POST CONVICTION BAIL AND POWERS OF SESSIONS COURT TO GRANT ANTICIPATORY BAIL

by

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INTRODUCTION: "The issue of bail is one of liberty, justice, public safety, and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process." **-– Justice V.R.Krishna Iyer, In Gudikanti Narasimhulu Case (1978) 1 SCC 240.**

CLAUSE 39 OF THE MAGNA CARTA IS CONSIDERED TO BE THE ORIGIN OF THE MODERN CONCEPT OF BAIL, WHICH STATES THAT:

> *"No free man shall be seized or imprisoned, or stripped of his rights or possessions, or restricted or exiled, or otherwise deprived of his status, nor shall we proceed with force against him or send others to do so, except by the lawful judgment of his equals or by the law of his equals."*

The Constitution of India under Article 21 guarantees the right to life and liberty as a fundamental Right. Article 21 states, "No person shall be deprived of his life or personal liberty except according to procedure established by law."

In landmark judgments, the Hon'ble Supreme Court has consistently held that the right to bail is part of the right to personal liberty under Article 21, subject to reasonable restrictions and conditions imposed by law to secure the presence of the accused during trial and prevent abuse of the process of law.

THE PHYLOSOPHICAL FOUNDATION OF PERSONAL LIBERTY AND LAW OF BAILS: Personal liberty is a priceless treasure for a human being. The philosophy of bail is founded on the bedrock of constitutional liberty and reinforced by human rights jurisprudence. It is basically a natural right. Liberty is not a privilege. It is a natural right. No one would willingly surrender it, nor barter it for all the wealth of the world. History itself is a testimony that mankind has fought and sacrificed for liberty.

The absence of liberty creates a deep sense of emptiness. The deprivation of liberty inflicts a deep and lasting impact not only on the body but also on the very spirit of an individual. The liberty of an individual is not absolute. Society, through its collective wisdom and due process of law, may withdraw the liberty it has

granted to an individual, but only when that individual poses a threat to the collective welfare or disrupts the societal order. Emphasis on individual liberty cannot be stretched to such an extent that it results in chaos and anarchy within society. A society expects responsibility and accountability from the members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. Therefore, when an individual behaves in a disharmonious manner, society disapproves, and the legal consequences are bound to follow.

At that stage, the Court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law. **- Neeru Yadav Vs. State of UP, 2015 (88) ACC 624 (SC)**

DEFINITION OF BAIL: The term BAIL has not been defined in the Criminal Procedure Code. In Black's Law Dictionary (4 th Edn.), bail has been defined as "a security such as cash or bond, especially security required by a court for the release of a prisoner who must appear at a future date." The Law Lexicon defines bail as the security for the appearance of the accused person on which he is released pending trial or investigation.

The Criminal Procedure Code, 1973, however, does not define bail, although the terms bailable offence and non-bailable offence have been defined in Section 2 (a) Cr.P.C. Further, Sections 436 to 450 set out the provisions for the grant of bail and bonds in criminal cases.

The amount of security that is to be paid by the accused to secure his release has not been mentioned in the Cr.P.C. Thus, it is the discretion of the court to put a monetary cap on the bond.

According to Section 2 (1) (b) of the BNSS, the term means "release of a person accused of or suspected of commission of an offence from the custody of law upon certain conditions imposed by an officer or court on execution by such person of a bond or bail bond.

ORIGIN OF BAIL: The term Bail is extracted from the old French verb '**baillier'**, which basically means to give or deliver. In Latin, the word **'bajulare'** means bearing a burden. The presence of this system can be traced back to the period of approximately 377 B.C, when Plato tried to create a bond for the release of Socrates. However, the modern system of bail developed from laws originating in the medieval period in England.

The history of bail in India may be traced back to ancient Hindu jurisprudence, which required an expedient disposal of disputes by the functionaries responsible for the administration of justice.

Kautilya's Arthashastra also mentioned that avoiding pre-trial detention was ideal. Probably the first recorded instance of bail in India is the 17th-century travelogue of Italian traveller 'Manucci', who himself was restored to his freedom by bail, from imprisonment for a false charge of theft. He was granted bail by the then ruler of Punjab and the Kotwal, who released him only after he furnished a surety.

During the British Raj, the gradual control of the East Indian Company over the Nizamat Adalats and Faujdari Courts paved the way for the implementation of English criminal law in the Indian judicial system. The criminal courts used two forms of bail known as 'Zamanat' and 'Muchalka', which were practised till the time statutory law was introduced by the British in the 19th century. The judicial release on surety was termed as 'Zamanat', whereas an obligatory, penal bond procured mandatorily was termed 'Muchalka'.

ORIGIN OF BAIL IN COMMON LAW: We may trace the history of bail in common law starting from the second half of the seventh century, when Anglo-Saxon Kings sought to bring order and consistency to dispute resolution by creating a basic court system in which an aggrieved man could initiate a complaint, and the accused was required to give borb (surety) and make any retribution prescribed by the judicial officer. Borb was designed to ensure that the accused appear before a judicial officer to participate in the judicial process. If the accused fled, he was presumed guilty and the surety was expected to pay compensation as applicable, on behalf of the person for whom borb was pledged.

In the early ninth century, the Anglo-Saxon surety system permitted family, friends, and acquaintances to act as borb. Moreover, property could be pledged in satisfaction of a surety. But in case the accused had neither property nor other forms of borb, the law of England permitted that he be held in custody until judgment. By the mid-ninth century, every person in England was required to have a borb. The value of the borb pledged in the Anglo-Saxon surety system was equal to the amount of the compensation to be paid as a penalty upon conviction.

In the mid-to-late 12th century, crimes were no longer considered to be private matters, but instead were viewed as offences against the Crown. As a result of this shift, the law of the land began to be harmonized into a "common law": one law that applied consistently throughout the King's lands.

In the Magna Carta of 1215, the first step was taken in granting rights to citizens. It is said that no man could be taken or imprisoned without being judged by his peers or the law of the land. These changes in the criminal process necessitated modifications to the system of pre-trial surety that worked well with the borb system. Under the Anglo-Saxon borb system, as long as offences were punishable through one or more types of compensation, all transgressors were "bailable". But eventually, with the introduction of harsher penalties, the accused of homicide lost the right to bail because the offence became punishable by death. The tremendous discretion was given in the hands of local law enforcement officials, which led to widespread corruption concerning bail.

In 1275, the Statute of Westminster divided crimes into bailable and non-bailable. It defined bailable and non-bailable offences in a manner that lasted until 1826. It also determined which judges and officials could make decisions on bail.

In 1679, the Habeas Corpus Act gave the right to the defendant, the right to be told of the charges against him and whether the charges against him were bailable or not. Habeas Corpus Act of 1679 provided facilities to a prisoner to obtain either a speedy trial or release on bail.

In 1689, the English Bill of Rights came into effect, which introduced a principle of proportionality to bail by stating that excessive bail ought not to be required. Lastly, the Bail Act 1976 came into force. It sets out the current and the basic legal position of bail prevailing in England. British institution of bail was statutorily transposed into the Indian legal system by the passing of the Code of Criminal Procedure in 1861, followed by its re-enactment in 1872 and 1898, respectively. But prior to England's Bail Act, 1976, India repealed the previous enactment of 1898 and brought its new Criminal Procedure Code, 1973, in which the provision of bail has been enacted in detail.

CONSTITUTIONAL FOUNDATIONS OF BAIL: The right to bail, as a facet of Article 21 of the Constitution of India, has evolved through statutory codification and judicial interpretation. The Code of Criminal Procedure, 1973 (CrPC), and now, the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), codify procedural provisions regulating the arrest, detention, and release of accused persons.

Article 21 of the Constitution guarantees the right to life and personal liberty. Bail serves as a mechanism to ensure that this liberty is not arbitrarily curtailed before conviction.

TYPES OF BAILS: The Code of Criminal Procedure, 1973, contains elaborate provisions relating to bails. The Code provides different kinds of bails:-

- Bail in Bailable offence (Section 436 Cr.P.C / section 478 BNSS.)
- Bail in Non-Bailable offence (section 437 Cr.P.C / section 480 BNSS.)
- ANTICIPATORY BAIL (section 438 Cr.P.C. / Section 482 BNSS)
- Ad interim bail.
- Bail after conviction (section 389 Cr.P.C/Section 430 of BNSS.)
- DEFAULT BAIL: (section 167 (2) Cr.P.C/ section 187 BNSS.)
- MEDICAL BAIL: Granted to an individual based solely on medical grounds

POST CONVICTION BAIL: (SUSPENSION OF SENTENCE PENDING APPEAL)

The modern-day concept of suspension of sentence was introduced in Belgium in 1888, which was later incorporated by the judiciary of Ireland, the United States, Denmark, etc., in the early 1900s. The Indian legislation has incorporated this concept from English law.

The person who has been convicted of the offence can also seek bail under Section 430 of BNSS, which has replaced Section 389 of CrPC.Accordingly, under Section 389 of Cr.P.C / Section 430 of BNSS,the appellate court has the power to direct the suspension of the sentence of an accused pending the appeal and also to release the appellant on bail based on the nature of offence and the facts and circumstances of each case.

SUSPENSION OF SENTENCE PENDING THE APPEAL; RELEASE OF APPELLANT ON BAIL: Section 389 of CrPC/Section 430 BNSS, states that:

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond **or bail bond. (This word has been newly added to section 430 (1) of BNSS, which was not there in section 389 (1) of Cr.P.C.)**

Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release;

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by convicted person to a Court subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall;

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under Sub-Section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

In **Preet Pal Singh vs. State of U.P. (AIR 2020 SUPREME COURT 3995) the Apex Court observed that,**

"There is a difference between the grant of bail under Section 439 of the CrPC, in case of pre-trial arrest and suspension of sentence under Section 389 of the CrPC and grant of bail, post conviction. In the earlier case, there may be a presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the rule and jail is an exception, as held by this Court in Dataram Singh vs. State of U.P. and Anr. (Supra). However, in the case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt, and the question of presumption of innocence does not arise. Nor is the principle of bail being the rule and jail an exception attracted, once there is conviction upon trial. Rather, the Court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling

reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) of the Cr.P.C."

The objective of Section 389 CrPC is to ensure that a person who has been convicted by a Trial court but has appealed against the conviction is not subjected to unnecessary incarceration until the appellate court decides on the appeal. The section also seeks to strike a balance between the interest of justice and the personal liberty of the convicted person.

The provisos to Section 389 CRPC were introduced mainly pursuant to the 154th Report of the Law Commission of India submitted in 1996. The amendments were introduced by Act 25 of 2005, and they have come into effect from 23.06.2006. The Law Commission recommended for addition of two provisos. The recommendation reads as follows: Two provisos to sub-section (1) of section 389 of the Code be added to the effect that the Appellate Court would give notice to the prosecution before releasing a convicted person on bail, if he was convicted of an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and also to enable the prosecution to move an application for cancellation of such bail granted by the Appellate Court. However, in the Bill, a further modification was suggested to the effect that the public prosecutor be given an opportunity to show cause in writing against the release and, thus, the provisos have found place under Section 389(1) Cr.PC.

Section 389 (1) and (2) of Cr.P.C/Section 430 (1) and (2) of BNSS deal with a situation where a convicted person can get Bail from the appellate court after filing a criminal appeal.

BAIL UNDER SECTION 389(3) CRPC/SECTION 430 (3) OF BNSS, BY THE TRIAL COURT ON CONVICTION :

Section 389(3) CrPC/Section 430 (3) of BNSS, empowers the trial court to grant bail to a convicted accused, enabling him to prefer an appeal, if the accused satisfies the trial court i.e. the court which ordered his conviction that he wants to prefer an appeal in such cases; (i) if such an accused person, being on bail, is sentenced for a term not exceeding three years or (ii) if such an accused person being on bail is convicted of a bailable offence, and he is on bail; then in such cases, such trial court can order that the accused should be released on bail and the term of such a sentence will also be suspended till the time an appeal is made before the appellate court by such accused person.

RELEVANT CONSIDERATIONS FOR GRANT OF BAIL UNDER SECTION 389 CRPC/SECTION 430 BNSS

During the pendency of an appeal, an appellate court is empowered under section 389 CrPC /section 430 BNSS to release the convict/appellant on bail and may also suspend the judgment of conviction and order of sentence passed by the Trial court for the reasons to be recorded in writing.

When a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances like any statutory restriction against suspension of sentence. Similarly, when the sentence is life imprisonment, the consideration for suspension of sentence could be a different approach. When the appellate court finds that, due to practical reasons, the appeal cannot be disposed of expeditiously, the appellate court must bestow special concern in the matter of suspending the sentence to make the right of appeal meaningful and effective. Of course, an appellate court can impose similar conditions when bail is granted. (**Bhagwan Rama Shinde Gosai Vs. State of Gujarat, AIR 1999 SC 1859.)**

HEARING OF THE PUBLIC PROSECUTOR ON THE BAIL APPLICATION IS MANDATORY:

Service of a copy of the appeal and application for bail on the public prosecutor, and providing him the opportunity to hear is mandatory as required by the first proviso to Section 389 CrPC. In the event of non-observance of the said provision, the bail order has to be set aside by the superior court. (**Atul Tripathi Vs. State of UP, 2015 (88) ACC 525 (SC).**)

SECOND BAIL APPLICATION UNDER SECTION 389 CRPC/SECTION 430 BNSS:

An order passed on a bail application is only an interlocutory order and cannot be treated as a judgment or final order disposing of a case, and the bar contained under Section 362 CrPC is not attracted to entertaining a second bail application under Section 389 CrPC by the appellate court. There is no provision in the CrPC creating a bar against the maintainability of a second bail application, under section 389 CrPC, in an appeal. A second bail application would be maintainable only on some substantial grounds where some point which has a strong bearing on the fate of the appeal and which may have the effect of

reversing the order of conviction of the accused is made out. Apart from the ground on the merits of the case, a second bail application would also be maintainable on the ground of unusual long delay in the hearing of the appeal within a reasonable time, and the convicted accused undergoes a major part of the sentence imposed upon him, as the purpose of filing the appeal itself may be frustrated. A strong humanitarian ground, which may not necessarily pertain to the accused himself but may pertain to someone very close to him, may also, in certain circumstances, be a ground to entertain a second bail application. These are some of the grounds on which a second bail application may be entertained. It is not only very difficult but hazardous to lay down the criteria on which a second bail application may be maintainable, as it will depend upon the peculiar facts and circumstances of each case. **(Dal Chand Vs. State of U.P., 2000 Cr.L.J.4579)**

RECTIFICATION OF BAIL ORDER: If the Court had committed any mistake in passing a bail order, it has the power to rectify the same. But the court would carry out necessary rectification/correction by giving an opportunity to the accused of being heard. **(Rajendra Prasad Arya Vs. State of Bihar, 2000 (41) ACC 346 (SC)**

PERIOD OF SUSPENSION OF SENTENCE BY THE MAGISTRATE: Under Section 389(3) CrPC/ Section 430 (3) of BNSS, when a Magistrate convicts a person and he intends to prefer an appeal, the Magistrate may:

- suspend the execution of the sentence for a period not exceeding **30 days**, and
- Release the accused on bail, to enable him to file an appeal before the Sessions Court.
- **The 30 days period is to be calculated from the date of the judgment/conviction** — i.e., the date on which the Magistrate pronounces the judgment and imposes the sentence.

This is because: The purpose of suspension is only to afford the accused a reasonable opportunity to prefer an appeal, and the limitation for filing an appeal under Section 374(3) Cr.P.C. read with the Limitation Act, commences from the date of judgment. So, the clock for **30 days** starts ticking **from the date of the judgment of conviction by the Magistrate.** If the accused fails to obtain orders from the appellate court, the magistrate **has no power to extend suspension of sentence beyond 30 days under Section 389(3) CrPC.**

STATUTORY LIMIT – Section 389(3) CrPC/**Section 430 (3) of BNSS** expressly says *"for a period not exceeding thirty days"*. The magistrate has the power to suspend the sentence for a maximum period of 30 days. **(Mr.P.Ramakrishnan vs Tmt. Rani Rambai-MADRAS HIGH COURT)**

The Magistrate cannot extend it further. Magistrate's power is **strictly confined to 30 days**. The Magistrate becomes *functus officio* after 30 days. The **Appellate Court can only** suspend the sentence pending appeal **under Section 389(1) CrPC** thereafter. If the accused does not secure appropriate orders from the **Appellate Court (Sessions Court / High Court, as the case may be)** within **30 days**, the suspension lapses automatically. The sentence becomes executable.

DIFFERENCE BETWEEN THE ORDER OF SUSPENSION OF SENTENCE AND ORDER OF SUSPENSION OF CONVICTION-

Suspension is an act of temporarily preventing something from operating or being in force. It is an act of keeping the sentence in abeyance, at the pleasure of the person who is authorised to suspend the sentence. Conviction and sentence, although often associated with each other, are two entirely different things. Conviction can be defined as the decision of the judge declaring someone as guilty of an offence. On the other hand, a sentence is a form of punishment whereby the accused has to undergo either imprisonment, a fine, or punishment for the offence committed by him/her. It is upon the discretion of the court to entirely suspend the sentence or just a part of it, whereas the conviction cannot be partially suspended. Thus, the order of sentence is always after the order of conviction, and the suspension of the execution of the sentence does not alter or affect the fact that the offender has been convicted of an offence

CONSEQUENCE OF STAY OF ORDER OF CONVICTION:

The order of stay of conviction does not make the conviction non-existent, but only non-operative. By staying the order of the sentence, the presumption of guilt does not come to an end. Therefore, an order of suspension of sentence is not equivalent to an order of suspension of conviction, and these two reliefs operate in different fields. Where the sentence passed against the accused is suspended, he must not be entitled to seek suspension of the order of conviction either. On the contrary, when the order of conviction is suspended, the accused cannot remain behind bars and has to be released either on bail or on his own bond. Consequently, when an order of conviction is suspended, the order of sentence has

to be suspended. In other words, an order suspending conviction will, eventually, lead to an order of suspension of sentence.

JURISDICTION OF THE APPELLATE COURT TO STAY THE ORDER OF CONVICTION:

The Apex Court, through its various judgements and precedents, has settled the position of law with respect to the stay of the order of conviction. Accordingly, the appellate Court, while exercising its powers under section 389(1) of Cr.P.C, can suspend the order of conviction.

In the case of **Rama Narang vs Ramesh Narang & Ors (AIR ONLINE 1995 SC 903),** a three -judge bench of the Supreme Court, observed that,

> *The appeal under section 374 CRPC is essentially against the order of conviction because the order of sentence is merely consequential thereto; albeit even the order of sentence can be independently challenged if it is harsh and disproportionate to the established guilt. Therefore, when an appeal is preferred under section 374 of the Code the appeal is against both the conviction and sentence and therefore, we see no reason to place a narrow interpretation on section 389 (1) of the Code not to extend it to an order of conviction. Although that issue in the instant case recedes in the background because High Courts can exercise inherent jurisdiction under section 482 of the Code if the power was not to be found in Section 389 (1) of the Code.*

WHAT CONSTITUTES A FIT CASE FOR SUSPENSION OF THE ORDER OF CONVICTION?

Suspension of conviction is a "relief" and not a "right" by the law. Although the Apex Court has widened the scope of Section 389, it has time and again suggested that the appellate court should always maintain caution while exercising its jurisdiction or providing relief under this section. The Supreme Court also clarified that an order granting a stay of conviction is not the rule but is an exception to be resorted to in rare cases, depending upon the facts of a case **(Ravikant S. Patil vs Sarvabhouma S. Bagali 2007 (2) AIR KAR R 152)**. Till now, the Apex Court has not specifically laid down any set of guidelines or tests to determine as to what will constitute a fit case for providing a relief under this section. However, from its innumerable judgements on this subject matter, certain essentials can be listed down that can be considered by the courts while staying the order of conviction.

RARE AND EXCEPTIONAL CASES AND IRREVERSIBLE DAMAGES:

Precisely from the acknowledgement of this relief, both the Supreme Court and the High Courts have time and again expressed through their judgements that the power of the court to stay the order of conviction should be used in exceptional circumstances only. Such rare and exceptional circumstances can vary from case to case, and "no *straight jacket formula"* can be evolved. Thus, a prima facie case coupled with peculiar or special circumstances involved may place the case in an exceptional or extraordinary category when specific consequences are shown.It was also observed that to constitute a fit case for this relief, specific attention of the appellate court should be drawn to the consequences that may arise if the conviction is not suspended. The court can only provide relief of this nature in a case where, if the conviction is not stayed, it will lead to injustice and irreversible consequences to the convict against the harm that can be caused to the opposite party.

SERIOUSNESS OF OFFENCE OR OFFENCE OF MORAL TURPITUDE:

The gravity of the offence and the impact that it can cause to society and people in general play a significant role in providing such a relief. It was observed by the Honble Supreme Court, in the case of ***Shyam Narain Pandey Vs. State of U.P, reported in 2014 AIR SCW 6227****, that*

> "*Similar is the case with offences involving moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction is also stayed, it would have a serious impact on the public perception of the integrity of the institution. Such orders will definitely shake the public confidence in the judiciary. That is why, it has been cautioned time and again that the court should be very wary in staying the conviction, especially in the types of cases referred to above, and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice."*

Although the expressions moral turpitude or seriousness of the offence are not defined under any law, the Supreme Court interpreted them as expressions which are used in legal and societal parlance to describe conduct that is inherently base, vile, depraved, or having any connection showing depravity.

CRIMINAL ANTECEDENTS OF THE ACCUSED WILL BE A RELEVANT CONSIDERATION:

The criminal history of the accused and the nature of offences committed by him over a period of time are to be noted. It was held that the criminal antecedents of the accused are not only a requirement for staying the order of conviction but also for staying the order of suspension. The court further observed that "the law does not make any distinction between the representatives of the people and others, accused of criminal offences. Neither they can claim any privilege nor can it be granted by any Court**. The law treats all equally."(Kanaka Rekha Naik v. Manoj Kumar Pradhan reported in AIR 2011 SC 799.)**

RAHUL GANDHI'S CASE:

Recently, Rahul Gandhi filed a criminal revision application before the Hon'ble High Court of Gujarat, praying to stay the order of conviction against him. He was convicted for the offence of defamation under the provisions of IPC., In the same case, Rahul Gandhi was also sentenced to two years of imprisonment, for which he obtained an order for suspension of sentence by the Surat Sessions Court until the disposal of the appeal.

WHEN THE SESSIONS COURT HAS ALREADY SUSPENDED THE SENTENCE, WHY DID RAHUL GANDHI HAS TO SEEK AN ORDER FOR SUSPENSION OF CONVICTION?

Because Section 8(3) of the Representation of the People's Act provides that- *"A person convicted of any offence and sentenced to imprisonment for not less than two years, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release"*

Therefore, even when Rahul Gandhi's sentence order was suspended, he was still not allowed to contest for election and to hold his office as a Member of Parliament, as his conviction continued to operate and he was considered an offender before the eyes of the law. Thus, to prevent his disqualification and to meet the eligibility criteria mentioned under section 8(3) of the RPA, Rahul Gandhi sought a stay order on his conviction. **However, the Gujrat High Court rejected the plea on the ground that a representative of the people should be a man of clear antecedents.** On August 4th, 2023, the Supreme Court of India stayed Rahul Gandhi's conviction in the criminal defamation case and observed that the trial judge failed to provide sufficient reasons for imposing the maximum two-

year sentence, an error that had led to his disqualification from parliament. The stay on the conviction paved the way for Gandhi's reinstatement as an MP.

CASE LAWS-

1. Public Servant Convicted for the offence of Corruption-

KC SAREEN v. C.B.I (2001)- (Para 13) The apex court laid down the legal position that in a case where the public servant is charged with the offence of corruption, then the appellate court should not suspend the order of conviction even if the sentence for imprisonment is suspended. This policy was considered necessary by the court since, when a person who is convicted of an offence of corruption continues to hold his office, then it can diminish the morale of other people manning such an office, which can consequently erode the confidence of people in public institutions.

2. BR Kapur v. State of Tamil Nadu-

J.Jayalalitha was convicted under section 409 of the IPC and section 13 of the Prevention of Corruption Act. Because of this, she was disqualified from being a member of the state legislature. However, her party contested the election and appointed her as the Chief Minister after securing a landmark majority. When her appointment was challenged, the Madras High Court suspended the execution of her sentence. Later, when an appeal was preferred in the Supreme Court, the court observed that merely suspending the execution of the sentence does not alter the effect that the offender is convicted for a very serious crime and that her conviction still operates, which disqualifies her from being appointed as a chief minister. Thus, a person who is disqualified under section 8(3) of RPA, 1950 cannot be appointed as Chief Minister and cannot continue to function as such.

3. Navjot Singh Sidhu vs State of Punjab-

In this case, Navjot Singh, along with other co-accused, were convicted under section 304 part II of IPC and was sentenced to 3 years of imprisonment. After his conviction, he resigned from the post of MP from the Lok Sabha, yet he wanted to contest for the elections again. However, the Apex court provided him with the relief of a stay on the order of conviction. High Courts in cases like *Nehru C. Olekar Vs. State of Karnataka, Mohammed Moquim Vs. State of Odisha, Shakuntala Khatik Vs. State of M.P* have granted a stay on the order of conviction on the grounds of irreparable loss to the public exchequer, and that the order of conviction will ultimately lead to an untimely bye-election.

SUSPENSION OF SENTENCE IN A CASE UNDER THE NEGOTIABLE INSTRUMENTS ACT :

> Section 148 of the Negotiable Instruments Act was amended w.e.f.02.08.2018. As per Section 148(1) of the Negotiable Instruments Act as amended, the appellate Court, while suspending the sentence, may direct the petitioner/accused to deposit such sum, which shall be a minimum of 20% of the compensation/fine imposed by the trial Court.
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> (*2*) The amount referred to in sub-section (*1*) shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.
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> (*3*) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:
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> Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year, within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant.

No discretion is provided to the appellate court to direct the accused to deposit below 20% of the amount, out of the fine / compensation amount, as the quantum of amount of 20% is mandatory.

DISCRETION OF APPELLATE COURT TO DIRECT PARTIAL DEPOSIT OF FINE:

In **Stanny Felix Pinto Vs M/s. Jangid Builders Pvt. Ltd. & Another, AIR 2001 SC 659,** the court observed that

> *"When a person was convicted under Section 138 of the Negotiable Instruments Act and sentenced to imprisonment and a fine, he moved the superior court for suspension of the sentence. The High Court, while entertaining his revision, granted suspension of the sentence by imposing a condition that part of the fine shall be remitted in court within a specified time. It is against the said direction that this petition has been filed. In our view, the High Court has done it correctly and in the interest of justice. We*

feel that while suspending the sentence for the offence under Section 138 of the Negotiable Instruments Act, it is advisable that the court imposes a condition that the fine part is remitted within a certain period. If the fine amount is heavy, the court can direct at least a portion thereof to be remitted as the convicted person wants the sentence to be suspended during the pendency of the appeal. In this case the grievance of the appellant is that he is required by the High Court to remit a huge amount of rupees four lakhs as a condition to suspend the sentence. When considering the total amount of fine imposed by the trial court (twenty lakhs of rupees) there is nothing unjust or unconscionable in imposing such a condition.

SECTION 439(2) CRPC NOT APPLICABLE TO BAIL GRANTED UNDER SECTION 389 CRPC :

Section 439(2) CrPC for cancellation of bail cannot be invoked where the accused convict has been granted bail in a criminal appeal under section 389(1) CrPC.

THE BAIL CAN BE CANCELLED UNDER SECTION 482 CRPC:

Where a pending appeal, a prosecution witness was murdered by the accused/ convict, bail was cancelled. **(Rajpal Singh vs State of UP, 2002 CrLJ 4267)**

POWERS OF SESSIONS COURT TO GRANT ANTICIPATORY BAIL: SECTION 438 CRPC/SECTION 482 BNSS:

Anticipatory bail is based on the legal principle of "presumption of innocence" i.e. every person accused of any crime is considered innocent until proven guilty. This is a fundamental principle mentioned in the Universal Declaration of Human Rights ,to which India is a signatory under Article 11.

Anticipatory Bail, a word widely used in the parlance of litigation, but which does not owe its origin to a statute. Neither section 438 of Cr.P.C nor its marginal note so describes it, but the expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. In fact 'anticipatory bail' is a misnomer. It is not a bail presently granted by the Court in anticipation of arrest. When the court grants anticipatory bail, it means that in the event of arrest, the person shall be released on bail.

The conflict of judicial opinion whether a High Court had inherent power to make an order of bail in anticipation of arrest and the need to curb the acts of, influential persons trying to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days ,were the necessities, carved out by Law Commission of India in its 41st Report to introduce provision relating to Anticipatory bail.

As most things have a dark side, so does this provision of the code. The object behind enacting this law was to prevent the innocent from getting trapped, but with time, the picture has changed, and now persons accused of heinous offences and even habitual offenders are invoking it repeatedly, which was not the intent of the relief sought to be given by this section.

INTRODUCTION AND ITS HISTORY:

The Code of Criminal Procedure, 1898 (old Code) did not contain a specific provision corresponding to Section 438 of the present Code of 1973 (SECTION 482 of BNSS). Under the old Code, there was a sharp difference of opinion amongst various High Courts on the question whether a Court had inherent power to make an order of bail in anticipation of arrest. The preponderance of view, however, was that it did not have such power.

The Law Commission of India, in its 41st Report dated September 24, 1969, pointed out the necessity of introducing a provision in the Code of Criminal Procedure enabling the High Court and the Court of Sessions to grant "anticipatory

bail". **The first use of the term 'Anticipatory Bail' can be found in the 41st Report of the Law Commission, 1969** wherein a comprehensive report for the revision of the Code of Criminal Procedure was submitted by 41st Law Commission, which was headed by Dr. Justice V.S. Malimath. The Commission felt the need to provide a provision to protect an accused or any person who apprehends or assumes that he can be arrested for any non-bailable offence.

The Central Government accepted the recommendations of the 41 st Law Commission and introduced Clause 447 in the Draft Bill of the Code of Criminal Procedure 1970 with the intent of conferring authority on the High Court and Court of Session to grant anticipatory bail or pre-arrest bail**.**

Considering these reports and the serious need of the hour, Parliament added a provision for pre-arrest bail under Section 438 to the Act of 1973, with a heading "Direction for grant of the bail to a person apprehending arrest" without mentioning the term 'anticipatory bail'. Hence, with some modifications, Clause 447 of the Draft Bill Code of 1970 finally became Section 438 of the Cr.P.C 1973, which is the current statutory provision governing the pre-arrest bail cases in India.(NOW 482 BNSS).

**The expression `anticipatory bail' has not been defined in the Code.** Where a competent court grants `anticipatory bail', it makes an order that in the event of arrest, a person shall be released on bail. The power of granting 'anticipatory bail' is extraordinary in character and only in exceptional cases where it appears that a person is falsely implicated or a frivolous case is launched against him or "*there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail*, such power is exercised. Therefore, the power being `unusual in nature' is entrusted only to the higher echelons of judicial service, i.e. a Court of Sessions and a High Court.

JURISDICTION:

The High Court and the Court of Sessions have jurisdiction to grant anticipatory bail. There has been a judicial conflict as regards the Court competent to grant anticipatory bail, when the place of commission of the offence and the place of apprehension of arrest lie within two different states. But the dictum accepted by the majority of the High Courts is that a court of Sessions or the High Court having jurisdiction over the local commission of offence can only grant anticipatory bail. The High Courts of Rajasthan, Madhya Pradesh, Gujarat, and

Delhi have been firm on the legal position that a court within whose jurisdiction a person apprehends arrest for a non-bailable offence is a competent court to grant anticipatory bail, and a court has no jurisdiction to grant anticipatory bail to the petitioner against whom a case has been registered in another state. The Kerala High Court has also held that an arrest made outside the State will not be protected by an order under Section 438 unless the offence itself is alleged to have been committed within the State. Whereas, the Bombay High Court has taken a contrary view and held that if the offence is committed in one state but arrest is expected in another State, the High Court in the latter state can entertain an application for anticipatory bail.

The unique stand taken by the High Courts of Karnataka and Gujarat regarding the same appears to be more suitable interpretation wherein it was held that:

> *"Section 438 Cr.P.C. provides relief to the person apprehending arrest even though the court may not have jurisdiction to deal with the offence. He can seek relief in the court within whose jurisdiction he ordinarily resides. Anticipatory bail of limited duration can be granted with a direction to the petitioner to approach the court concerned. Thus, an application under Sec 438 should be finally decided by only the court within whose jurisdiction the alleged offence has been committed."*

An order of anticipatory bail constitutes an insurance against police custody. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favor it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. Section 46(1) of the Code of Criminal Procedure, which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest "*shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action*". A direction under section 438 is intended to confer conditional immunity from this 'touch' or confinement.

The distinction between an ordinary order of bail and an order of anticipatory bail is that the former is granted after arrest and thus means release from the custody where as , the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest.

STATUTORY FRAMEWORK AND JUDICIAL INTERPRETATION UNDER CR.P.C., 1973, STRUCTURE OF SECTION 438, CR.P.C.:

Section 438 Cr.P.C. permits a person to apply for anticipatory bail if there existed a reasonable apprehension of arrest for a non-bailable offence. The Section provided that: *"...the Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail."*

Courts were required to consider relevant factors including the nature and gravity of the accusation, antecedents of the applicant, possibility of fleeing from justice, and the probability of tampering with evidence or threatening witnesses. Additionally, amendments in various states and judicial interpretations led to the incorporation of safeguards, including a notice of at least seven days to the Public Prosecutor or Superintendent of Police before granting anticipatory bail (added through amendments in some jurisdictions).

- Provisions requiring the presence of the applicant at the hearing of the bail application. These procedural requirements were designed to ensure prosecutorial participation and prevent misuse of anticipatory bail.

In ***Siddharam Satlingappa Mhetre* Vs *State of Maharashtra, (AIR 2011 SUPREME COURT 312),*** the Hon'ble Supreme Court, *held that* ***"Life and personal liberty are the most prized possessions of an individual"*** *and clarified the scope of , anticipatory bail and held that,*

- Anticipatory bail is an important tool to protect personal liberty under Article 21 of the Constitution.
- Anticipatory bail is not to be granted sparingly but should be available liberally when circumstances justify.

2. Rejected the restrictive view in *Kartar Singh*& others.

- Earlier rulings suggested anticipatory bail should be granted in exceptional or rare cases.
- In *Siddharam*, the Court held that such a restrictive interpretation would defeat the purpose of Section 438 CrPC, which exists to prevent arbitrary arrest.

3. GUIDELINES FOR GRANTING ANTICIPATORY BAIL:

The Court laid down detailed factors to be considered, such as:

- Nature and gravity of accusation.
- Role attributed to the accused.
- Antecedents of the accused.

- Possibility of fleeing from justice.
- Likelihood of repeating offences or tampering with witnesses.

4. LONG-TERM PROTECTION

- The Court clarified that anticipatory bail can be granted without any time limit (till the end of the trial), unless circumstances require limitation.
- This overruled the earlier practice where anticipatory bail was often granted only for a few weeks.

5. REINFORCED CONSTITUTIONAL VALUES

- The judgment stressed that personal liberty is the most precious of human rights, and anticipatory bail is a safeguard against misuse of police power.

6. PRINCIPLES TO BE BORNE IN MIND WHILE GRANTING ANTICIPATORY BAIL :

- The Apex Court in the case of Gurbaksh Singh Sibbia and Ors. vs. State of Punjab,(1980 AIR 1632, 1980) laid down the following principles with regard to anticipatory bail:
  a) Section 438(1) is to be interpreted in light of Article 21 of the Constitution of India.
  b) Filing of FIR is not a condition precedent to the exercise of power under Section 438.
  c) Order under Section 438 would not affect the right of the police to conduct investigation.
  d) Conditions mentioned in Section 437 cannot be read into Section 438.
  e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character, this would "not justify the conclusion that the power must be exercised in exceptional cases only."
- Powers are discretionary and to be exercised in light of the circumstances of each case.
- Suitable conditions should be imposed on the applicant.

WHETHER ANTICIPATORY BAIL CAN BE GRANTED WITHOUT REGISTRATION OF FIR:

In **Sushila Aggarwal vs State (NCT Of Delhi)** AIR 2020 SUPREME COURT 831, the Apex Court held that “An application for “anticipatory bail” in anticipation of arrest could be moved by the accused at a stage before an FIR is filed or at a stage when FIR is registered but the charge sheet has not been filed and the investigation is in progress or at a stage after the investigation is concluded.”

WHETHER A SUBSEQUENT BAIL APPLICATION CAN BE FILED IN THE COURT, WHEN THE HIGHER COURT HAS ALREADY REJECTED THE BAIL ONCE :

In the case of ***Kalyan Chandra Sarkar and Ors. vs. Rajesh Ranjan and Ors. (AIR 2004 SC 1866):***, the Apex court held that:

> *"The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher court or a coordinate bench must receive serious consideration at the hands of the court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event the courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be reagitated on the same grounds, as the same it would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.*
>
> *The decisions given by a superior forum, undoubtedly, is binding on the subordinate for a on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Therefore, we are not in agreement with the argument of learned counsel for the accused that in view the guaranty conferred on a person under Article 21 of the Constitution of India, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by courts earlier including the Apex Court of the country."*

In **Kusha Duruka vs State Of Odisha**, reported in **2024 (1) KHC 389 (SC),** the **Apex Court issued directions to safeguard Judicial integrity and to curb the playing of fraud with the Court**, while dealing with bail applications, and the same are as follows:

"(1) Details and copies of order(s) passed in the earlier bail application(s) filed by the petitioner, which have already been decided.

(2) Details of any bail application(s) filed by the petitioner, which are pending either in any Court, below the Court in question, or the higher Court, and if none is pending, a clear statement to that effect has to be made"

SUCCESSIVE ANTICIPATORY BAIL APPLICATIONS ON THE GROUND OF CHANGE OF CIRCUMSTANCES :

In a very recent case of **Bipin Sunny vs. State of Kerala ((BAIL APPL. NO.4416 OF 2023 dated 29/2/2024), the court held that ,,** in order to keep judicial discipline in tact, in cases where the High Court rejected anticipatory bail plea, second or successive anticipatory bail applications, pointing out change in circumstances, have to be filed before the High Court and not before the Sessions Court.

WHETHER THE BAIL GRANTED FOR A LESSER OFFENCE STANDS CANCELLED AUTOMATICALLY IF, AT A LATER STAGE, THE CHARGE SHEET IS FILED FOR A MORE AGGRAVATED OFFENCE?:

In the case of **Prahlad Singh Bhati vs. N.C.T., Delhi and Another, AIR 2001 SC 1444,** the accused was granted anticipatory bail in terms of S. 438 in respect of offences under Ss. 306 and 498-A, I.P.C. registered against him, and applications for cancellation of the anticipatory bail were dismissed. However, later on charge sheet was filed against the accused under Ss. 302, 406 and 498-A, I.P.C. by the investigating agency and he was directed to appear before the Metropolitan Magistrate. The Magistrate, granted him bail even in a case under S.302, I.P.C. which is an offence punishable with death or imprisonment for life, on grounds that the accused cannot be held liable for arrest every time the charge is altered or enhanced at any stage.

The Hon'ble Supreme Court, held that:

"The Magistrate committed a irregularity by holding that "I do not agree with the submission made by the Ld.Prosecutor in as much as if we go by his submissions then the accused would be liable for arrest every time the charge is altered or enhanced at any stage, which is certainly not the spirit of law". With the change of the nature of the offence, the accused becomes disentitled to the liberty granted to him in relation to a minor offence, if the offence is altered for an aggravated crime. Instead of referring to the

grounds which entitled the respondent- accused ,the grant of bail, the Magistrate adopted a wrong approach to confer him the benefit of liberty on allegedly finding that no grounds were made out for cancellation of bail. Despite the involvement of important questions of law, the High Court failed in its obligation to adjudicate the pleas of law raised before it and dismissed the petition of the appellant by a one sentence order. The orders of the Magistrate as also of the High Court being contrary to law are liable to be set aside."

WHETHER A REGULAR BAIL CAN BE GRANTED IN A CASE IN WHICH THE ANTICIPATORY BAIL IS ALREADY GRANTED?

In ***Rukmani Mahato vs. The State of Jharkhand, (dated 03.08.2017) the Apex Court held that***

" When this Court or a High Court or even a Sessions Judge grants interim anticipatory bail and the matter is pending before that Court, there can be no occasion for the accused to appear and surrender before the learned Trial Court and seek regular bail. The predicament of the subordinate Judge in considering the prayer for regular bail and the impossibility of denial of such bail in the face of the pre-arrest bail granted by a higher forum is real. Surrender and a bail application in such circumstances is nothing but an abuse of the process of law by the concerned accused. Once a regular bail is granted by a subordinate Court on the strength of the interim/pre-arrest bail granted by the superior Court, even if the superior Court is to dismiss the plea of anticipatory bail upon fuller consideration of the matter, the regular bail granted by the subordinate Court would continue to hold the field, rendering the ultimate rejection of the pre-arrest bail by the Superior Court meaningless.

If this is a practice that is prevailing in some of the subordinate Courts in the Country and we have had notice of several such cases, time has come to put the learned subordinate Courts in the country to notice that such a practice must be discontinued and consideration of regular bail applications upon surrender during the pendency of the application for pre-arrest bail before a superior Court must be discouraged*. We, therefore, direct that a copy of this order be forwarded to the Director of all Judicial Academies in the country to be brought to the notice of all judicial officers exercising criminal jurisdiction in their respective States."*

WHETHER AN APPLICATION FOR ANTICIPATORY BAIL UNDER SECTION 438OF THE CODE OF CRIMINAL PROCEDURE, 1973 (FOR SHORT, "Cr.P.C.") IS MAINTAINABLE AT THE INSTANCE OF AN ACCUSED WHILE HE IS ALREADY IN JUDICIAL CUSTODY IN CONNECTION WITH HIS INVOLVEMENT IN A DIFFERENT CASE?:

In **Dhanraj Aswani vs Amar S. Mulchandani** the Apex court observed that ,

i) There is no statutory bar for an accused in custody in connection with a case to pray for grant of anticipatory bail in another case registered against him;

(ii) Anticipatory bail, if granted, shall however be effective only if he is arrested in connection with the subsequent case consequent upon his release from custody in the previous case;

(iii) The investigating agency, if it feels necessary for the purpose of interrogation/investigation, can seek remand of the accused whilst he is in custody in connection with the previous case, and in which no order granting anticipatory bail has yet been passed. If such an order granting remand is passed, it would no longer be open to the accused to seek anticipatory bail, but he can seek regular bail.

WHETHER ANTICIPATORY BAIL IS TIME-BOUND:

In the case of **Sushila Aggarwal v. State (NCT of Delhi), 2018 (7) SCC 731**, the Supreme Court clarified that:

- No statutory time limit can be read into Section 438.
- Protection granted by anticipatory bail can continue till the end of the trial, unless circumstances justify cancellation.

"DOES THE PROTECTION GRANTED UNDER ANTICIPATORY BAIL AUTOMATICALLY COME TO AN END ONCE THE ACCUSED IS SUMMONED OR CALLED UPON BY THE COURT?"

The Supreme Court held that the time period for which anticipatory bail can be granted is discretionary and can vary depending on the facts and circumstances of each case. The Supreme Court also placed reliance on **Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565,** wherein it was held that anticipatory bail was a question of personal liberty, and hence not subject to a time period. In the present case, the Court answered the two issues based on the reasoning it provided, that an order passed under Section 438 should not ordinarily be limited

to a fixed period, but if the situation demands, conditions should be imposed under Sections 437(3) and 438(2). Answering the 2nd issue, the Court said that the term of anticipatory bail does not expire when a summons is issued by the Trial Court, but can be prolonged until the trial is completed.

NO BLANKET PROTECTION UNDER ANTICIPATORY BAIL:-

An order granting anticipatory bail cannot extend to a future occurrence constituting a commission of a crime, and there cannot be a 'blanket' order. The very purpose of anticipatory bail under **Section 438 CrPC / Section 482 BNSS** is to safeguard an individual from unjustified arrest in connection with a particular non-bailable offence at a given point in time. The scope of such relief is limited to the facts and circumstances existing when the application is filed. Courts have consistently held that anticipatory bail cannot be granted in a manner that provides general immunity from arrest for any future offences which may or may not occur. This is because:

1. **Anticipatory Bail is, case-specific** – It is meant to address a particular accusation based on a particular set of facts. Once new facts or a fresh offence emerges, the accused must seek protection afresh.
2. **No "Blanket Immunity"** – Granting a blanket anticipatory bail order would virtually amount to giving an accused a license to commit future offences without the fear of arrest, which would undermine the criminal justice system.
3. **Principle of Balance** – While protecting personal liberty, the law also ensures that accused persons cannot misuse the remedy of anticipatory bail to escape accountability for future acts that constitute independent offences.

Thus, anticipatory bail operates within the boundaries of the **offence alleged at the time of application** and cannot be stretched to cover unknown or hypothetical future crimes.

WHETHER THE PROCLAIMED OFFENDER IS ENTITLED TO ANTICIPATORY BAIL?

In **Lavesh Vs. State (NCT of Delhi) reported in 2001 Criminal Law Journal 171,** the Apex Court held that

> *"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 the warrant*

and declared as a proclaimed offender in terms of section 82 of the Code is not entitled to the relief of anticipatory bail."

An accused who has been declared as an absconder/proclaimed offender in terms of Section 82 of the Criminal Procedure Code and who has not cooperated with the investigation should not be given an anticipatory bail.

The Hon'ble APEX Court in **State of M.P vs. Pradeep sharma (Criminal Appeal No.2049 of 2013 dt.06-12-2013)** held 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".

WHETHER APPLICATION FOR ANTICIPATORY BAIL FOR CHILD IN CONFLICT WITH THE LAW IS MAINTAINABLE?

Various High Courts have expressed different views regarding the maintainability of anticipatory bail applications for child in conflict with law under Section 438 of the Code of Criminal Procedure (CrPC). Two primary reasons are highlighted for denying such applications:

- Non Obstante Clause in Section 12: Some courts argue that the non obstante clause in Section 12 of the Juvenile Justice (Care and Protection of Children) Act, 2015, indicates that the Act supersedes the provisions of the Cr.P.C., thereby preventing High Courts or Sessions Courts from entertaining anticipatory bail applications for children.
- Terminology Distinction: Other courts note that the Act uses the term "apprehend" rather than "arrest," suggesting that the legal prerequisites for applying for anticipatory bail (i.e., apprehension of arrest for a non-bailable offence) are not satisfied, and thus the power under Section 438 of the CrPC cannot be exercised.

The Hon'ble High Court of Jharkhand in the case of **Birbal Munda v. State Of Jharkhand,** (2019 Scc Online Jhar 1794) held that the non obstante clause does not eliminate the provisions for bail, including anticipatory bail, in the CrPC but rather facilitates the granting of bail to children by overcoming certain barriers. Citing the Supreme Court case of Nikesh Tarachand Shah v. Union of India, the Hon'ble Court observed that the absence of explicit exclusions for anticipatory bail in specific legislations indicates that such bail can still be granted under appropriate circumstances. Ultimately, the Hon'ble court concludes that Section 12(1) of the

Juvenile Justice (Care and Protection of Children) Act does not extinguish the jurisdiction of High Courts or Sessions Courts to grant anticipatory bail under Section 438 of the CrPC. This interpretation aligns with the principles of juvenile justice aimed at protecting the rights and liberties of children in conflict with the law.

ANTICIPATORY BAIL UNDER BNSS, 2023:

Key Shifts: BNSS, 2023, which replaces the Cr.P.C., codifies anticipatory bail under Section 482. The basic framework empowering the Court of Sessions or the High Court to issue a direction for release in the event of arrest has been retained. However, there are certain changes

Key differences include:

- **Wider Discretion:** The language "if it thinks fit" has been retained, but without further codified criteria. Unlike Cr.P.C., BNSS does not expressly enumerate the considerations for granting anticipatory bail. This increases judicial discretion and introduces the risk of inconsistent or arbitrary decision-making.

SUBSTANTIVE BAR ON BAIL IN CERTAIN OFFENCES: A significant change under the BNSS is the express bar on anticipatory bail in specific sexual offences. Section 482(4) BNSS (Section 438 (4) CrPC) imposes a statutory prohibition against granting anticipatory bail in the following cases:

- Rape on a woman under 16 years of age (Section 65 (1), BNS, 2023- Section 376 (3) IPC).
- Gang rape on a woman under 18 years of age (Section 70(2), BNS, 2023). This marks a departure from the Cr.P.C., where no such explicit bar existed, and courts could exercise discretion based on facts.

ANTICIPATORY BAIL UNDER SPECIAL ENACTMENTS:

Prevention of Money Laundering Act, 2002 (PMLA)

The Prevention of Money Laundering Act, 2002 (PMLA) has all the characteristics of a modern-day criminal Act. It is unique since it creates a completely new offence.

As per Section 45 of the Prevention of Money Laundering Act, 2002 (PMLA), the offences under the Act are cognizable and non-bailable. This section applies the twin conditions cumulatively for a scheduled offence and not for an offence under the Act.

The anomaly that arose in this context was that when it came to anticipatory bail, there was no bar under the Act. Therefore, the provisions of section 438 of the Code would continue to be applied when a person seeks pre-arrest/anticipatory bail for all offences, including the scheduled offences. The result would be that it was easier to get anticipatory bail in case of offences under PMLA than to seek regular bail after arrest.

In **Nikesh Tarachand Shah v. Union of India, the Supreme Court** had to decide the constitutionality of section 45 of PMLA, which was challenged as being discriminatory and arbitrary. The Court held that *"we declare Section 45 (1) of the Prevention of Money Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India."*

SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989:

Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 expressly provides for the exclusion of section 438 of the CrPC in relation to any case involving the arrest of any person on any accusation of having committed an offence under the said Act, and does not permit the granting of pre-arrest/anticipatory bail in cases involving offences laid down in the statutes.

In Vilas Pandurang Pawar vs. State of Maharashtra, the question raised before the Court was whether a person charged with various offences under the IPC and SC/ST Act is entitled to anticipatory bail under Section 438?

The Supreme Court stated that the scope of section 18 vis-à-vis section 438 is that it creates a specific bar in the grant of anticipatory bail. It added: When an offence is registered against a person under the provisions of the SC/ST Act, no court shall entertain an application for anticipatory bail unless it, prima facie, finds that such an offence is not made out. Moreover, while considering the application for bail, the scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record.

When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section **438 of the Code, the provision in the**

Special Act, cannot be easily brushed aside by elaborate discussion on the evidence.

THE TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987:

Section 20 (7) reads that, nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act or any rule made thereunder.

THE MAHARASHTRA CONTROL OF ORGANISED CRIME ACT, 1999: Section 21 (3) of the Act, expressly provides for the exclusion of section 438 of the CrPC in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act.

ARNESH KUMAR'S CASE:

Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273: The petitioner, Arnesh Kumar, approached the Hon'ble Supreme Court by way of a Special Leave **Petition seeking anticipatory bail.**

However, both the Sessions Court and the High Court dismissed his plea, prompting the present petition before the Supreme Court.

OBSERVATIONS OF THE COURT: The case was decided by a two-Judge Bench comprising Justices Chandramauli Kr. Prasad and Pinaki Chandra Ghose. The Supreme Court expressed serious concern over the growing misuse of Section 498A of the Indian Penal Code.

The Court observed that police must act in accordance with the mandate of Section 41 of the Code of Criminal Procedure, which lays down specific criteria for making an arrest. Moreover, Magistrates were directed to exercise judicial discretion in authorising detention and ensure that such orders are supported by cogent reasons.

In ***Arnab Manoranjan Goswami vs. The State of Maharashtra and Ors., (AIR 2021 (SC) 1)*** the Apex Court held that

> "*. …High Courts get burdened when courts of first instance decline to grant anticipatory bail or bail in deserving cases. This continues in the Supreme Court as well, when High Courts do not grant bail or anticipatory bail in cases falling within the parameters of the law. The consequences for those who suffer incarceration are serious. Common citizens without the means or resources to move the High Courts or this Court languish as under trials. Courts must be alive to the situation as it prevails on the ground - in the*

jails and police stations where human dignity has no protector. As judges, we would do well to remind ourselves that it is through the instrumentality of bail that our criminal justice system's primordial interest in preserving the presumption of innocence finds its most eloquent expression. The remedy of bail is the "solemn expression of the humaneness of the justice system". Tasked as we are with the primary responsibility of preserving the liberty of all citizens, we cannot countenance an approach that has the consequence of applying this basic Rule in an inverted form. We have given expression to our anguish in a case where a citizen has approached this Court. We have done so in order to reiterate principles which must govern countless other faces whose voices should not go unheard."

CONCLUSION:

In conclusion, the law relating to post-conviction bail and anticipatory bail represents the delicate balance between the rights of an individual and the interests of society. Post-conviction bail safeguards liberty even after guilt is declared, while anticipatory bail shields it before guilt is proved — together, they reaffirm that justice is not about imprisonment alone, but about preserving the rule of law with fairness and balance.

* * * * *