HIGH COURT OF HIMACHAL PRADESH

Bench: Rakesh Kainthla, J.

Date of Decision : 26-02-2024

Cr. MP (M) No. 3233 of 2023

REETA JHA

Vs.

STATE OF HIMACHAL PRADESH AND ANOTHER

Legislation:

Sections 498-A, 323, 504, 328 read with Section 34 of the Indian Penal Code - Sections 3 and 4 of the Prohibition of Dowry Act, 1961 - Section 438 of the Cr.P.C.

Subject: Pre-arrest/transit bail application in connection with complaint case involving offences under IPC and Prohibition of Dowry Act.

Headnotes:

Application for Pre-arrest/Transit Bail – Offences under IPC and Prohibition of Dowry Act – Petitioner, a school principal, sought pre-arrest bail due to apprehension of arrest following the addition of Section 328 IPC – Earlier granted pre-arrest bail for other charges – Petitioner claims false implication by daughter-in-law. [Paras 1, 6, 21]

Jurisdiction of High Court for Pre-arrest Bail – Reliance on Supreme Court judgement in Priya Indoria v. State of Karnataka (2023 SCC OnLine SC 1484) – High Court has jurisdiction to grant interim protection under Section 438 Cr.P.C in FIRs registered outside territorial jurisdiction – Specific conditions outlined by Supreme Court for such bail. [Paras 6, 13]

Pre-arrest Bail Post-Issuance of Non-bailable Warrants – Legal Principle – Pre-arrest bail can be granted after issuance of non-bailable warrants in certain circumstances – Reference to various High Court judgments – Court can exercise discretion based on case facts. [Paras 7-14, 18, 21]

Discretion of Court in Granting Pre-arrest Bail – Consideration of case-specific factors – Court's discretion to grant pre-arrest bail even after issuance of non-bailable warrants by a competent court – Importance of safeguarding individual liberty while ensuring justice. [Paras 20, 21]

Decision – Application allowed – Pre-arrest bail granted to petitioner under specific conditions – Observations confined to disposal of the petition with no bearing on the merits of the case. [Para 21]

Referred Cases:

- Priya Indoria v. State of Karnataka, 2023 SCC OnLine SC 1484
- Saravjeet Singh v. State of H.P., Cr.MP(M) No. 493 of 2020
- Sheik Khasim Bi v. State, 1986 SCC OnLine AP 161
- Nirbhay Singh v. State of Madhya Pradesh, 1994 SCC OnLine MP 206
- Yogendra Singh v. State, 1999 SCC OnLine MP 589
- HDFC Bank Ltd. v. J.J. Mannan, (2010) 1 SCC 679
- Himanshu v. State of Maharashtra, 2014 SCC OnLine Bom 1582
- Injoriya v. State of Chhattisgarh, 2021 SCC OnLine Chh 3005
- Anil Kumar v. State of Bihar, 2023 SCC OnLine Pat 2150
- Saubhagya Bhagat v. State of Uttarakhand, 2023 SCC OnLine Utt 917J

UDGMENT

Rakesh Kainthla, J. - The petitioner has filed the present petition to seek pre-arrest/transit bail in complaint case No. 1038(C) of 2023, for the commission of offences punishable under Sections 498-A, 323, 504, and 328 read with Section 34 of the Indian Penal Code and Sections 3 and 4 of the Prohibition of Dowry Act, 1961. It has been asserted that the petitioner was falsely implicated at the instance of her daughter-in-law Smt. Shivangini alias Sakshi.

Akash Jha, elder son of the petitioner, got married to the complainant Smt. Shivangini alias Sakshi on 21.2.2019 as per Hindu Rites and Customs. She filed a complaint against the petitioner, petitioner's two sons and her husband. The complaint was registered as complaint case No. 1038(C) of 2021 in the Court of learned Sub Divisional Judicial Magistrate. The petitioner was granted pre-arrest bail by learned Additional Sessions Judge, Patna on 24.11.2022. Her husband and her younger son were also granted pre-arrest bail by learned Additional Sessions Judge-I, Patna on 16.11.2021. The husband of the complainant was also granted pre-arrest bail by Patna High Court on 19.5.2023. Section 328 of IPC was added subsequently, which offence is exclusively triable by the Court of Sessions. Learned Sub Divisional Judicial Magistrate committed the complaint to learned Sessions Judge and it was registered as Sessions Trial Case No. 992 of 2023. Learned Additional

Sessions Judge-X, Patna issued non-bailable warrants of arrest against the accused on the first date of hearing. An application for recalling of order was filed, which was wrongly dismissed by the learned Additional Sessions Judge. The petitioner is apprehending her arrest. The petitioner is a Principal at Tagore Vanasthali Public School, Kasauli, Solan, H.P. She is residing separately from her son and the complainant in connection with her job. The petitioner will have to face humiliation in society in case of her arrest. She is ready and willing to appear before the learned Trial Court but is apprehending her arrest due to the issuance of non-bailable warrants of arrest. Hence, the prearrest transit bail has been sought by the petitioner.

2. I have heard Mr. Vivek Singh Attri, learned counsel for the petitioner and Mr. Jitender Sharma, learned Additional Advocate General for the respondent-State.

3. Mr. Vivek Singh Attri, learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court in **Priya Indoria Vs. State of Karnataka and others 2023 SCC OnLine SC 1484** to submit that the Court has jurisdiction to grant pre-arrest bail even if the arrest is sought by the authorities located in a different State to enable the petitioner to approach the authority to seek the regular bail. He has also relied upon the following case law:

(i) Saravjeet Singh Vs. State of H.P., Cr.MP(M) No. 493 of 2020, decided on 17.3.2020;

(ii) **Sennasi and another Vs. State Rep. by Inspector of Police, 1997 (2) CTC 665**;

(iii) Nikita Jacob Vs. The State of Maharashtra, Anticipatory Bail Application No. 441 of 2021, decided on 17.2.2021;

(iv) Kewal Chamanlal Sharma Vs. The State of Maharashtra and Anr., Criminal Anticipatory Bail Application ST No. 3041 of 2020, decided on 10.12.2020;

(v) Sasi Madathil Vs. State of NCT of Delhi, Bail Application No. 3942 of 2021, decided on 3.11.2021;

(vi) **Ameet Khandewal Vs. State of NCT of Delhi, 2021 SCC OnLine Del 2527: 2021 Cri LJ 2638**;

(vii) **Daler Singh Vs. State of NCT of Delhi and Anr. 2003 SCC Online Del 983: (2004) 72 DRJ 465**;

(viii) **Sushil Kumar Bhati & Anr. Vs. State & Anr. 2016 SCC OnLine Del 6370 ; (2017) 1 DLT (Cri) 452**;

(ix) **Ramaben Govindbhai Pansuriya Vs. State of Gujarat, R/Cr. Misc. Application No. 5457 of 2019**;

(x) **Ajay Agarwal Vs. State of U.P., Cr. Misc. Anticipatory Bail Application No. 1669 of 2022**;

(xi) **Mahesh Kumar Sharma Vs. State of Rajasthan, 2006 (1) ALD Cri 52**;

(xii) Arnesh Kumar Vs. State of Bihar and Anr. SLP (Crl.) No. 9127 of 2013;

(xiii) Aakash Jha and another Vs. State of Sikkim, Criminal Misc. Bail No. 59 of 2023; and

(xiv) Aakash Jha and others Vs. State of Bihar, Anticipatory Bail Application No. 5730 of 2022.

4. Mr. Jitender Sharma, learned Additional Advocate General submitted that the pre-arrest bail cannot be granted when a competent Court has issued a non-bailable warrants of arrest as it would amount to usurping the jurisdiction of a competent Court. Therefore, he prayed that the present petition be dismissed.

5. I have given considerable thought to the submissions at the bar and have gone through the records carefully.

6. It was laid down by the Hon'ble Supreme Court in **Priya Indoria v. State of Karnataka, 2023 SCC OnLine SC 1484** that the High Court or the Court of Sessions can grant limited anticipatory bail in the form of an interim protection under Section 438 of Cr.PC in the interest of justice with respect to an FIR registered outside the territorial jurisdiction of the Court. It was observed:-

93. In view of what we have discussed above, we are of the view that considering the constitutional imperative of protecting a citizen's right to life, personal liberty and dignity, the High Court or the Court of Session could grant limited anticipatory bail in the form of an interim protection under Section 438

of CrPC in the interest of justice with respect to an FIR registered outside the territorial jurisdiction of the said Court, and subject to the following conditions:

(i) Prior to passing an order of limited anticipatory bail, the investigating officer and public prosecutor who are seized of the FIR shall be issued notice on the first date of the hearing, though the Court in an appropriate case would have the discretion to grant interim anticipatory bail.

(ii) The order of grant of limited anticipatory bail must record reasons as to why the applicant apprehends an inter-state arrest and the impact of such grant of limited anticipatory bail or interim protection, as the case may be, on the status of the investigation.

(iii) The jurisdiction in which the cognizance of the offence has been taken does not exclude the said offence from the scope of anticipatory bail by way of a State Amendment to Section 438 of CrPC.

(iv) The applicant for anticipatory bail must satisfy the Court regarding his inability to seek anticipatory bail from the Court which has the territorial jurisdiction to take cognizance of the offence. The grounds raised by the applicant may be

a. a reasonable and immediate threat to life, personal liberty and bodily harm in the jurisdiction where the FIR is registered;

b. the apprehension of violation of the right to liberty or impediments owing to arbitrariness;

c. the medical status/disability of the person seeking extra-territorial limited anticipatory bail.

94. It would be impossible to fully account for all exigent circumstances in which an order of extraterritorial anticipatory bail may be imminently essential to safeguard the fundamental rights of the applicant. We reiterate that such power to grant extra-territorial anticipatory bail should be exercised in exceptional and compelling circumstances only which means where denying transit anticipatory bail or interim protection to enable the applicant to make an application under Section 438 of CrPC before a Court of competent jurisdiction would cause irremediable and irreversible prejudice to the applicant. The Court, while considering such an application for extra-territorial anticipatory bail, in case it deems fit may grant interim protection instead for

a fixed period and direct the applicant to make an application before a Court of competent jurisdiction.

7. This Court had also granted transitory interim protection in **Saravjeet Singh's case** (supra). Therefore, the Court has jurisdiction to grant transit interim bail even if the case has been registered outside the territorial jurisdiction of this Court provided that the petitioner is residing within the jurisdiction of the Court and has a reasonable apprehension of his/her arrest within the jurisdiction of this Court. In the present case, the petitioner is serving as a Principal at Tagore Vanasthali Public School, Kasauli, Solan, H.P. within the jurisdiction of this Court; therefore, this Court has the jurisdiction to grant interim transit bail to the petitioner.

8. It was submitted by Mr. Jitender Sharma, learned Additional Advocate General for the respondent-State that the jurisdiction under Section 438 of Cr.PC cannot be exercised where the non-bailable warrants of arrest have been issued by a competent Court of law. The question "whether the Court can exercise the jurisdiction under Section 438 of Cr.PC after the issuance of non-bailable warrants of arrest by the competent Court" has engaged the attention of various Courts from time to time. A Full Bench of Andhra Pradesh High Court held in **Sheik Khasim Bi v. State, 1986 SCC OnLine AP 161,1986 Cri LJ 1303** that there may be justifiable grounds to grant anticipatory bail to a person who apprehends arrest and against whom a warrant of arrest is pending. In such a situation, the officer arresting the accused will take him to the Magistrate taking cognizance and issuing the process who shall release him in terms of the prearrest bail granted by the competent Court. It was observed: -

"15. It can, therefore, be seen that sub-sec. (3) of S. 438, Cr. P.C. does not in any manner restrict the power of the court to grant anticipatory bail, but on the other hand, it only contains the procedural aspect that is necessary to give effect to the order of anticipatory bail passed under sub-sec. (1) of S. 438 and the manner in which it would be given effect to. Maybe the High Court or the Court of Session (would) not (be) inclined to grant bail keeping in view the fact that the Magistrate has taken cognizance and issued process, but the mere non-exercise of such power does not mean lack of jurisdiction.

16. Even in a case where cognizance is taken there may be justifiable grounds to grant anticipatory bail to a person who apprehends arrest and against whom a warrant of arrest is pending.

17. The learned Public Prosecutor however laying stress on the words "reason to believe" submitted that when once the charge sheet is filed and a warrant is issued, that means the matter has reached a stage that arrest is a certainty and there is no question of the person still having only "reason to believe". We are unable to read the words in the manner the learned Public Prosecutor intends to. The words "reason to believe" have been used in a wider sense.

18. In **Gurbaksh Singh's case**, (1980) 2 SCC 565: AIR 1980 SC 1632: (1980 Cri LJ 1125) supra it is observed as follows: -

"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. S. 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".

19. Filing of a charge sheet and issuance of a warrant are certainly the grounds which make the person not only to believe that he would be arrested but also to move the courts under S. 438(1).

20. One other aspect which is highlighted by the learned Public Prosecutor is that if anticipatory bail under S. 438(1) Cr. P.C. is granted in a case where cognizance is already taken and a warrant is issued, then, the officer arresting will be in a predicament and he may also be guilty of contempt of court if he does not execute the warrant issued by the Magistrate and since there is no provision under S. 438 Cr. P.C. for such a situation it must be presumed that the powers under S. 438 Cr. P.C. come to an end after the Magistrate takes cognizance and issues the process. We see no force in this submission. Even in a case where anticipatory bail is granted before the Magistrate takes cognizance, the accused has to be arrested and released, and sub-sec. (3)

of S. 438 provides for the same. Likewise, in a case where cognizance is taken and process is issued, if the Court grants anticipatory bail under S. 438(1) the police officer shall execute the process, viz., the warrant, by arresting the accused and produce him before the Magistrate who shall release him on bail pursuant to the orders of anticipatory bail granted by the High Court or the Court of Session. There may also be cases where anticipatory bail is granted under S. 438(1) without knowing that cognizance has been taken and the process has been issued, but that does not mean the order passed by the superior court under a statutory provision becomes redundant we are aware that S. 70 Cr. P.C. lays down that every warrant of arrest issued by a court under the Cr. P.C. shall remain in force until it is cancelled by the court which issued it, or until it is executed. In such a situation also in cases of arrest pursuant to the warrant, the order under S. 438(1) has to be obeyed and can be given effect to by following the necessary procedure in the matters of releasing the persons on bail. However, this difficulty does not arise even in a case where cognizance is taken because the court will have knowledge about the fact that the Magistrate has taken cognizance. Therefore, even in such a case if the court intends to grant anticipatory bail, it can lay down the necessary conditions and directions which are generally given while releasing a person under S. 437 or S. 439. In **Gurbaksh Singh's case, (1980) 2 SCC 565: AIR 1980 SC 1632 : (1980 Cri LJ 1125)** supra the Supreme Court in para 26 observed thus: -

"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 S. 438 especially when no such restrictions have been imposed by the legislature in the terms of that section. S. 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 S. 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 S. 438 must be saved, not jettisoned".

23. Similar modalities can also be applied in the case of granting of anticipatory bail under S. 438(1) even in a case where the criminal court takes

cognizance and issues the warrant, depending upon the circumstances. A notice to the Public Prosecutor can be issued after the application is filed, and after hearing both sides the court will have the necessary information, particularly regarding the fact of the charge sheet having been filed and the warrant having been issued, and if the High Court or the Sessions Court is satisfied that there are certain exceptional circumstances, then it may in its discretion, instead of directing the applicant to obtain bail under S. 437 or S. 439 Cr. P.C. grant anticipatory bail under S. 438 Cr. P.C. with suitable directions and impose necessary conditions. Of course, as pointed out by the Supreme Court in **Gurbaksh Singh's case, (1980) 2 SCC 565: AIR 1980 SC 1632 : (1980 Cri LJ 1125)** supra, it is purely within the discretion of the court, but the fact that the charge-sheet is filed and a warrant is issued, is yet another strong circumstance which the court should keep in view while exercising this extraordinary power. However, the non-exercise of this extraordinary power ordinarily is not due to lack of jurisdiction.

24. The discretion to exercise such power is always there, but it always depends upon various facts and circumstances of each case.

25. For all the aforesaid reasons we hold that the filing of a charge sheet by the police and issuing of a warrant by the Magistrate does not put an end to the power to grant bail under S. 438(1) Cr. P.C. and on the other hand we are of the view that the High Court or the Court of Session has power to grant anticipatory bail under S. 438(1) to a person after the criminal court has taken cognizance of the case and has issued process viz., the warrant of arrest of that accused person. Therefore, the decision of the Division Bench in **Kamalakara Rao's case, (1983) 1 APLJ 97: (1983 Cri LJ 872)** supra, upholding the view taken by Madhusudhan Rao, J., in **N. Dasaratha Reddy's case, (1975) 2 APLJ (HC) 214** supra, and by Ramachandra Raju, J., in Crl. M.P. 884 of 1981 does not lay down the correct legal position and consequently, all these rulings are overruled.

9. A Full Bench of Madhya Pradesh High Court also held in **Nirbhay Singh v. State of Madhya Pradesh, 1994 SCC OnLine MP 206:1995 Cri LJ 3317** that there is nothing in Section 438 of Cr.PC to confine its operation to arrests made by the police and to hold that this Section will not apply to the arrest made by the police on a warrant issued by the Court. It was observed: -

"11. Section 438 speaks of a person having reason to believe that he may be arrested on an 'accusation'. There may be an accusation even before a case is registered by police. After the registration of the case, filing of the charge sheet or filing of the complaint taking cognizance or issuance of a warrant, the accusation will not cease to be an accusation. At the later stage, there may be a stronger accusation or more evidence. Nevertheless, the accusation survives or continues. Section 438 speaks of apprehension and belief that he may be 'arrested'. There is no limitation in the language employed by the legislature indicating that the arrest contemplated is an arrest by the police of their own accord or that an arrest by the police on a warrant issued by the Court will not attract section 438. The language used is clear and unambiguous, namely, apprehension of "arrest on an accusation." Considering the legislative purpose underlying the provision and the clarity of the language used in the section, we do not find any justification to import anything extraneous into the interpretation so as to restrict the scope or vitality of the provision. It is not as if circumstances justifying an application under section 438 would disappear once a Magistrate takes cognizance of the offence or even after he passes an order committing the case to the Sessions Court. Even at such stages, there may be circumstances warranting the invocation of the special jurisdiction under section 438. A person may file a private complaint and produce before the Magistrate a few witnesses who will provide a consistent version of an imaginary occurrence. At that stage, the Magistrate will not be in a position to appreciate the evidence or go behind the same. If the material is such that he is satisfied that there is sufficient ground for proceeding he is bound to take cognizance and issue process. This may happen even if the story put forth by the complainant is more imaginary than real or may be hopelessly exaggerated. Such a situation may arise at the stage of committal where the Magistrate is concerned only with one aspect, namely, whether the material disclosed commission of the offence is exclusively triable by the Court of Session. At neither stage is he required to go into the truth or otherwise of the material before him. It cannot, therefore, be said that at such stages the justification for invocation of section 438 of, the Criminal Procedure Code no longer exists. In this view, the scope of section 438 should not be restricted by reading into its words to the effect - "when any person has reason to believe that he may be arrested solely at the instance of the police and not as per warrant issued by a competent Magistrate." The clear purpose underlying the language employed by the legislature precludes any justification for reading such words into the statute.

12-13. It has been strenuously argued that the second part of sub-section (3) of section 438 would warrant a restricted interpretation being given to sub-section (1). The second part states that if a Magistrate takes cognizance of an offence, and decides to issue a warrant, he shall issue a bailable warrant in conformity with the order of anticipatory bail. This provision is unambiguous indicating how in the face of an order passed under subsection (1) a Magistrate should exercise his jurisdiction under section 204. He is precluded from issuing a non-bailable warrant since that may cause embarrassment to the police officer entrusted with the duty of executing the warrant. Even without this provision, a Magistrate can be expected only to issue a non-bailable warrant even after coming to know of an order of anticipatory bail passed by the High Court or Sessions Court. Of course, he may not be aware of the fact that an order of anticipatory bail has been passed. Such cases will have to be treated at par with the instances of non-bailable warrants issued prior to the passing of an order under section 438(1). In such cases, a pragmatic view should be taken and conflict avoided. A reading of paragraph 39 of the decision in Gurbaksh Singh's case would be instructive. The Supreme Court referred to orders passed in an appeal against orders of the High Court granting anticipatory bail imposing conditions. The Supreme Court in those cases directed the person concerned to surrender 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 exceptional cases, the Court directed that the order of anticipatory bail will remain in operation only for a few days until the filing of the F.I.R. in respect of matters covered by the order. After referring to these orders, the Court observed - "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".

14. In our opinion, the conflict between an order of anticipatory bail and a non-bailable warrant has to be met in a pragmatic manner striking a balance between an individual's right to personal freedom and the invocation of the right of the police and the procedure required to be followed by a Magistrate. Where an order of anticipatory bail is passed after the issue of a non-bailable warrant of arrest by a Magistrate, the duty of the police officer entrusted with the execution of the warrant would be to arrest the person and produce him before the Magistrate who thereupon shall deal with the accused as required by the order of anticipatory bail.

15. In view of what we have indicated above, we are in respectful agreement with the view taken by the High Court of Punjab and Haryana that an application under section 438, Criminal Procedure Code would be maintainable even after the Magistrate issued process under section 204 or at the stage of committal of the case to the Sessions Court or even at a subsequent stage if circumstances justify the invocation of the provision. This is not to say that the jurisdiction under section 438 of the Code is to be freely exercised without reference to the nature and gravity of the offence alleged, the possible sentence which may be ultimately imposed, the possibility of interference with the investigation or the witnesses and public interest. With great respect, we are unable to agree with the view taken by the High Court of Rajasthan."

10. A Division Bench of Madhya Pradesh High Court examined this judgment in **Yogendra Singh v. State, 1999 SCC OnLine MP 589** and held that the privilege of anticipatory bail cannot be extended to a person who has violated terms and conditions of bail. Speaking through Hon'ble Mr Justice Dipak Misra (J) (as His Lordship then was), it was held as under:-

"The accused persons were released on bail. They appeared in the Court and as per the conditions in the bail bond they were required to appear before the Court which was in seisin of the matter. In this context, I may profitably refer to Section 441 of the Code, which reads as under:

"441. (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or court, as the case may be, thinks sufficient shall be executed by such person, and when he is released on bail, by one or more sufficient sureties conditions that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.

(2) Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.

(3) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

(4) For the purpose of determining whether the sureties are fit or sufficient, the Court may accept affidavits in proof of the facts contained therein relating

to the sufficiency or fitness of the sureties, or, if it considers necessary, may either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the Court, as to such sufficiency or fitness."

The aforesaid provision contemplates that an accused is required to appear before the Court to answer a charge levelled against him. It is imperative for the accused to do so. When an order of bail is passed the accused gets back his liberty from the custody on a condition that he would be present during trial. He is not totally free. His liberty is conditional. I am conscious of the fact that the Full Bench has used the words subsequent stages, but I have already indicated that the same should be read in the context of paragraph 11 of the judgment. At this juncture, I may usefully refer to a decision rendered in the case of **Naiturasu v. State 1998 Cri LJ 1762**, wherein a learned Single Judge of the Madras High Court enumerated stages when apprehension of arrest arises. It is useful to produce the same:

"91. When apprehension of arrest arises? The apprehension of arrest for a non-bailable offence, one can have at different stages, namely:

(a) during the period of investigation by the police after registration of FIR and before filing of the final report under section 173, Cr. P.C.

(b) during further investigation under section 173(8), Cr. P.C. even after filing of the chargesheet under Section 173, Cr. P.C.

(c) after taking cognisance by the Magistrate, summoning the accused under section 204, Cr. P.C. through warrant;

(d) while the Magistrate committing the Sessions case to the Court of Session under Section 209, Cr. P.C. and remanding the accused to custody;

(e) during the enquiry or trial, if the Court, on the basis of the evidence let in, impleads a person as an accused under Section 319 Cr. P.C. for the purpose of summoning or detaining him under Section 319(2) and (3), Cr. P.C."

I am in respectful agreement that these are the stages wherein an accused can apprehend arrest. These would conceptually engulf subsequent stages' but would not cover a stage where an accused who has availed the privilege of anticipatory bail or regular bail fails to appear before the Court on the dates fixed for trial and in a way abuses his liberty. The learned Single Judge in the case of **Natturasu** (supra) has further held as under"

"92. The above five contingencies involve different stages. As seen earlier, once the person accused of is released on anticipatory bail or bail at one stage, the operation of the bail continues till the conclusion of the trial. Therefore, the person, who is already on bail or anticipatory bail, cannot be entitled to apply for a fresh anticipatory bail in respect of the same accusation, in other stages.

(93) For instance, if a person, who is already on bail, did not appear before the trial court and, therefore, the Court issues a warrant of arrest, then the said person will certainly have the apprehension of arrest.

94. But, in such a situation, the accused is not entitled to file an application for anticipatory bail, because he is already on bail or anticipatory bail in respect of the accusation of a non-bailable offence. He shall, in such circumstances, have to take steps to recall the warrant.

95. Therefore, the application for anticipatory bail would not deal with the situation, wherein the accused had appeared before the Court, in relation to the case in which he already obtained the bail.

96. In other words, the application under section 438, Cr. P.C., being dealt with only relates to the apprehension of arrest for the accusation of non-bailable offence only one."

I have quoted in extenso from the aforesaid decision, as I am in respectful agreement in the law laid down therein. I may hasten to add that emphasis has to be given not only on stage but also on self-same accusation. To elaborate if initially the accused is being sought to be arrested for an offence punishable u/s. 326 of IPC and has been granted anticipatory bail but later on, section 307 of IPC is added and the Magistrate issues summons to him and he has an apprehension that he may be arrested once he surrenders before the Court an application u/s. 438 of the Code at his instance may stand in a different footing but supposing an accused who has been granted benefit of anticipatory bail after a warrant of arrest has been issued u/s. 319 of the Code and he after availing the privilege and obtaining the concession of bail does not appear during the trial and jumps bail and the Court issues a non-bailable warrant of arrest for his production, in that case, the apprehension may ensue but that will not give him right to approach the Court for grant of anticipatory for the simple reason, at his behest an application for anticipatory bail would not lie. The concept of 'Ex paritaterationis' will not be attracted

inasmuch as the first limb, the apprehension' of arrest exists, but the second limb 'self-same accusation' is not amputated. No accused should forget the basic principle that he who seeks liberty must conduct himself with propriety as liberty blossoms in an atmosphere of composite restraint and collective good. Section 438 of the Code cannot be given an interpretation to guillotine other provisions of the Code. It is hereby made clear that it would be open to him to take appropriate steps under Section 70(2) of the Code for recall/cancellation of the warrant so issued against him or, he may, if he so chooses, assail the order issuing warrant as illegal or improper by preferring appropriate application before the higher courts, wherein the propriety of issuance of warrant may be gone into. The justifiability or the defensibility of the order would be a matter of scrutiny by the Court exercising power and that is a different arena altogether.

Before I part with the case, I may state that the goddess of liberty is to be worshipped because without liberty there is no moon, no stars, no light, and no life but he who intends to have the light must light the candle and look at the stars with humility so that stars shall reveal themselves and the moon shall shine. He cannot be allowed to kick the goddess of liberty and then cry at the altar for mercy. It should not be forgotten that the longevity of liberty is dependent upon a healthy mind which devoutly obeys the law."

11. Orissa High Court also held in **Padma Charan Panda v. S. Ram Mohan Rao, 1987 Cri LJ 923** that where an accused has been arrested and released on bail under Section 437 and 439 of Cr.PC, the provision of Section 438 of Cr.PC will not apply to him. It was observed:-

"7. Section 438 of the Code which was engrafted into the statute with a particular purpose and not to be made applicable in all contingencies where the normal Criminal Courts have already released the accused on bail by invoking their jurisdiction either under S. 437 or under S. 439. As has been stated by the Supreme Court in some of the cases to which we will refer later it applies at a stage prior to arrest when the person apprehends his arrest on being accused of committing a non-bailable offence. Once the person concerned is arrested or appears before the Court and the Court is in seisin over the matter and is then released on bail, the subsequent apprehension of his further arrest in the event of the matter being committed to the Court of Session, will not attract the operation of S. 438 of the Code. The scope and effect of S. 438 of the Code of Criminal Procedure came up for consideration

before this Court in the case of **Mohan Behera v. State, (1985) 59 Cut LJ 110**. Our learned brother Justice Behera has elaborately discussed this matter and has taken into consideration the Bench decision of the Madhya Pradesh High Court to which we have already referred and disagreed with the view expressed by the Madhya Pradesh High Court held that S. 438 of the Code deals with the grant of anticipatory bail which means bail in anticipation of arrest and this section does not take in its ambit the case of an accused against whom a Court has already issued process by taking cognizance of the offence. In the aforesaid Orissa case, our learned brother has referred the observation of the Supreme Court in **Gurbaksh Singh case reported in (1980) 2 SCC 565: AIR 1980 SC 1632 : (1980 Cri LJ 1125)** where the Supreme Court held:

"........The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest............" (Underlining is ours)

8. In our view the aforesaid decision of this Court in the Mohan Behera case lays down the correct position of law so far as the stage at which S. 438 of the Code can be made applicable. The provision of S. 438 came up for consideration before a Bench of Gauhati High Court in **State of Assam v. Mobarak Ali, 1982 Cri LJ 1816**, and it was held:

"The term "appears" in S. 437 means and includes a voluntary appearance before the Court without the intervention of any agency and the act of surrender before the Court coupled with submission to its direction. These are implicit in S. 437. As such, when a person accused of a non-bailable offence voluntarily appears before the Court and remains in physical control of the Court and prays for bail, the Magistrate is empowered to grant bail to him if he is so entitled. Such a bail not being asked for in apprehension of arrest, it cannot be said that the Magistrate exercises the powers under S. 438 which are not vested in him. The granting of bail by the Magistrate in such circumstances is well within the scope of S. 437."

9. In another decision of this Court in the case of **Sri Bhramar v. State of Orissa, (1981) 51 Cut LT 391**, another single Judge of this Court also examined the scope of S. 438 and held that the said provision can be attracted only when the accused is apprehending arrest and does not take

within its sweep the case of an accused against whom the Criminal Court has already issued process by taking cognizance of the offence. The Supreme Court also considered the scope and effect of S. 438 of the Code visa-vis R. 184 of the Defence of India Rules. In **Balchand Jain v. State of Madhya Pradesh, (1976) 4 SCC 572: AIR 1977 SC 366: (1977 Cri LJ 225)**, the Supreme Court has held:

"....Now S. 438 contemplates an application to be made by a person who apprehends that he may be arrested on an accusation of having committed a non-bailable offence. It is an application on an apprehension of arrest that invites the exercise of the power under S. 438. And on such an application, the direction that may be given under S. 438 is that in the event of his arrest, the applicant shall be released on bail. Rule 184 on the other hand deals with a different situation and operates at a subsequent stage when a person is accused or convicted of contravention of any rule or order made under the Rules and is in custody. It is only the release of such a person on bail that is conditionally prohibited by R. 184. If a person is not in custody but is merely under an apprehension of arrest and he applies for a grant of 'anticipatory bail' under S. 438, his case would clearly be outside the mischief of R. 184 because when the Court makes an order for grant of 'anticipatory bail', it would not be directing the release of a person who is in custody. It is an application for the release of a person in custody that is contemplated by R. 184 and not an application for a grant of 'anticipatory bail' by a person apprehending arrest. Section 438 and R. 184 thus operate at different stages, one prior to arrest and the other after arrest and there is no overlapping between these two provisions so as to give rise to a conflict between them........"

10. The aforesaid observations would equally apply to a case when an accused is released on bail under S. 437 or 439 of the Code and, therefore, to such a case S. 438 cannot be made applicable again merely because the accused may be re-arrested or taken into custody on being committed to the Court of Session. A learned single Judge of the Rajasthan High Court also considered the scope and effect of S. 438 in the case of **Rewat Dan v. State of Rajasthan, 1975 Cri LJ 691 (Raj),** and held:

"S. 438 no doubt authorises the High Court and the Court of Session to grant bail in anticipation of arrest upon an application made by a person who has reason to believe that he may be arrested, but the High Court has no power

to direct the committing Magistrate that in the event of committing the case to the Court of Session if the accused person is not in custody, he shall take bail from him for appearance before the Court of Session.

Such a direction if given will amount to taking away the discretion of power given to him under Cl. (b) of S. 209 of the Code." (Quoted from the head-notes)

11. In our opinion, therefore, an order under S. 438 of the Criminal Procedure Code can be passed before the arrest of the applicant. It is the imminent likelihood of arrest, founded on a reasonable belief on being accused of the commission of a non-bailable offence which gives the jurisdiction of the Court of Session and High Court to grant anticipatory bail under S. 438 of the Code and an accused can invoke the jurisdiction of the Court under S. 438 so long he has not been arrested. The provisions of S. 438 cannot be invoked after the arrest of the accused since in such an event the accused must seek his remedy either under S. 437 or 439 of the Code. In that view of the matter, an application under S. 438 will not be maintainable at the stage of the passing of the commitment order under S. 209 or under the apprehension that the case may be committed to the Court of Session. The learned Sessions Judge, therefore, was in error in invoking his jurisdiction under S. 438 of the Code since the accused in the present case were released on bail by the learned Magistrate on 18-2-80 and they had invoked the jurisdiction of the Sessions Judge apprehending that the case may be committed to the Court of Session. We are in respectful disagreement with the view taken by the Madhya Pradesh High Court and Andhra Pradesh High Court in the two cases earlier referred to by us and follow the decision of our learned brother Justice Behera in **Mohan Behera case, (1985) 59 Cut LT 110** referred to supra."

12. A Full Bench of Calcutta High Court held in **Shamim Ahmed v. State, 2003 Cri LJ 2815** that the pre-arrest bail can be granted under Section 438 of Cr.PC even if the Court has taken cognizance and issued non-bailable warrants of arrest. It was observed: -

"50. Much was argued on the provisions of Chapter VI of the Code pointing out that once the process to compel the appearance of the parties is taken, no authority can be given to the High Court or the Court of Sessions under section 438 of the Code for interference. Reference was also made to section 70(2) of the Code which indicates that every warrant of arrest issued by the court under the Code was to remain in force until it is cancelled by the court

which issued it or until it is executed. So the argument was that if a warrant of arrest issued by a court of law after the filing of the chargesheet or under section 204 of the Code, the High Court or the Court of Sessions while exercising power under section 438 is not competent to cancel the said warrant of arrest though there are other provisions on the basis of which such courts can interfere with that order. Section 70(2) also indicates that the court issuing the warrant of arrest has the power to cancel it. So as soon as the issuing court is apprised of the fact that an order under section 438 in respect of the person against whom a warrant of arrest has been issued is in force, it may cancel a non-bailable warrant of arrest or can convert it in a bailable warrant of arrest, the power of which is already given under subsection (3) of section 438. Section 70(2) of the Code is also sufficient to indicate that as soon as the person against whom a warrant of arrest has been issued is arrested, it comes to an end, meaning that the warrant of arrest has been executed. So after arresting a person if it is detected that there is an order under section 438, the arresting officer can proceed in accordance with sub-section (3) of section 438 immediately after the execution of the warrant of arrest. So we do not think that the provisions of section 70 or the other provisions of Chapter VI or section 209 of the Code prohibit entertainment of an application under section 438 of the Code after the charge sheet is filed or the process is issued under section 204 or section 209. It is pertinent to mention that under section 209, there are sufficient indications as regards the actions to be taken with regard to bail. So the arguments advanced on this score do not attract our judicial confidence.

51. We have already discussed hereinabove placing reliance on the different verdicts of the Apex Court that it is not permissible to introduce any new word or provision in a particular section. It is also indicated that there is no ambiguity in the provisions of section 438 that requires judicial scrutiny. It is true that a chargesheet in a case is generally filed after finding a prima facie case. Similarly, in a complaint case the learned Magistrate after examining the witnesses and perusing the documents produced, issues processes like a warrant of arrest. In both these occasions cognizance is taken and thereafter, processes are issued indicating that the learned Magistrate was prima facie satisfied from the materials on record as regards the commission of the offence and thereafter issues appropriate process for apprehension of the accused person. So, it has been argued that as soon as the matter is pending before a court of law, there is no necessity to interfere with that case

under section 438 of the Code. It is to be noted that we have been considering a stage when an application under section 438 is to be filed. There are cases in which charge-sheets have been filed by the police after investigation without the knowledge of the accused persons showing them as absconders. Such an accused person after the submission of the charge sheet and on issuance of a warrant of arrest gets the knowledge of the case and then, only for the first time, he has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. In a case of this nature, it cannot be thought of that the person who was unaware of the case should be arrested and kept in the custody of the police or of the court for getting an opportunity of filing an application under section 437 or section 439 of the Code. It is desirable to keep in view the observations of the Law Commission and also of the Apex Court as regards the necessity of passing an order under section 438 in these days when political vendetta and other factors rule the realm of police investigation of a case. We are not unmindful of a situation that in a complaint case a process can be issued relying on the statements of the witnesses examined under section 200. But the person against whom those statements were made might be falsely implicated to satisfy political or personal vengeance and may be without his knowledge.

52. It is a settled principle of law that a man cannot be stated to be guilty unless his guilt is proved after adducing reliable evidence. Sending a person to custody after finding his guilt is a rule. But before finding the accused guilty, it is not always possible or permissible to conclude on the basis of the chargesheet or on the basis of the process issued under section 204 in a complaint case that custody of that person is necessary. The word "bail" has not been defined in the Code, the literal meaning of the word "bail" is to set free or liberate a person on security being given of his appearance. In Law Lexicon, the word "bail" is defined "to set at liberty a person arrested or imprisoned on security being taken for his appearance". So the accepted meaning of "bail" is to release a person from legal custody.

53. Under section 438 the question posed before the High Court or the Court of Sessions is whether a person if arrested on an accusation of having committed a non-bailable offence, can be released on bail. The apprehension of such an arrest is possible only when the person is being haunted by the police or other authorities. In many cases, such haunting of a person is possible only after the issuance of the warrant of arrest after the filing of the chargesheet or after the steps under section 204 of the Code are taken. At

this juncture, a person cannot move the courts under section 437 or under section 439 because he is not in custody. But he can very well approach the High Court or the Court of Sessions under section 438 for an appropriate order. The High Court or the Court of Sessions in its turn is competent to examine the case of the person and his suitability to be enlarged on bail after the arrest and then only an order under section 438 is passed. So filing of an application under section 438 itself does not mean that the applicant will be entitled to an order thereof. It is already settled that an order under section 438 can be passed after examining each case cautiously and carefully inasmuch as it is an order converting a non-bailable offence into a bailable one and protecting a person for some time from going to custody after the arrest. At the risk of repetition, we point out that we are not considering as to what order the High Court or the Court of Sessions is competent to pass under section 438 and under which circumstances. We have simply considered the question posed before this Bench very minutely and keeping in view that section 438 is placed between the two sections 437 and 439, we deem it proper to accept the argument advanced by the present petitioners.

54. So after careful scrutiny of the different case laws and on perusal of the structure of the Code of Criminal Procedure, we hold and conclude that there is no bar in filing an application under section 438 after the filing of the chargesheet or after the issuance of a process under section 204 of the Code or after the issue of a warrant of arrest in a complaint case. We also come to the conclusion that such an application is quite maintainable at the post cognizance stage of a case instituted on police report or complaint after the court issues a process like a warrant of arrest for the production of a person of having committed a non-bailable offence. The question is accordingly answered in the affirmative."

13. The Hon'ble Supreme Court held in **HDFC Bank Ltd. v. J.J. Mannan, (2010) 1 SCC 679** that provisions of Section 438 Cr.PC cannot be invoked to exempt a person from surrendering to the Court after the investigation is complete and a charge sheet is filed against him. It was observed:-

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

the investigation is complete and if a charge sheet is filed against him. Such an interpretation would amount to violence to the provisions of Section 438 CrPC since even though a charge sheet may be filed against an accused and a charge is framed against him, he may still not appear before the court at all even during the trial.

20. Section 438 CrPC contemplates arrest at the stage of investigation and provides a mechanism for an accused to be released on bail should he be arrested during the period of investigation. Once the investigation makes out a case against him and he is included as an accused in the charge sheet, the accused has to surrender to the custody of the court and pray for regular bail. On the strength of an order granting anticipatory bail, an accused against whom a charge has been framed, cannot avoid appearing before the trial court.

14. The Bombay High Court also held in **Himanshu v. State of Maharashtra, 2014 SCC OnLine Bom 1582** that if the non-bailable warrants of arrest are issued due to the default in appearance, the jurisdiction under Section 438 Cr.PC will not be available to the Sessions Court or the High Court. It was observed:

18. A Magistrate, who issues a Warrant knows fully why the Accused is avoiding to remain present before the Court and non-appearance causes obstruction in the smooth working of the Court. It is a hurdle in the speedy disposal of the matter and therefore, the Magistrate issues a Non-Bailable or Bailable Warrant. On a number of occasions, a Magistrate is constrained to issue a Non-Bailable Warrant to compel a person to appear before the Court as the trial is at a standstill for want of appearance. To remove this stagnation, the appearance is a must. Though pre-arrest Bail can be granted under Section 438, however, it cannot be granted in any or each and every impending arrest in a Non-Bailable offence, which is pursuant to a Warrant of Arrest issued by the learned Magistrate for any other purpose but not under Section 204 of Cr.P.C. Thus, Anticipatory Bail cannot be sought when Warrant is issued during the trial due to non-attendance of the Accused. If all the sub-sections of Section 438, are taken into account, the very language of the statute compels this construction. While granting Anticipatory Bail, the Court has to consider the four factors including the antecedents of the Applicant. There is a provision for interim Bail, so also it is obligatory for the Court to give Notice to the Public Prosecutor and hear the Prosecutor.

However, if the Warrant of Arrest is issued by the Judicial Magistrate for non-attendance of a particular person, then it is not obligatory on the said Magistrate to hear the prosecution. There is no such provision of interim Bail available while cancelling the Warrant issued under Section 70 of Cr.P.C. Moreover, while granting Anticipatory Bail, the Court has to see that the Applicant shall be available for interrogation by the Police Officer as and when required. Thus, it is amply clear that the Anticipatory Bail, which is an extraordinary provision which protects the liberty of an individual can be used before he is taken into custody by the Police first time after the registration of an offence against him. Once he is taken in custody, this power is not available to the Court and also cannot be invoked. Thus, within the purport of Section 438 of Cr.P.C. grant of pre-arrest bail is not available to the Sessions Court or the High Court when a Warrant of Arrest issued is by the Magistrate except Warrant of Arrest issued under Section 204 of Cr.P.C. Under Section 204 of Cr.P.C., the Magistrate takes cognizance and thereafter issues the Warrant, so this is the first instance that the person is booked for some offence, which may be either by the Police or by the Magistrate.

15. Chhattisgarh High Court held in **Injoriya v. State of Chhattisgarh, 2021 SCC OnLine Chh 3005** that where a person jumped the bail by not appearing before the Court, an application for pre-arrest bail is not maintainable. It was observed:-

14. In the case at hand, it is not the case of the applicant that she was enlarged on bail for some minor offence, thereafter, during the trial, some graver offence is added to the charge, but it is the case where the applicant jumped the bail by not appearing before the trial Court on the dates fixed for hearing after her release on bail, therefore, in view of aforementioned decisions of High Court of Madras and High Court of Madhya Pradesh, I am of the considered opinion that application for grant of anticipatory bail under Section 438 of Cr.P.C. is not maintainable when the liberty granted to applicant of releasing her on bail was misused.

15. Accordingly, the anticipatory bail application is dismissed as not maintainable. However, it would be open for the applicant to take appropriate steps under Section 70(2) of Cr.P.C. for the recall/cancellation of a warrant issued against her to be decided in accordance with law.

16. A Full Bench of Patna High Court held in Anil Kumar v. State of Bihar, 2023 SCC OnLine Pat 2150 that even if the summons have been issued in a

matter involving the commission of a non-bailable offence, the apprehension of arrest will continue and an application under Section 438 Cr.PC will lie. It was observed: -

"100. Thus, the apprehension of being arrested in a non-bailable offence continues, notwithstanding only summons having been issued by the concerned Court, entitling the accused/petitioner to move for anticipatory bail in such case before the Sessions Court or the High Court."

17. A Full Bench of Uttrakhand High Court also considered this question in **Saubhagya Bhagat v. State of Uttarakhand, 2023 SCC OnLine Utt 917** and held by the majority that an application for pre-arrest bail would be maintainable even after filing of the charge sheet in the Court. It was observed: -

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

18. However, Hon'ble Mr Justice Ravinder Maithani, J. dissented and held that an application for anticipatory bail can be moved by the accused before the charge sheet is filed and not after the conclusion of the investigation. It was further held that the word 'arrest' used in Section 438 of Cr.PC cannot include the arrest during the trial. It was observed:-

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

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

134. As discussed hereinabove, there are various provisions of bail in the Code. Sections 437 and 439 of the Code are general and broad principles. Section 438 of the Code comes into play only when there is apprehension of

arrest in a non-bailable offence. Now, if the word "arrest" as occurs in Section 438 of the Code is taken to cover all situations of arrest or all situations under which an accused may be taken into custody by a court, it may make various other provisions of the Code redundant and may be a kind of violence to the provisions of Section 438 of the Code.

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

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

137. If it is construed that the word "arrest", as used under Section 438 of the Code may include any arrest or any custody during trial or appeal, etc., it may definitely bring it in conflict with Section 389 of the Code. Section 389 of the Code makes provisions with regard to bail during the pendency of an appeal. Can an accused, who is facing trial in a criminal case, move an application for anticipatory bail prior to judgment on the ground that he has apprehension that he may be convicted and may be taken into custody? If it is answered in the affirmative, it would make Section 389 of the Code redundant.

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

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139. The word "arrest", as used under Section 438 of the Code, may not be stretched beyond the purpose, for which it was enacted, i.e., insurance against police custody. It is arrest by police during investigation alone, not beyond that. If in the name of personal liberty, the word "arrest", as used under Section 438 of the Code, is extended to any arrest, it may again create difficult situations. For example, if on the date of judgment, one of the accused does not appear and he is convicted with a sentence, in that eventuality, the Court would issue a non-bailable warrant for ensuring his presence, so as to serve out the sentence. Can it be said that because the convict is apprehending his arrest, he may file an anticipatory bail application? Can an anticipatory bail application filed by such a convict be entertained? Definitely, it cannot be. Section 438 of the Code has not contemplated such a situation.

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142. This has been further clarified by the Hon'ble Supreme Court in the case of **Satender Kumar Antil** (supra) on 21.03.2023, when the Hon'ble Supreme Court observed that, "we would like to clarify that what we have enunciated qua bail would equally apply to anticipatory bail cases. Anticipatory bail is after all one of the species of bail." It may be noted that in the case of **Satender Kumar Antil** (supra) in category-A cases when an accused is not arrested during the investigation if such an accused appears before the court, he is not to be taken into custody. Which means, by virtue of the directions of the Hon'ble Supreme Court, an accused falling in category-A cases, does not apprehend his arrest. The provisions of Section 438 of the Code come into play when a person apprehends his arrest in non-bailable cases. It means that for category-A cases, as classified in the case of Satender Kumar Antil (supra), an application for anticipatory bail may not at all be entertained because as stated, such a person is not to be taken into custody. He cannot be said to be carrying any apprehension of arrest. While clarifying its order on 21.03.2023, the Hon'ble Supreme Court, in the case of Satender Kumar Antil (supra) was not invited to interpret the word "arrest", as occurs in Section 438 of the Code and the principle of law laid down by the Hon'ble Supreme Court in the case of Sushila Aggarwal (supra) on anticipatory bail.

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

19. Since the matter has been decided by the various Hon'ble Division Benches and the Full benches, it is not necessary to refer to the judgments of various Single Judges to burden the present judgment.

20. It is apparent from the perusal of these judgments that the jurisdiction under Section 438 of Cr.PC is available to the Court of Sessions and the High Court when the non-bailable warrants of arrest have been issued by the Court; however, the stage at which warrants have been issued has also to be considered. When the warrants have been issued at the initial stage at the time of taking of the cognizance or after the addition of some graver offence, the Court can exercise the jurisdiction to grant the pre-arrest bail; however, this bail should be granted for a limited time to enable the accused to approach competent Court seized of the matter to obtain a regular bail from the Court. This is so because the competent Court is seized of the matter and is in the best position to say whether bail should be granted to the accused or not. The jurisdiction vested in the competent Court to grant bail should not be usurped by the Court of Sessions or the High Court merely because they possess the power under Section 438 of Cr.PC to grant pre-arrest bail. However, when non-bailable warrants of arrest have been issued due to the default in compliance with the conditions of the bail or non-appearance before the Court, the jurisdiction under Section 438 of Cr.PC should not be exercised to thwart the course of justice and permit the accused to abstain from the Court.

21. In the present case, it has been asserted that the non-bailable warrants of arrest were issued because of the addition of an offence punishable under Section 328 of IPC which is a graver offence and is triable by the Court of Sessions.

Therefore, the jurisdiction of the Court to grant pre-arrest bail will be available. Hence, the present application is allowed and order dated 29.12.2023 is made absolute.

22. The observations made hereinbefore shall remain confined to the disposal of the petition and will have no bearing, whatsoever, on the merits of the case.

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