COMPENDIUM OF CASE LAWS ON

ANTICIPATORY BAIL



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1. This extract is taken from *Gurbaksh Singh Sibbia v. State of Punjab*, (5J) (1980) 2 SCC 565 : 1980 SCC (Cri) 465 : 1980 SCC OnLine SC 125 at page 576

3. Criminal Appeal 335 of 1977 which is the first of the many appeals before us, arises out of a judgment dated September 13, 1977 of a Full Bench of the High Court of Punjab and Haryana [*Gurbaksh Singh Sibbia* v. *State of Punjab*, 1978 Cri LJ 20 (FB) : AIR 1978 P & H 1] . The appellant therein, Shri Gurbaksh Singh Sibbia, was a Minister of Irrigation and Power in the Congress Ministry of the Government of Punjab. Grave allegations of political corruption were made against him and others whereupon, applications were filed in the High Court of Punjab and Haryana under Section 438, praying that the appellants be directed to be released on bail, in the event of their arrest on the aforesaid charges. Considering the importance of the matter, a learned Single Judge referred the application to a Full Bench, which by its judgment dated September 13, 1977 dismissed them.

11. The Full Bench of the Punjab and Haryana High Court rejected the appellants' applications for bail after summarising, what according to it is 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."

It was urged before the Full Bench that the appellants were men of substance and position who were hardly likely to abscond and would be prepared willingly to face trial. This argument was rejected with the observation that to accord differential treatment to the appellants on account of their status will amount to negation of the concept of equality before the law and that it could hardly be contended that every man of status, who was intended to be charged with serious crimes, including the one under Section 409 IPC which was punishable with life imprisonment, "was entitled to knock at the door of the court for anticipatory bail". The possession of high status, according to the Full Bench, is not only an irrelevant consideration for granting anticipatory bail but is, if anything, an aggravating circumstance.

10. Shri V.M. Tarkunde, appearing on behalf of some of the appellants, while supporting the contentions of the other appellants, said 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 imposed by the legislature in the terms of that section. **The learned Counsel added a new dimension to the argument by invoking Article 21 of the Constitution**. He urged that Section 438 is a procedural provision which is concerned with the personal liberty of an individual who has not been convicted of the offence in respect of which he seeks bail and who must therefore be presumed to be innocent. The validity of that section must accordingly be examined by the test of fairness and reasonableness which is implicit in Article 21. If the legislature itself were to impose an unreasonable restriction on the grant of anticipatory bail, such a restriction could have been struck down as being violative of Article 21. Therefore, while determining the scope of Section 438, the court should not impose any unfair or unreasonable limitation on the individual's right to obtain an order of anticipatory bail. Imposition of an unfair or unreasonable limitation, according to the learned Counsel, would be violative of Article 21, irrespective of whether it is imposed by legislation or by judicial decision.

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.

> "*15*. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the courts, by devising a formula which will confine the power to grant anticipatory bail within a straitjacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises. Therefore, even if we were to frame a 'Code for the grant of anticipatory bail', which really is the business of the legislature, it can at best furnish broad guidelines and cannot compel blind adherence. In which case to grant bail and in which to refuse it is, in the very nature of things, a matter of discretion. But apart from the fact that the question is inherently of a kind which calls for the use of discretion from case to case, the legislature has, in terms express, relegated the decision of that question to the discretion of the court, by providing that it may grant bail 'if it thinks fit'. The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law."

After considering the scheme of "anticipatory bail" under Section 438 CrPC and while not agreeing with the Full Bench, Hon'ble Supreme Court has observed and held as under : (***Gurbaksh Singh Sibbia case*** **[*Gurbaksh***

***Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , SCC pp. 577, 579-80, 582-86 & 589-91, paras 12-13, 18-22, 25, 33 & 35-43)**

"***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 is 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.

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 preconditions 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-sections (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*** **[*State of U.P.* v. *Deoman***

***Upadhyaya*, AIR 1960 SC 1125** : (1961) 1 SCR 14 : 1960 Cri LJ 1504] , SCR at p. 26 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 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.

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* [*Balchand Jain* v. *State of M.P.*, (1976) 4 SCC 572 : 1976 SCC (Cri) 689] in an altogether different context on an altogether different point.

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.

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

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 Sections 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 Sections 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."

(emphasis supplied)

2. This extract is taken from *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514 : 2010 SCC OnLine SC 1375 at page 709

2. The brief facts which are necessary to dispose of this appeal are recapitulated as under: the appellant, who belongs to the Indian National Congress Party (for short "the Congress Party") is the alleged accused in this case. The case of the prosecution, as disclosed in the first information report (for short "FIR"), is that Sidramappa Patil was contesting election to the State Assembly on behalf of the Bhartiya Janata Party (for short "BJP"). In the FIR, it is incorporated that Baburao Patil, Prakash Patil, Mahadev Patil, Mallikarjun Patil, Apparao Patil, Yeshwant Patil were supporters of the Congress and so also the supporters of the appellant, Siddharam Mhetre and opposed to the BJP candidate.

3. On 26-9-2009, around 6.00 p.m. in the evening, Sidramappa Patil of BJP came to the village to meet his party workers. At that juncture, Shrimant Ishwarappa Kore, Bhimashankar Ishwarappa Kore, Kallapa Gaddi, Sangappa Gaddi, Gafur Patil, Layappa Gaddi, Mahadev Kore, Suresh Gaddi, Suresh Zhalaki, Ankalgi, Sarpanch of Village Shivmurti Vijapure met Sidramappa Patil and thereafter went to worship and pray at Layavva Devi's temple. After worshipping the goddess when they came out to the assembly hall of the temple, these aforementioned political opponents, namely, Baburao Patil, Prakash Patil, Gurunath Patil, Shrishail Patil, Mahadev Patil, Mallikarjun Patil, Annarao alias Pintu Patil, Hanumant Patil, Tammarao Bassappa Patil, Apparao Patil, Mallaya Swami, Sidhappa Patil, Shankar Mhetre, Usman Sheikh, Jagdev Patil, Omsiddha Pujari, Panchappa Patil, Mahesh Hattargi, Siddhappa Birajdar, Santosh Arwat, Sangayya Swami, Anandappa Birajdar, Sharanappa Birajdar, Shailesh Chougule, Ravi Patil, Amrutling Koshti, Ramesh Patil and Chandrakant Hattargi suddenly came rushing in their direction and shouted loudly, "Why have you come to our village? Have you come here to oppose our Mhetre Saheb?" They asked them to go away and shouted "Mhetre Saheb ki jai".

4. Baburao Patil and Prakash Patil from the aforementioned group fired from their pistols in order to kill Sidramappa Patil and the other workers of BJP. Bhimashankar Kore was hit by the bullet on his head and died on the spot. Sangappa Gaddi, Shivmurti Vjapure, Jagdev Patil, Layappa Patil, Tammaro Patil were also assaulted. It is further mentioned in the FIR that about eight days ago, the appellant Siddharam Mhetre and his brother, Shankar Mhetre had gone to the village and talked to the abovementioned party workers and told them that, "if anybody says anything to you, then you tell me. I will send my men within five minutes. You beat anybody. Do whatever".

5. According to the prosecution, the appellant along with his brother instigated their party workers which led to killing of Bhimashankar Kore. It may be relevant to mention that the alleged incident took place after eight days of the alleged incident of instigation.

14. It is clear from the Statement of Objects and Reasons that the purpose of incorporating Section 438 in CrPC was to recognise the importance of personal liberty and freedom in a free and democratic country. When we carefully analyse this section, the wisdom of the legislature becomes quite evident and clear that the legislature was keen to ensure respect for the personal liberty and also pressed in service the age-old principle that an individual is presumed to be innocent till he is found guilty by the court.

Ratio : In *Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] noticed that *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] 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* [*Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] observed as follows : (SCC pp. 729-33 & 736-37, paras 85-114)

> "*85.* ... Those orders are contrary to the law laid down by the judgment of the Constitution Bench in *Sibbia case* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] .
>
> *86.* According to the report of the National Police Commission, when 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 is presumed to be innocent till he is found guilty by the competent court.
>
> *87.* The complaint filed against the accused needs to be thoroughly examined including the aspect whether the complainant has filed a 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.

88. 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.

89. 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.

90. 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 CrPC are subject to limitation of Section 437 CrPC?

91. The question which arises for consideration is whether the powers under Section 438 CrPC are unguided or uncanalised or are subject to all the limitations of Section 437 CrPC? The Constitution Bench in *Sibbia case* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] has clearly observed that there is no justification for reading into Section 438 CrPC and the limitations mentioned in Section 437 CrPC. The Court further observed that the plenitude 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 CrPC to a dead letter. The Court observed that : (SCC p. 584, para 21)

'*21.* ... We do not see why the provisions of Section 438 CrPC should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable.'

92. As aptly observed in *Sibbia case* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] that : (SCC p. 584, para 21)

'*21.* ... 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.'

93. 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 be enlarged on bail.

94. 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 the 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.

95. 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 case* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] .

96. 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.

97. 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 case* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] 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 : (SCC p. 589, para 33)

'*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 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

98. 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. The judgment in *Salauddin Abdulsamad Shaikh* [*Salauddin Abdulsamad Shaikh* v. *State of Maharashtra*, (1996) 1 SCC 667 : 1996 SCC (Cri) 198] 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.

99. The restriction on the provision of anticipatory bail under Section 438 CrPC 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 case* [*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248] in which the Court observed that : (*Sibbia case* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , SCC p. 586, para 26)

> '*26.* … 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.'

100. Section 438 CrPC 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 court concerned would be fully justified in imposing conditions including direction of joining investigation.

101. 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 Session in the event of arrest. According to the aforesaid judgment of *Salauddin case* [*Salauddin Abdulsamad Shaikh* v. *State of Maharashtra*, (1996) 1 SCC 667 : 1996 SCC (Cri) 198] , 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.

102. In pursuance to the order of the Court of Session 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.

103. 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 agency concerned 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 case* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] .

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

105. It is a settled legal position crystallised by the Constitution Bench of this Court in *Sibbia case* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] that the courts should not impose restrictions on the ambit and scope of Section 438 CrPC which are not envisaged by the legislature. The Court cannot rewrite the provision of the statute in the garb of interpreting it.

106. 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 *Sibbia case* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465]

111. 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 visualised 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 case* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] that the High Court or the Court of Session has to exercise their jurisdiction under Section 438 CrPC 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.

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 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.

113. 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. 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 visualise 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 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."

3. This extract is taken from *Sushila Aggarwal v. State (NCT of Delhi)*, (2020) 5 SCC 1 : (2020) 2 SCC (Cri) 721 : 2020 SCC OnLine SC 98 at page 26

M.R. SHAH, J. (*Arun Mishra, Indira Banerjee, Vineet Saran, JJ. and Ravindra Bhat, J. concurring*)— In the light of the conflicting views of the different Benches of varying strength, more particularly in *Gurbaksh Singh Sibbia* v. *State of Punjab* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , *Siddharam Satlingappa Mhetre* v. *State of Maharashtra* [*Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] , *Bhadresh Bipinbhai Sheth* v. *State of Gujarat* [*Bhadresh Bipinbhai Sheth* v. *State of Gujarat*, (2016) 1 SCC 152 : (2016) 1 SCC (Cri) 240] on one side and in *Salauddin Abdulsamad Shaikh* v. *State of Maharashtra* [*Salauddin Abdulsamad Shaikh* v. *State of Maharashtra*, (1996) 1 SCC 667 : 1996 SCC (Cri) 198] , subsequently followed in *K.L. Verma* v. *State* [*K.L. Verma* v. *State*, (1998) 9 SCC 348 : 1998 SCC (Cri) 1031] , *Sunita Devi* v. *State of Bihar* [*Sunita Devi* v. *State of Bihar*, (2005) 1 SCC 608 : 2005 SCC (Cri) 435] , *Nirmal Jeet Kaur* v. *State of M.P.* [*Nirmal Jeet Kaur* v. *State of M.P.*, (2004) 7 SCC 558 : 2004 SCC (Cri) 1989] , *HDFC Bank Ltd.* v. *J.J. Mannan* [*HDFC Bank Ltd.* v. *J.J. Mannan*, (2010) 1 SCC 679 : (2010) 1 SCC (Cri) 879] and *Satpal Singh* v. *State of Punjab* [*Satpal Singh* v. *State of Punjab*, (2018) 13 SCC 813 : (2019) 1 SCC (Cri) 424] , **the following questions are referred [*Sushila Aggarwal* v. *State (NCT of Delhi)*, (2018) 7 SCC 731 : (2018) 3 SCC (Cri) 331] for consideration by a larger Bench:**

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

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?**

2.6. It is further submitted by Shri Raval that in the subsequent decision of this Court in *Siddharam Satlingappa Mhetre* [*Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] , 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 *Siddharam Satlingappa Mhetre* [*Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] in paras 94, 95, 98, 100, 122 and 123.

It is submitted by Shri Raval that however, the judgment rendered in *Siddharam Satlingappa Mhetre* [*Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] particularly in paras 95, 108, 122 and 123 does not take into consideration the observations of the Constitution Bench in *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] in paras 42 and 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* [*Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] proceeded to hold that the anticipatory bail shall subsist 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 *Siddharam Satlingappa Mhetre* [*Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] particularly the observations made in paras 95, 108, 122 and 123 need to be revisited.

Ratio 7.6. Thus, considering the observations made by the Constitution Bench of this Court in *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , 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 court concerned while granting pre-arrest bail order including limiting the operation of the order in relation to a period of time if the circumstances so warrant, more particularly the stage at which the "anticipatory bail" application is moved, namely, whether the same is at the stage before the FIR is filed or at the stage when the FIR is filed and the investigation is in progress or at the stage when the investigation is complete and the charge-sheet is filed. However, as observed hereinabove, the normal rule should be not to limit the order in relation to a period of time.

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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 Punjab1 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 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, 1 1980 (2) SCC 565 51 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 Maharashtra2; K.L. Verma v. State & Anr3; Sunita Devi v. State of Bihar & Anr4; Adri Dharan Das v. State of West Bengal5; Nirmal Jeet Kaur v. State of M.P. & Anr6; HDFC Bank

Limited v. J.J. Mannan7; Satpal Singh v. the State of Punjab8 and Naresh Kumar Yadav v Ravindra Kumar9 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 & Ors10 and Bhadresh Bipinbhai Sheth v. State of Gujarat & Anr11; 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.

13. The context of *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] was the correctness of a decision [*Gurbaksh Singh Sibia* v. *State of Punjab*, 1977 SCC OnLine P&H 157 : ILR (1978) 1 P&H 109] 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 extraordinary*" 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 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."

14. *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] 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 [*Gurbaksh Singh Sibia* v. *State of Punjab*, 1977 SCC OnLine P&H 157 : ILR (1978) 1 P&H 109] ; the five-Judge Bench ruled as follows : (*Sibbia case* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , SCC pp. 579-80, 583-86 & 589-91, paras 12-14, 19, 21-22, 26 & 33-43)

"***12.*** … 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 resorting 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 is 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. Generalisations 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 Ahmad* [*King Emperor* v. *Khwaja Nazir Ahmad*, 1944 SCC OnLine PC 29 : AIR 1945 PC 18 : (1943-44) 71 IA 203 : 1945 Cri LJ 413] : (SCC OnLine PC)

> '... 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-sections (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* [*State of U.P.* v. *Deoman Upadhyaya*, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 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.

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 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.

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* v. *Union of India* [*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.

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

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 Sections 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."

19. 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.

32. *The counsel submitted that 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. The counsel pointed to Section 438(3) and submitted that two important aspects of this provision highlight the understanding the scheme of the Code:*

32.1. *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.*

32.2. *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.*

33. *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 is 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) CrPC. 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 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.*

34. *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. The counsel stated that this proposition of law was considered by this Court in Pradeep Ram v. State of Jharkhand [Pradeep Ram v. State of Jharkhand, (2019) 17 SCC 326 : 2019 SCC OnLine SC 825] . In this case, this Court while considering an earlier judgment in Mithabhai Pashabhai Patel v. State of Gujarat [Mithabhai Pashabhai Patel v. State of Gujarat, (2009) 6 SCC 332 : (2009) 2 SCC (Cri) 1047] , 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 recognised the need for the court's supervision after the bail had been granted.*

37. 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).**

Analysis and Conclusions

Re Question 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.

45. 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*".

52. In the light of the relevant extracts of *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , it would now be worthwhile to recount the relevant observations on the issue. The discussion and conclusions in *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] are summarised as follows:

52.1. 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".

52.2. Grant of an order under Section 438(1) does not per se hamper investigation of an offence; Sections 438(1)(*i*) and (*ii*) enjoin that an accused/applicant should cooperate with investigation. *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] also stated that courts *can fashion appropriate conditions governing bail, as well.* One condition can be that if the police makes 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

52.3. 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

52.4. 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

52.5. 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. (Paras 24-25, *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

52.6. 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)

52.7. 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

52.8. 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

52.9. 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

52.10. 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 unspelt apprehensions. (Para 35, *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

52.11. 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 Magistrate concerned. (Para 36, *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

52.12. 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

52.13. 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. (Paras 38-39, *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

52.14. 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. (Paras 40-41, *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

52.15. 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*:

> "*42.* ... 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." (SCC p. 591, para 42, *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465])

53. It is quite evident, therefore, that the predominant thinking of the larger Constitution Bench, in *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , 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 (like cooperation 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.*

55. In *Gudikanti Narasimhulu* v. *Public Prosecutor* [*Gudikanti Narasimhulu* v. *Public Prosecutor*, (1978) 1 SCC 240 : 1978 SCC (Cri) 115] this Court observed that : (SCC p. 242, para 1)

> "*1.* … 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".

56. The reason for enactment of Section 438 in the Code was parliamentary acceptance of the crucial underpinning of personal liberty in a free and democratic country. Parliament wished to foster respect for personal liberty and accord primacy to a fundamental tenet of criminal jurisprudence, that everyone is presumed to be innocent till he or she is found guilty. Life and liberty are the cherished attributes of every individual. The urge for freedom is natural to each human being. Section 438 is a procedural provision concerned with the personal liberty of each individual, who is entitled to the benefit of the presumption of innocence. As denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when not imposed by the legislature. In *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , it was observed that : (SCC p. 589, para 35)

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

59. The persistence of the phenomena of unwarranted arrests was sharply criticised by this Court in *Arnesh Kumar* [*Arnesh Kumar* v. *State of Bihar*, (2014) 8 SCC 273 : (2014) 3 SCC (Cri) 449] , saying that the approach of the police continued to be colonial despite six decades of Independence, that the power of arrest : (SCC p. 277, para 5)

> "*5.* … 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 emphasised 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 handy tool to the police officers who lack sensitivity or act with oblique motive."

The latest report of the Law Commission [268th Report, 2017.] notes that "*67% 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] was decided.

62. 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 376-AB or Section 376-DA or Section 376-DB of the 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:**

> **"438. (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."**

Section 18 of SC & ST Act.

Bihar Prohibition & Excise act 2016

65. 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] .

66. 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] 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*".

73. 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-cooperation 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 on preconceived 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] had envisioned the situation; the Court had cited *State of U.P.* v. *Deoman Upadhyaya* [*State of U.P.* v. *Deoman Upadhyaya*, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504] , wherein this Court had observed as follows : (*Deoman Upadhyaya case* [*State of U.P.* v. *Deoman Upadhyaya*, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504] , AIR p. 1131, para 12)

> "*12.* ... 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 Evidence Act : *Legal Remembrancer* v. *Lalit Mohan Singh Roy* [*Legal Remembrancer* v. *Lalit Mohan Singh Roy*, 1921 SCC OnLine Cal 61 : ILR (1922) 49 Cal 167] , *Santokhi Beldar* v. *King Emperor* [*Santokhi Beldar* v. *King Emperor*, 1932 SCC OnLine Pat 82 : ILR (1933) 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 *Soni Vallabhdas Liladhar* v. *Collector of Customs* [*Soni Vallabhdas Liladhar* v. *Collector of Customs*, (1965) 3 SCR 854 : AIR 1965 SC 481 : (1965) 1 Cri LJ 490] . The observations in *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] are relevant, and are reproduced again, for facility of reference : (SCC p. 584, para 19)

> "*19.* ... 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* [*State of U.P.* v. *Deoman Upadhyaya*, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504] ."

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.

Ratio : 75. 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 bail 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 cooperation or non-cooperation with the investigating agency or police, etc. There can be no inflexible time-frame for which an order of anticipatory bail can continue.

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

77. 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.

77.2. 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 *Gurcharan Singh* [*Gurcharan Singh* v. *State (Delhi Admn.)*, (1978) 1 SCC 118 : 1978 SCC (Cri) 41] , that 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* [*Aslam Babalal Desai* v. *State of Maharashtra*, (1992) 4 SCC 272 : 1992 SCC (Cri) 870] 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.

77.3. 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 behaviour 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.

77.4. 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).

79. 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* [*Pradeep Ram* v. *State of Jharkhand*, (2019) 17 SCC 326 : 2019 SCC OnLine SC 825] wherein this Court held as follows : (SCC pp. 340-45, paras 23, 27, 29-31)

> "*23.* 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 Sections 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 Sections 437(5) and 439(2). Cancelling the bail granted to an accused and directing him to be arrested and taken into custody can be one course of action, which can be adopted while exercising power under Sections 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.
>
> *27.* We may have again to look into provisions of Sections 437(5) and 439(2) CrPC. Sub-section (5) of Section 437 CrPC 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 CrPC 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 necessarily 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-bailable offences. The two-Judge Bench judgment in *Mithabhai Pashabhai Patel* [*Mithabhai Pashabhai Patel* v. *State of Gujarat*, (2009) 6 SCC 332 : (2009) 2 SCC (Cri) 1047] uses the word "ordinarily" in para 18 of the judgment which cannot be read as that mandatorily bail earlier granted to the accused has to be cancelled before the investigating officer to arrest him due to addition of graver and non-bailable offences.

29. Relying on the abovesaid order, the learned counsel for the appellant submits that respondent State ought to get first the order dated 10-3-2016 [*Pradeep Ram* v. *State of Jharkhand*, 2016 SCC OnLine Jhar 3254] granting bail to the 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 the 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 the 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 powers under Sections 437(5) and 439(2) are wide powers granted to the court by the legislature under which the 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.

30. Coming back to the present case, the appellant was already into jail custody with regard to another case and the investigating agency applied

before the 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 26-6-2018 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 the 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 the 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 10-3-2016 [*Pradeep Ram* v. *State of Jharkhand*, 2016 SCC OnLine Jhar 3254] granted to the appellant before permitting the appellant-accused to be produced before it or remanding him to the judicial custody.

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

31.1. 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.

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

31.3. The court, in exercise of power under Section 437(5) or 439(2) CrPC, 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 Section 437(5) as well as Section 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-bailable offences which may not be necessary always with order of cancelling of earlier bail.

31.4. 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."

80. Earlier, in the decision in *Dolat Ram* v. *State of Haryana* [*Dolat Ram* v. *State of Haryana*, (1995) 1 SCC 349 : 1995 SCC (Cri) 237] this Court had observed that : (SCC p. 351, para 4)

"*4.* … bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial."

81. This decision was followed, and its *ratio* applied, in *Hazari Lal Das* v. *State of W.B.* [*Hazari Lal Das* v. *State of W.B.*, (2009) 10 SCC 652 : (2010) 1 SCC (Cri) 381] The decision in *Bhadresh Bipinbhai Sheth* v. *State of Gujarat* [*Bhadresh Bipinbhai Sheth* v. *State of Gujarat*, (2016) 1 SCC 152 : (2016) 1 SCC (Cri) 240] stated, after culling out the principles in *Mhetre* [*Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] , as follows : (*Bhadresh case* [*Bhadresh Bipinbhai Sheth* v. *State of Gujarat*, (2016) 1 SCC 152 : (2016) 1 SCC (Cri) 240] , SCC p. 167, para 25)

"*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."

83. 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 2 referred to the present Bench.**

Conclusions

84. This Court answers the reference in the following manner:

84.1. Regarding Question 1, it is held that the protection granted under Section 438 CrPC should not always or ordinarily be limited to a fixed period; it should enure 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 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.

84.2. 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 of 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.

85. 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 CrPC:

85.1. As held in *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , 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 to a specific offence or particular 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 is considering the application, the 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.

85.2. 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.*

85.3. Section 438 CrPC 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) CrPC [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.

85.4. Courts ought to be generally guided by the considerations such as 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.

85.5. Anticipatory bail granted can, depending on the conduct and behaviour 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.

85.6. 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.

85.7. The observations in *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] had observed that : (SCC p. 584, para 19)

> "*19.* ... 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* [*State of U.P.* v. *Deoman Upadhyaya*, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504] ."

85.8. 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.

85.9. 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* v. *Ramprasad Vishwanath Gupta* [*Prakash Kadam* v. *Ramprasad Vishwanath Gupta*, (2011) 6 SCC 189 : (2011) 2 SCC (Cri) 848] , *Jai Prakash Singh* [*Jai Prakash Singh* v. *State of Bihar*, (2012) 4 SCC 379 : (2012) 2 SCC (Cri) 468] and *State of U.P.* v. *Amarmani Tripathi* [*State of U.P.* v. *Amarmani Tripathi*, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] .) This does not amount to "cancellation" in terms of Section 439(2) CrPC.

85.10. The judgment in *Mhetre* [*Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] (and other similar decisions) that restrictive conditions cannot be imposed at all, at the time of granting anticipatory bail are hereby overruled. Likewise, the decision in *Salauddin* [*Salauddin Abdulsamad Shaikh* v. *State of Maharashtra*, (1996) 1

SCC 667 : 1996 SCC (Cri) 198] and subsequent decisions (including *K.L. Verma* [*K.L. Verma* v. *State*, (1998) 9 SCC 348 : 1998 SCC (Cri) 1031] , *Nirmal Jeet Kaur* [*Nirmal Jeet Kaur* v. *State of M.P.*, (2004) 7 SCC 558 : 2004 SCC (Cri) 1989]) which state that such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.

FINAL CONCLUSIONS OF THE COURT

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

91.1. Regarding Question 1, this Court holds that the protection granted to a person under Section 438 CrPC should not invariably be limited to a fixed period; it should enure 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.

91.2. 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.

92. 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 CrPC:

92.1. Consistent with the judgment in *Gurbaksh Singh Sibbia* v. *State of Punjab* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] , 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 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.

92.2. 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.*

92.3. Nothing in Section 438 CrPC, 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) CrPC [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.

92.4. 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.

92.5. Anticipatory bail granted can, depending on the conduct and behaviour of the accused, continue after filing of the charge-sheet till end of trial.

92.6. 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.

92.7. 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.

92.8. The observations in *Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] 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* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] had observed that : (SCC p. 584, para 19)

> "19. … 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* [*State of U.P.* v. *Deoman Upadhyaya*, AIR 1960 SC 1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504] ."

92.9. 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.

92.10. The court referred to in para 92.9 above is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.

92.11. 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* v. *Ramprasad Vishwanath Gupta* [*Prakash Kadam* v. *Ramprasad Vishwanath Gupta*, (2011) 6 SCC 189 : (2011) 2 SCC (Cri) 848] ; *Jai Prakash Singh* [*Jai Prakash Singh* v. *State of Bihar*, (2012) 4 SCC 379 : (2012) 2 SCC (Cri) 468] ; *State of U.P.* v. *Amarmani Tripathi* [*State of U.P.* v. *Amarmani Tripathi*, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] .) This does not amount to "cancellation" in terms of Section 439(2) CrPC.

92.12. The observations in *Siddharam Satlingappa Mhetre* v. *State of Maharashtra* [*Siddharam Satlingappa Mhetre* v. *State of Maharashtra*, (2011) 1 SCC 694 : (2011) 1 SCC (Cri) 514] (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* [*Salauddin Abdulsamad Shaikh* v. *State of Maharashtra*, (1996) 1 SCC 667 : 1996 SCC (Cri) 198] and subsequent decisions (including *K.L. Verma* v. *State* [*K.L. Verma* v. *State*, (1998) 9 SCC 348 : 1998 SCC (Cri) 1031] , *Sunita Devi* v. *State of Bihar* [*Sunita Devi* v. *State of Bihar*, (2005) 1 SCC 608 : 2005 SCC (Cri) 435] , *Adri Dharan Das* v. *State of W.B.* [*Adri Dharan Das* v. *State of W.B.*, (2005) 4 SCC 303 : 2005 SCC (Cri) 933] , *Nirmal Jeet Kaur* v. *State of M.P.* [*Nirmal Jeet Kaur* v. *State of M.P.*, (2004) 7 SCC 558 : 2004 SCC (Cri) 1989] , *HDFC Bank Ltd.* v. *J.J. Mannan* [*HDFC Bank Ltd.* v. *J.J. Mannan*, (2010) 1 SCC 679 : (2010) 1 SCC (Cri) 879] , *Satpal Singh* v. *State of Punjab* [*Satpal Singh* v. *State of Punjab*, (2018) 13 SCC 813 : (2019) 1 SCC (Cri) 424] and *Naresh Kumar Yadav* v. *Ravindra Kumar* [*Naresh Kumar Yadav* v. *Ravindra Kumar*, (2008) 1 SCC 632 : (2008) 1 SCC (Cri) 277]) which lay down such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.

1. **This extract is taken from *Lavesh v. State (NCT of Delhi)*, (2012) 8 SCC 730 : (2012) 3 SCC (Cri) 1040 : 2012 SCC OnLine SC 665 at page 733**

12. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail.

2. <u>This extract is taken from *State of M.P. v. Pradeep Sharma*, (2014) 2 SCC 171 : (2014) 1 SCC (Cri) 768 : 2013 SCC OnLine SC 1071 at page 176</u>

16. Recently, in *Lavesh* v. *State (NCT of Delhi)* [(2012) 8 SCC 730 : (2012) 3 SCC (Cri) 1040] , this Court (of which both of us were parties) considered the scope of granting relief under Section 438 vis-à-vis a person who was declared as an absconder or proclaimed offender in terms of Section 82 of the Code. In para 12, this Court held as under : (SCC p. 733)

> "*12.* From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as 'absconder'. Normally, when the accused is 'absconding' and declared as a 'proclaimed offender', there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail."

It is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail.

3. <u>This extract is taken from *Prem Shankar Prasad v. State of Bihar*, (2022) 14 SCC 516 : 2021 SCC OnLine SC 955 at page 522</u>

10.3. In *State of M.P.* v. *Pradeep Sharma* [*State of M.P.* v. *Pradeep Sharma*, (2014) 2 SCC 171 : (2014) 1 SCC (Cri) 768] , it is observed and held by this Court that if anyone is declared as an absconder/proclaimed offender in terms of Section 82CrPC, he is not entitled to relief of anticipatory bail. In paras 14 to 16, it is observed and held as under : (SCC pp. 175-76)

"*14*. In order to answer the above question, it is desirable to refer to Section 438 of the Code which reads 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.'

The above provision makes it clear that the power exercisable under Section 438 of the Code is somewhat extraordinary in character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for

holding that a person accused of an offence is not likely to otherwise misuse his liberty.

15. In *Adri Dharan Das* v. *State of W.B.* [*Adri Dharan Das* v. *State of W.B.*, (2005) 4 SCC 303 : 2005 SCC (Cri) 933] this Court considered the scope of Section 438 of the Code as under : (SCC pp. 311-12, para 16)

'*16.* Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead innocence, since he is not on the date of application for exercise of power under Section 438 of the Code convicted for the offence in respect of which he seeks bail. The applicant must show that he has "reason to believe" that he may be arrested in a non-bailable offence. Use of the expression "reason to believe" shows that the belief that the applicant may be 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 vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief of the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the court concerned to decide whether a case has been made out for granting of the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which 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. Normally a direction should not issue to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such "blanket order" should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 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. On the facts of the case, considered in the background of the legal position set out above, this does not prima facie appear to be a case where any order in terms of Section 438 of the Code can be passed.'

16. Recently, in *Lavesh* v. *State (NCT of Delhi)* [*Lavesh* v. *State (NCT of Delhi)*, (2012) 8 SCC 730 : (2012) 3 SCC (Cri) 1040] , this Court (of which both of us were parties) considered the scope of granting relief under Section 438 vis-à-vis a person who was declared as an absconder or proclaimed offender in terms of Section 82 of the Code. In para 12, this Court held as under : (SCC p. 733)

'*12*. From these materials and information, it is clear that the present appellant was not available for interrogation and investigation and was declared as "absconder". Normally, when the accused is "absconding" and declared as a "proclaimed offender", there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail.'

It is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail."

11. Thus the High Court has committed an error in granting anticipatory bail to Respondent 2-accused ignoring the proceedings under Sections 82/83CrPC.

1. **This extract is taken from *Priya Indoria v. State of Karnataka*, (2024) 4 SCC 749 : (2024) 2 SCC (Cri) 532 : 2023 SCC OnLine SC 1484 at page 762**

Bird's eye view of the controversy

2. We begin this judgment by an illustration : a person allegedly under intoxication beats another person with an iron rod in the State of Goa. The victim of the attack is injured. The alleged assailant travels to Rourkela, Odisha, where he is working in a factory. Meanwhile, the family of the injured registered a first information report (FIR) for the offence of causing grievous hurt under Section 326 of the Penal Code, 1860 (IPC) at Bicholim Police Station, Goa. On coming to know about the same and apprehending his arrest, the alleged assailant files an application for anticipatory bail before the District and Sessions Judge, Sundargarh, Odisha, having jurisdiction over Rourkela. Whether the alleged assailant's application is maintainable or not? Such a question has come for consideration before this Court in the present appeal.

Facts of the case

3. The present appeals have been filed by the complainant wife, against the orders dated 7-7-2022 passed by the learned Additional City Civil and Sessions Judge, Bengaluru City in Criminal Misc. Nos. 3941 and 3943-45 of 2022. By the said orders, the learned Additional City Civil and Sessions Judge, Bengaluru City has granted anticipatory bail to the accused husband and his family, namely, Accused 2, 3 and 4 in FIR No. 43/2022 which alleged commission of offences under Sections 498-A, 406 and 323 of the Penal Code ("IPC" for short), registered by the complainant wife at Chirawa Police Station, District Jhunjhunu, Rajasthan.

5. According to the complainant wife (appellant herein), the facts giving rise to the present appeal, in a nutshell as gathered from the material on record are : the complainant wife got married to the accused husband on 11-12-2020 and started living in Bengaluru. On 9-11-2021, the accused husband filed a divorce petition MC No. 5786/2021 under Section 13 of the Hindu Marriage Act, 1955 before the Principal Judge, Family Court, Bengaluru, Karnataka. Notice was issued in the divorce petition on 15-11-2021. On 7-3-2022, the complainant wife filed Transfer Petition No. 590 of 2022 before this Court to transfer the case from the Principal Judge, Family Court, Bengaluru to the Court of Additional District Judge, Chirawa, Jhunjhunu, Rajasthan. The complainant wife registered a first information report ("FIR" for short) being FIR No. 43/2022 for offences under Sections 498-A, 406 and 323IPC, at Chirawa Police Station, District Jhunjhunu, Rajasthan, on 25-1-2022 at 06.07 p.m.

23. Thereafter, the present special leave to appeal came to be filed and notice was issued by this Court on 17-3-2023 [*Priya Indoria* v. *State of Karnataka*, 2023 SCC OnLine SC 1626] . On 7-7-2023 [*Priya Indoria* v. *State of Karnataka*, 2023 SCC OnLine SC 1628] , this Court requested the learned Additional Solicitor General Shri Vikramjit Banerjee to assist the Court as an Amicus Curiae, having regard to the ramifications that would arise in the context of Section 438CrPC and the jurisdiction of the Sessions Court or High Court concerned to grant pre-arrest bail, when the FIR is not registered within the territorial jurisdiction of a particular district or State but in a different State.

Points for consideration

30. Having heard the learned Amicus and Senior Counsel and counsel for the respective parties and on perusal of the material on record, the following points would emerge for our consideration:

30.1. (*i*) Whether the power of the High Court or the Court of Session to grant anticipatory bail under Section 438CrPC could be exercised with respect to an FIR registered outside the territorial jurisdiction of the said court?

30.2. (*ii*) Whether the practice of granting transit anticipatory bail or interim protection to enable an applicant seeking anticipatory bail to make an application under Section 438CrPC before a court of competent jurisdiction is consistent with the administration of criminal justice?

30.3. (*iii*) What order?

60. This Court, while being seized of a challenge to grant extra-territorial anticipatory bail, had kept the question of law open in the following two cases:

60.1. In *Brojen Gogol* [*State of Assam* v. *Brojen Gogol*, (1998) 1 SCC 397 : 1998 SCC (Cri) 403] , this Court considered the Assam Police's challenge to the Bombay High Court's grant of anticipatory bail to an accused who was allegedly involved in offences perpetrated in Guwahati. Accordingly, it held that the anticipatory bail application ought to be made before the Gauhati High Court as the alleged activities had been perpetrated within its territorial jurisdiction. Consequently, this Court set aside the impugned order of the Bombay High Court granting anticipatory bail on the ground that the prosecuting agency was not heard. However, this Court held that it did not think it necessary to decide whether the Bombay High Court had jurisdiction to entertain the anticipatory bail application. It was held that status quo would be maintained until the High Court of Gauhati passed appropriate order(s) on the anticipatory bail application.

60.2. This Court also had the occasion to adjudicate upon *Teesta Atul Setalvad* v. *State of Maharashtra* [*Teesta Atul Setalvad* v. *State of Maharashtra*, 2014 SCC OnLine SC 1854] , whereby the applicant seeking extra-territorial anticipatory bail had appealed against the Bombay High Court's order [*Teesta Atul Setalvad* v. *State of Maharashtra*, 2014 SCC OnLine Bom 5140] . The Bombay High Court had permitted the applicant for extra-territorial anticipatory bail to move before the appropriate court in Gujarat for the said relief and granted transit bail for four weeks so as to enable the same. This Court disposed of Special Leave Petition No. 1770 of 2014 on 24-2-2014 [*Teesta Atul Setalvad* v. *State of Maharashtra*, 2014 SCC OnLine SC 1854] without interfering with the Bombay High Court's judgment [*Teesta Atul Setalvad* v. *State of Maharashtra*, 2014 SCC OnLine Bom 5140] while observing that the question of law about the jurisdiction of the High Court was kept open.

60.3. Therefore, the present appeal constitutes the third of the cases where this crucial question of public importance has been raised before this Court by the appellant who is the complainant.

62.1. The Patna High Court in *Zafrul Hassan* [*Zafrul Hassan* v. *State*, 1986 SCC OnLine Pat 3] stressed on the plain meaning of Section 438CrPC to hold that “the High Court” or “the Court of Session” cannot mean “any” High Court or Court of Session. Therefore, it held that the application for direction under Section 438CrPC was not maintainable at Patna Bench of the Patna High Court because the FIR was registered at Jhinkpani Police Station which falls in the District of Singhbhum. The matter thus came squarely within the jurisdiction of the Bench of the Patna High Court at Ranchi. The High Court stressed on the principle that a criminal court takes cognizance of the offence and not of individual offenders, vide *Raghubans Dubey* [*Raghubans Dubey* v. *State of Bihar*, 1967 SCC OnLine SC 3 : (1967) 2 SCR 423 : AIR 1967 SC 1167] . Therefore, the High Court emphasised upon the practical difficulties if the jurisdiction of criminal court was determined by “the shady or evasive movements of the offender”, there would be “judicial chaos and an inherent conflict betwixt the comity of courts”. The High Court cautioned that if the application for anticipatory bail was maintainable outside the territorial jurisdiction of the High Court, “a fugitive offender may well move from court to court ad infinitum and if he fails in one jurisdiction then on to another until he secures relief in the last”.

62.2. The Calcutta High Court in *Sadhan Chandra Kolay* [*Sadhan Chandra Kolay* v. *State*, 1998 SCC OnLine Cal 382] relied upon Article 214 of the Constitution which states that there shall be a High Court for each State and had categorically held that the Sessions Judge has got no authority to exercise the power or jurisdiction under Section 438CrPC beyond the local limits of the territorial jurisdiction of the Sessions-Division.

62.3. The facts in *Honey Preet Insan* [*Honey Preet Insan* v. *State*, 2017 SCC OnLine Del 10690] are peculiar to the extent that the relief of interim

protection was denied because the applicant was at large and had categorically refused to join investigation.

62.4. At this juncture it may be noted that the aforementioned approach was supported by the Justice V.S. Malimath Committee's Report on Reforms in Criminal Justice System. In Section 7.33, p. 121, the Committee had proposed that provision regarding anticipatory bail may be retained subject to two conditions : that the court would hear the Public Prosecutor; and that the petition for anticipatory bail should be heard only by the court of competent jurisdiction.

62.5. Another set of judgments, such as of the Delhi High Court in *Surya Pratap Singh* [*Surya Pratap Singh* v. *State of Karnataka*, 2019 SCC OnLine Del 9533] , the Allahabad High Court in *Ajay Agarwal* [*Ajay Agarwal* v. *State of U.P.*, 2022 SCC OnLine All 689] , *Amita Garg* [*Amita Garg* v. *State of U.P.*, 2022 SCC OnLine All 463] , the Bombay High Court in *Teesta Atul Setalvad* [*Teesta Atul Setalvad* v. *State of Maharashtra*, 2014 SCC OnLine Bom 5140] , *Nikita Jacob* [*Nikita Jacob* v. *State of Maharashtra*, 2021 SCC OnLine Bom 13919] and *Manda Suresh Parulekar* [*Manda Suresh Parulekar* v. *State of Goa*, 2023 SCC OnLine Bom 1568] , highlight the transit anticipatory bail approach. In these cases, the High Court granted transit bail and ruled that the grant of protection from arrest beyond the local limits of their jurisdiction is limited to the extent of consideration of bail for the transitional period. In other words, the High Courts in their respective judgment has read the scheme of administration of criminal justice and the provision for anticipatory bail in a conjoint sense, thereby limiting the relief of extra-territorial anticipatory bail to a definite interim period.

62.6. Another line of judgments, namely, by the Delhi High Court in *Pritam Singh* [*Pritam Singh* v. *State of Punjab*, 1980 SCC OnLine Del 336] ; the Kerala High Court in *C.I. Mathew* [*C.I. Mathew* v. *Union of India*, 1984 SCC OnLine Ker 207] ; the Bombay High Court in *N.K. Nayar* [*N.K. Nayar* v. *State of Maharashtra*, 1985 SCC OnLine Bom 53] ; the Calcutta High Court *Benod Ranjan Sinha, In re* [*Benod Ranjan Sinha, In re* v. *State*, 1981 SCC OnLine Cal 102] and the Karnataka High Court in *L.R. Naidu* [*L.R. Naidu* v. *State of Karnataka*, 1983 SCC OnLine Kar 206] and *Gameskraft Technologies* [*Gameskraft Technologies (P) Ltd.* v. *State of Maharashtra*, 2019 SCC OnLine Kar 520] have read the expression “the High Court or the Court of Session” in Section 438CrPC as different and disjoint from the general scheme of criminal procedure, thereby deciding in favour of grant of protection from arrest to remove the apprehension of arrest at a particular place, irrespective of the territorial jurisdiction to take cognizance of the criminal offence in question. The constitutional imperative of safeguarding personal liberty was emphasised and it was noted that a person may apprehend arrest at a place including at a place other than the one within the jurisdiction in which an alleged offence has been committed. The High Courts in their respective judgments adverted to the lack of

legislative qualification of the expression “the High Court or the Court of Session” to mean that it extends to any High Court or Court of Session in whose jurisdiction an arrest is apprehended by a person against whom an FIR has been filed.

1. **<u>This extract is taken from *Sushila Aggarwal v. State (NCT of Delhi)*, (2020) 5 SCC 1 : (2020) 2 SCC (Cri) 721 : 2020 SCC OnLine SC 98 at page 45</u>**

7.4. The aforesaid decision of the Constitution Bench in *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] 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 *Gurbaksh Singh Sibbia* [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] and Section 438(2) read with Section 437(3) CrPC:

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 police station concerned on _____ between _____;

3. The applicant shall cooperate 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 police station concerned 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 cooperate with the Hon'ble 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 Magistrate concerned would decide it on merits, without being influenced by the grant of anticipatory bail order.