission on the part of a public servant may attract disciplinary proceedings but may not attract a penal provision."

10. A perusal of the above-mentioned extract would show that the Court found that the TADA Act deals with heinous offence, which is punishable by death or life imprisonment, therefore, the said judgment in relation to an offence under the Act of 2002 cannot be considered to be applicable to the facts of this case.

11. We find that the judgment in **Nikesh Tarachand Shah (supra)** has no applicability to the facts of the present case where the petitioners seek pre-arrest bail. The conditions on which the pre-arrest bail can be granted have been enumerated in Section 438 of Code as well as in some of the judgments, to which reference would be made here-in-after. One of the fact which is required to be considered is nature and gravity of the accusation in terms of Section 438 of the Code itself. The relevant extract from the Code read as under:-

> "**438**. Direction for grant of bail to person apprehending arrest – (1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on

bail; and that Court may, after taking into consideration, *inter-alia,* the following factors, namely-

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and.

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

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

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12. Considering the aforesaid provisions, a Constitution Bench in a judgment reported as **1980 (2) SCC 565 (Shri Gurbaksh Singh Sibbia and others vs. State of Punjab**) held as under:-

"**31**. In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the

> combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The 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 applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in *The State v. Captain Jagjit Singh, (1962) 3 SCR 622: AIR 1962 SC 253*, which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.
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> **32**. A word of caution may perhaps be necessary in the evaluation of the consideration whether the applicant is likely to abscond. There can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it……....”

13. In another judgment reported as **(2011) 1 SCC 694 (Siddharam Satlingappa Mhetre vs. State of Maharashtra and others)**, the Supreme Court delineated the factors and parameters which can be taken into consideration while dealing with an application for grant of anticipatory bail. The relevant excerpts from the said decision are reproduced as under:-

> “**109**. A good deal of misunderstanding with regard to the ambit and scope of section 438 Cr.P.C. could have been avoided in case the Constitution Bench decision of this court in *Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565* was correctly

understood, appreciated and applied. This Court in the Sibbia's case (supra) laid down the following principles with regard to anticipatory bail:

a) Section 438(1) is to be interpreted in light of Article 21 of the Constitution of India.

b) Filing of FIR is not a condition precedent to exercise of power under section 438.

c) Order under section 438 would not affect the right of police to conduct investigation.

d) Conditions mentioned in section 437 cannot be read into section 438.

e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the circumstances of each case.

f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant.

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112. 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 Penal Code, 1860 the court should consider with even greater care and caution because overimplication 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.

113. 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. 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.

114. 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 Judge concerned, after

> consideration of the 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 Session or the High Court is always available."

14. The judgment in **Rajesh Kumar (supra)** relied upon by Shri Tulsi was a case where the Supreme Court was examining the conviction of the appellant for an offence punishable under Section 302 of IPC. The Court also considered the constitutionality of Section 302 of IPC and Section 354(3) of the Code. That was a case where the Court was examining whether a death penalty should have been imposed upon the appellant. The said judgment does not deal with the factors to be considered at the time of grant of pre-arrest bail. The discussion is on the scope of Article 21 of the Constitution of India. The petitioners in the present cases are under threat of arrest on the basis of their role unearthed in the process of investigation. It is not the case of the petitioners that threat of arrest is unconstitutional. What is argued is that the personal liberty of the petitioners cannot be curtailed only on filing of charge-sheet against the petitioners.

15. A Full Bench of this Court in **Nirbhay Singh's** case (**supra**) held that under Section 438 of the Code a person having reason to believe that he may be arrested on an accusation is competent to invoke the jurisdiction of the Court of Sessions or High Court under Section 438 of the Code. It held that even there can be accusation before a case is registered by the police. After registration of the case, filing of the charge-sheet or filing of a

complaint or taking cognizance or issuance of warrant, the accusation will not cease to be an accusation. It is, thus, held that jurisdiction under Section 438 of the Code does not warrant a restricted interpretation.

16. In **Ravindra Saxena**'s case **(supra)** decided on December 15, 2009, the Supreme Court set aside the order of the High Court, which denied the benefit of pre-arrest bail only for the reason that challan has now been presented. The court held as under:-

> "**9**. In our opinion, the High Court ought not to have left the matter to the Magistrate only on the ground that the challan has now been presented. There is also no reason to deny anticipatory bail merely because the allegation in this case pertains to cheating or forgery of a valuable security. The merits of these issues shall have to be assessed at the time of the trial of the accused persons and denial of anticipatory bail only on the ground that the challan has been presented would not satisfy the requirements of Sections 437 and 438 of Cr.P.C.
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> **10**. In our opinion, the High Court committed a serious error of law in not applying its mind to the facts and circumstances of this case. The High Court is required to exercise its discretion upon examination of the facts and circumstances and to grant anticipatory bail "if it thinks fit". The aforesaid expression has been explained by this Court in *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565 (SCC p. 583, para 18), as follows:
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> *** *** ***
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> **11**. The salutary provision contained in Section 438 CrPC was introduced to enable the court to prevent the deprivation of personal liberty. It cannot be permitted to be jettisoned on technicalities such as "the challan having been presented, anticipatory bail cannot be granted". We may notice here some more observations made by this Court in Gurbaksh Singh (supra) (SCC p.586, para 26):
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> *** *** ***"

17. In another judgment by a Bench of coordinate strength rendered in **HDFC Bank Limited (supra)** on December 16, 2009 i.e. the next date of the order in **Ravindra Saxena**'s case, the Supreme Court held that Section 438 of the Code contemplates arrest at the stage of investigation but 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. The relevant extract from the said judgment is quoted as under:-

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

Thus, there is a conflict between the two Coordinate Bench judgments of the Supreme Court. The judgment of Full Bench of this Court rendered in **Nirbhay Singh (supra)** is, in fact, contrary to the judgment of

the Supreme Court in **HDFC Bank Limited** (**supra**), but even though there is a conflict with the judgments of the Supreme Court, we find that such conflict is not required to be resolved in the present petitions and we proceed to decide the right of the petitioners to apply for anticipatory bail even if a report under Section 173(8) of the Code has been filed before the Court.

18. In **Inder Mohan Goswami**'s **case (supra),** an appeal was directed against an order passed by the High Court refusing to set aside non-bailable warrants issued against the appellant on the basis of first information report for the offence under Sections 420 and 467 of IPC. While considering the issue of personal liberty of citizen and interest of the State, the Court held as under:-

> "***Personal liberty and the interest of the State***
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> **50.** Civilized countries have recognized that liberty is the most precious of all the human rights. The American Declaration of Independence, 1776, French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, 1966 all speak with one voice - liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law.
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> **51**. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.
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> **52**. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely

imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

When non-bailable warrants should be issued

53. Non-bailable warrant should be issued to bring a person to court when summons of bailable warrants would be unlikely to have the desired result. This could be when:

- it is reasonable to believe that the person will not voluntarily appear in court; or
- the police authorities are unable to find the person to serve him with a summon; or
- it is considered that the person could harm someone if not placed into custody immediately.

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56. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided."

19. The Single Bench of Delhi High Court in **Court on its Own Motion** (**supra**) has taken *suo moto* notice of a newspaper report when a Special Judge has refused to accept charge-sheet in a fake visa racket and for not arresting the accused during the investigation. The Court issued directions to the Criminal Courts to accept the charge-sheet even if the investigation agency has not arrested the accused during the investigation and that if the Court exercises the discretion of warrant of arrest at any stage including the stage while taking cognizance of the charge-sheet, it has to record reasons as contemplated under Section 87 of the Code that the accused has either

been absconding or shall not obey the summons or has refused to appear despite proof of due service of summons upon him. It is the said order dated 28.01.2004 which was reiterated by another Single Bench of Delhi High Court in **Lt. Gen. Tejinder Singh (supra)**.

20. We find that in the order passed by Delhi High Court in **Court on its Own Motion** (**supra**), the learned Single Bench referred to a judgment passed by the Supreme Court in Joginder Kumar vs. State of U.P. and others, (1994) 4 SCC 260 wherein it has been held that it would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen that no arrest shall be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even as to the need to effect arrest. It was further held that the arrest may be necessary if the offence alleged is of a grave nature and prescribes a severe punishment and that there is a likelihood of offender either absconding or not appearing on being summoned or his fleeing away from justice or judgment. The said judgment was rendered prior to the Supreme Court judgment in **Siddharam Satlingappa Mhetre (supra)** wherein the Court has culled out the parameters, which are required to be taken into consideration while enlarging an accused on pre-arrest bail. Still further, that was not a case of pre-arrest bail but a case where the learned Special Court returned the charge-sheet. Similarly, in **Lt. Gen. Tejinder Singh (supra)**, the petitioner was an accused for an offence under the Prevention of Corruption Act, 1988. He sought bail under Section 437 of the Code after filing of the charge-sheet, therefore, such judgment is again not helpful to

the argument raised by the learned senior counsel, as it was not a case of pre-arrest bail under Section 438 of the Code.

21. Shri Pravin H. Parekh, learned senior counsel for the petitioner in MCRC No.24605/2017 has referred to another judgment of the Supreme Court reported as **2012(1) SCC 40 (Sanjay Chandra vs. Central Bureau of Investigation**) wherein the Court has observed as under:-

> "**21**. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.
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> **22**. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.
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> **40**. The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary

> purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required."

22. Section 438 of the Code itself has delineated some factors for consideration of grant of pre-arrest bail and the first and foremost is the nature and gravity of the accusation. The allegation against petitioner Dr. Ajay Goenka is that the Management of Chirayu Medical College has given dishonest and false information to the Director, Medical Education, Bhopal that 12 students have been admitted whereas none of those 12 students were admitted. Such 12 candidates were the engine candidates, explained to us as the candidates who do not intend to take admission but pair with a bogie candidate for admission before the last date of admission. The further allegation is that when charts in respect of vacant seats were prepared and forwarded to Director, Medical Education, Bhopal on 25.09.2012, information was sent that only nine seats are vacant whereas more than 50 seats were vacant. It is further alleged that 19 candidates were admitted on 28th September, who were not from the allotment list at all; 32 new students were admitted on 29th September and 4 candidates on 30th September without any merit and criteria and without following the due process.

23. The allegation against petitioners - Jai Narayan Chouksey and Dr. Divya Kishore Satpathi, who were Chairman and In-charge, Admission Committee respectively of L.N. Medical College, Bhopal is that one Mithilesh Kumar, a co-accused, was an engine candidate, who was already

admitted in Patna Medical College in the year 2011 but the Director, Medical Education, falsely with a dishonest intention was informed that he stands admitted in L.N. Medical College. The Director, Medical Education was informed on 25.09.2012 that only five seats are vacant, but, in fact, 40 seats were vacant, which were filled on 30.09.2012 after the process of counselling was over, after publishing an advertisement in an evening tabloid of very limited circulation.

24. Thus, there are grave and serious allegations of wrongful admission of students in the Medical Colleges being run and managed by the petitioners. As per the charge-sheet, in Chirayu Medical College, out of quota of 63 students, 55 students were granted wrongful admission. In L.N. Medical College, out of 63 seats, 41 students have been granted wrongful admission. Meaning thereby, that such large number of students have been admitted otherwise than on merit for financial considerations. Such action of the petitioners, if proved, during trial would show the deep-rooted malice in the admission process whereby the merit is given a go-bye and the students, who are not meritorious, were admitted at the cost of more meritorious candidates for monetary consideration. Thus, the action or inaction of the petitioners, who were running the medical colleges has denied admission to the large number of more meritorious candidates, who were, in fact, entitled to admission and thus, leading to their frustration. The entire process would be antithesis of the rule that the students should be admitted only on merit. Thus, the gravity of the accusation against the petitioners is glaring. In fact, the petitioners may not be an accused of taking life of a person but if the allegations are proved, the petitioners

cannot commit more heinous crime than of playing with the life of young students. It would be a case of mass killing of the career of numerous students.

25. The learned Special Judge has found that the allegation against the petitioners does not fall within the case of 'no evidence' or that the petitioners are being arrested without any basis or in a *mala fide* manner. The role of the petitioners vis-a-vis the nature and gravity of the accusation has been properly appreciated in terms of the direction (i) contained in para 112 of the judgment of the Supreme Court in **Siddharam Satlingappa Mhetre (supra)**. In the present case, direction (vi) contained in the said decision is also relevant that impact of grant of anticipatory bail in cases of large magnitude affecting a very large number of people is also a parameter for consideration for grant of anticipatory bail. The action of the petitioners has led to admission of large number of candidates at the cost of more meritorious candidates in a professional course. The impact of the action of the petitioners, if proved, would show that how the professional courses are being conducted by the private medical colleges, therefore, in view of the seriousness of the allegations, which have wide ramifications on the cause of professional education in the State, we do not find that the petitioners are entitled to concession of pre-arrest bail.

26. In respect of the argument that the learned Special Judge has issued non-bailable warrants without seeking presence by summons, is again not tenable. Our attention has been drawn in M.Cr.C. No. 25107/2017 (Dr. Vijay Kumar Pandya vs. Union of India) wherein the Central Bureau of

Investigation has directed the petitioner therein on 21.11.2017 to appear before the learned 15th Additional Sessions Judge, VYAPAM notified cases, Bhopal on 23.11.2017. Similar notice is believed to have been issued to the petitioners as well. It is, thereafter, on 23.11.2017, the Special Judge has passed an order that the petitioners have not appeared even though called upon by the Central Bureau of Investigation, Bhopal to appear before the Court, therefore, the presence of the petitioners was sought by issuance of non-bailable warrants. Thus, it is not a case where non-bailable warrants have been issued in the first instance. The petitioners were given opportunity to appear before the notified Court but on account of non-appearance, non-bailable warrants have been issued.

27. Further argument of the learned counsel for the petitioners is that the petitioners were not arrested during investigation and have cooperated with the Investigating Officer, therefore, at this stage the arrest of the petitioners will deprive them of personal liberty. The argument looks attractive but the fact is that the investigation process was long drawn. There are more than 500 accused. If the accused were not arrested during investigation, it does not mean that the petitioners are entitled to anticipatory bail as the allegations against the petitioners of exploiting the admission process are quite serious.

28. Consequently, the present petitions for grant of anticipatory bail under Section 438 of the Code are hereby **dismissed**.

(HEMANT GUPTA)
Chief Justice

(VIJAY KUMAR SHUKLA)
Judge

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