

A.F.R.

Judgement Reserved: 24.4.2023

Judgement Delivered: 24.5.2023

Chief Justice's Court

1. Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 8361 of 2020

Applicant :- Mohammad Zaid

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Brij Raj Singh

Counsel for Opposite Party :- G.A.

With

2. Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 7647 of 2020

Applicant :- Mannu @ Dushyant And Another

Opposite Party :- State of U.P.

Counsel for Applicant :- Rajrshi Gupta, Dileep Kumar(Senior Adv.), Shambhawi Shukla

Counsel for Opposite Party :- G.A.

With

3. Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 8222 of 2020

Applicant :- Bacche Lal Nirmal @ Nikhil Nirmal (Minor)

Opposite Party :- State of U.P.

Counsel for Applicant :- Deepak Kumar Srivastava

Counsel for Opposite Party :- G.A.

With

4. Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 8300 of 2020

Applicant :- Aman @ Mohd. Aman Shariq

Opposite Party :- State of U.P.

Counsel for Applicant :- Ramesh Chandra Yadav

Counsel for Opposite Party :- G.A.

With

5. **Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 8506 of 2020**

Applicant :- Shivam Gautam

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Om Prakash Vishwakarma

Counsel for Opposite Party :- G.A.

With

6. **Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 9100 of 2020**

Applicant :- Akhilesh Pratap Singh

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Ramanand Gupta

Counsel for Opposite Party :- G.A.

With

7. **Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 9323 of 2020**

Applicant :- Khushboo Yadav

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Sanjay Kumar Yadav

Counsel for Opposite Party :- G.A.

With

8. **Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 9699 of 2020**

Applicant :- Mohd. Suhail

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Mohd. Akbar Shah Alam Khan

Counsel for Opposite Party :- G.A.

With

9. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 1253 of 2021

Applicant :- Banti (Minor)

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Rameshwar Prasad Mishra

Counsel for Opposite Party :- G.A.

With

10. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 2863 of 2021

Applicant :- Ramashankar Yadav And 2 Others

Opposite Party :- State of U.P.

Counsel for Applicant :- Rajneesh Kumar Upadhyay

Counsel for Opposite Party :- G.A., Mohammad Alam

With

11. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 3665 of 2021

Applicant :- Saurabh Patel

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- B.N.Singh, Manish Kumar Singh

Counsel for Opposite Party :- G.A.

With

12. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 4034 of 2021

Applicant :- Mohd. Adnan

Opposite Party :- State of U.P.

Counsel for Applicant :- Istyak Khan

Counsel for Opposite Party :- G.A.

With

13. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 4050 of 2021

Applicant :- Monu Tomar

Opposite Party :- State Of U.P. And 2 Others

Counsel for Applicant :- Abdul Majeed, Sufia Saba

Counsel for Opposite Party :- G.A.

With

14. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 4204 of 2021

Applicant :- Gulfan

Opposite Party :- State of U.P.

Counsel for Applicant :- Gauri Dubey, Gautam Dubey

Counsel for Opposite Party :- G.A.

With

15. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 4247 of 2021

Applicant :- Vishal Chaubey @ Subham Chaubey

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Santosh Kumar Tiwari, Shashikant Mishra

Counsel for Opposite Party :- G.A.

With

16. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 4811 of 2021

Applicant :- Anirudha And Another

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Akhilesh Singh, Shivam Yadav

Counsel for Opposite Party :- G.A.

With

17. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 5243 of 2021

Applicant :- Niraj Kumar Bind @ Niraj And Another

Opposite Party :- State Of U.P. And 2 Other

Counsel for Applicant :- Vikrant Singh Parihar
Counsel for Opposite Party :- G.A.

With

18. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 5425 of 2021

Applicant :- Sachin
Opposite Party :- State of U.P.
Counsel for Applicant :- Ashutosh Kumar Pandey
Counsel for Opposite Party :- G.A.

With

19. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 6008 of 2021

Applicant :- Km. Swarti
Opposite Party :- State of U.P.
Counsel for Applicant :- Arjit Srivastava, Usha Srivastava,
Vinod Kumar Srivastava
Counsel for Opposite Party :- G.A.

With

20. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 6069 of 2021

Applicant :- Sameer
Opposite Party :- State of U.P. and Others
Counsel for Applicant :- Anoop Singh, Ashok Kumar Singh
Counsel for Opposite Party :- G.A.

With

21. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 6162 of 2021

Applicant :- Mohd. Arbaz
Opposite Party :- State Of U.P. And 2 Others
Counsel for Applicant :- Babu Lal Ram, Rajesh Kumar
Sachan
Counsel for Opposite Party :- G.A.

With

22. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 7654 of 2021

Applicant :- Anurag Rai

Opposite Party :- State of U.P.

Counsel for Applicant :- Shailendra Kumar Rai, Anil Kumar Dubey

Counsel for Opposite Party :- G.A.

With

23. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 7961 of 2021

Applicant :- Firdaus

Opposite Party :- State of U.P.

Counsel for Applicant :- Vinit Mishra, Meena Mishra

Counsel for Opposite Party :- G.A.

With

24. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 11149 of 2021

Applicant :- Mohd Faizan (Minor)

Opposite Party :- State Of U.P. And Another

Counsel for Applicant :- Istyak Khan

Counsel for Opposite Party :- G.A.

With

25. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 17265 of 2021

Applicant :- Ashutosh Yadav @ Ashok Yadav (Minor)

Opposite Party :- State Of U.P And 2 Others

Counsel for Applicant :- Munna Tiwari

Counsel for Opposite Party :- G.A.

With

26. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 7966 of 2022

Applicant :- Akram@ Raj@ Sameer Ali

Opposite Party :- State Of U.P. And 2 Others

Counsel for Applicant :- Amit Daga, Umesh Chandra Shukla

Counsel for Opposite Party :- G.A.

With

27. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 8763 of 2022

Applicant :- Ujaif

Opposite Party :- State of U.P.

Counsel for Applicant :- Samir Srivastava, Ravitendra Pratap Singh Chandel

Counsel for Opposite Party :- G.A., Avnish Kumar Srivastava

With

28. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 11280 of 2022

Applicant :- Abhishek Nagar

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Tabrez Ahmad, Aishwarya Pratap Singh

Counsel for Opposite Party :- G.A., Geeta Kushwaha

With

29. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 11945 of 2022

Applicant :- Pranjal Yadav

Opposite Party :- State of U.P.

Counsel for Applicant :- Shri Niwash Yadav, Ravi Prakash Singh Yadav

Counsel for Opposite Party :- G.A.

With

30. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 11946 of 2022

Applicant :- Shiva Singh

Opposite Party :- State of U.P.

Counsel for Applicant :- Mujiburrahman

Counsel for Opposite Party :- G.A., Sudheer Rana

With

31. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 12323 of 2022

Applicant :- Vikas Pal(Minor)

Opposite Party :- State Of U.P. And 3 Others

Counsel for Applicant :- Firoz Haider

Counsel for Opposite Party :- G.A., Sanjay Kumar Pal

With

32. **Case :-** CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 12787 of 2022

Applicant :- Ankit Singh Bhadauria

Opposite Party :- State Of U.P And Another

Counsel for Applicant :- Rohit Nandan Singh

Counsel for Opposite Party :- G.A.

Hon'ble Pritinker Diwaker, Chief Justice

Hon'ble Samit Gopal, J.

1. The Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. - 8361 of 2020 (Mohammad Zaid Vs. State of U.P. and another) has been placed before this Larger Bench on a reference made by a learned Single Judge, for the following questions to be answered :-

“(i) Whether limited window opened by the judgement of this Court in the case of Shahaab Ali (Minor) (supra) for child in conflict

with law confining his right to seek anticipatory bail before F.I.R is lodged against him deserves to be further opened to the stages where inquiry against such a child u/s 14 of the J. J. Act, 2015 and preliminary assessment into heinous offence u/s 15 of the J. J. Act, 2015, where needed, is concluded and he is found involved in heinous offence and his trial is transferred to Children's Court as per Section 18 (3) of the J. J. Act, 2015 ?

(ii) Whether Section 1 (4) of the J. J. Act, 2015 excludes the application of Section 438 Cr.P.C. to a child in conflict with law after the F.I.R. is registered against him as held by this Court in the case of Shahaab Ali (Minor) (supra) ?

(iii) Whether the arrest/apprehension/bail of a child in conflict with law is necessary during the inquiry by the Board about the nature of offences alleged against him u/s 14 of the J. J. Act, 2015; during preliminary assessment into heinous offence by Board u/s 15 of the J. J. Act, 2015 read with exercise of power u/s 94 of the J. J. Act, 2015 for determination of age of child in conflict with law, where required and before passing of order u/s 17 of the J. J. Act, 2015 that child has not been found in conflict with law or u/s 18 (3) of the J. J. Act, 2015 that the child in conflict with law has been found involved in commission of heinous offence ?

(iv) Whether only after a child in conflict with law is found involved in heinous offence and other non-bailable offence and found to be juvenile by the Board, he should be directed to surrender and obtain bail as per Section 12 of the J. J. Act, 2015 and not all the children allegedly in conflict with law, arrested/apprehended be compelled to seek bail u/s 12 of the J. J. Act, 2015 before inquiry u/s 14 of the J. J. Act, 2015 and preliminary assessment into heinous offence u/s 15 of the J. J. Act, 2015 is concluded and order u/s 17/18 of the J. J. Act, 2015 is passed, wherein a child may not be found to be a child in conflict with law or juvenile at all?

(v) Whether there is presumption in the J. J. Act, 2015 that by lodging of mere F.I.R against a juvenile, he becomes a child in conflict with law who has committed an offence, without any enquiry, preliminary assessment into a heinous offence and determination of his age and his declaration of being involved in an offence and he is only required to obtain bail as per Section 12 of the Act aforesaid and cannot be granted anticipatory bail ?

(vi) Whether the production of child in conflict with law before the Board for enquiry u/s 14 and preliminary assessment into heinous offence u/s 15 of the J. J. Act, 2015 where required, cannot be done while he is on anticipatory bail and his arrest/apprehension is compulsory ? ”

2. Reference to a Larger Bench occasioned before the learned Single Judge due to an order dated 20.1.2022 passed by another learned Single Judge in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 597 of 2020, (Shahaab Ali (Minor) and another vs. State of U.P.) in which, a question was raised before the said Court, as to whether a petition under Section 438 of the Code of Criminal Procedure, 1973 at the behest of child, in conflict with law, would be maintainable. After considering the same, the said Court reached to a conclusion that the same is not maintainable. The conclusion as reached therein is as follows:-

“ *CONCLUSION:*

In the present case, a first information report has already come to be lodged against the two applicants. The learned AGA has rightly submitted that the police cannot apprehend the applicants and that it is the procedure prescribed by Sections 10 and 12 that will have to be necessarily followed. In that view of the matter the Court is of the opinion that the apprehension of arrest is clearly misplaced.

Taking on board the statement of the learned AGA, the instant application is dismissed as not maintainable. ”

Before both the learned Single Judges, the applicants were minors who had filed applications for anticipatory bail through their natural guardians in respective cases in which they were accused. The conclusion drawn in the case of **Shahaab Ali (supra)** for holding the same to be not maintainable is that the police cannot apprehend the applicant and there is a procedure prescribed by Sections 10 and 12 of the Juvenile Justice Care and Protection

Act, 2015 that will have to be necessarily followed and as such, apprehension of arrest is misconceived. The same was thus dismissed as not maintainable. In the referring case, the learned Single Judge Bench being not in tandem with the view taken in the case of **Shahaab Ali (supra)**, came to the conclusion that a child in conflict with law cannot be granted anticipatory bail till conclusion of trial since it would negate the purpose of the Act 2015. It shall continue till inquiry is conducted by the Board regarding child in conflict with law is concluded as per Section 14 of the Act 2015 and where required, preliminary assessment into heinous offences under Section 15 of the Act and orders under Sections 17/18 of the Act 2015 is passed deciding whether the child is in conflict with law or not. If the child is found in conflict with law, he will surrender and apply for bail as per Section 12 of the Act 2015 regarding implication in heinous offence and other non-bailable offences. The matter was, thus, referred to be heard by a Larger Bench on the questions framed therein.

3. Heard Sri Rajrshi Gupta, Advocate, for the applicant in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 7647 of 2020, Sri J.K. Upadhyay and Sri Amit Sinha, learned Additional Government Advocates for the State of U.P. and Sri Gaurav Kakkar, Advocate, learned Amicus Curiae and perused the records.

4. Apart from the main referring cases, there are 31 other cases which have identical issue in them and as such have been connected with the referring case which is the leading petition. The said question referred to in the leading matter is being decided, which would also cover the issue in the connected petitions despite their being no representation on behalf of the respective applicants.

5. The dispute, in issue, is to the limited question as to whether a child in conflict with law would be entitled to file an application

for anticipatory bail under Section 438 Cr.P.C. or not. At the outset, certain provisions of the Code of Criminal Procedure, 1973 (hereinafter referred to as the ‘Cr.P.C.’) and the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as ‘the Act 2015’) are relevant to be quoted herein :-

“ Section 5 Cr.P.C. reads as under :-

“**5. Saving.-** Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.”

The Section 438 Cr.P.C. as introduced in the State of Uttar Pradesh on 06.06.2019 reads as follows :-

"438. Direction for grant of bail to person apprehending arrest -

(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:—

(i) the nature and gravity of the accusation;

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

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

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested, either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

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

(2) *Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, and if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions, namely:—*

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub - section (3) of section 437, as if the bail were granted under that section.

Explanation : The final order made on an application for direction under sub - section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) *Where the Court grants an interim order under sub - section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.*

(4) *On the date indicated in the interim order under sub - section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.*

(5) *The High Court or the Court of Session, as the case may be, shall finally dispose of an application for*

grant of anticipatory bail under sub-section (l), within thirty days of the date of such application.

(6) *Provisions of this section shall not be applicable—*

(a) to the offences arising out of, —

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secrets Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) *If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."*

The relevant and important provisions of the Act 2015 are reproduced hereunder:

“1. Short title, extent, commencement and application -

(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all matters concerning children in need of care and protection and children in conflict with law, including -

(i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration of children in conflict with law;

2. Definitions.- In this Act, unless the context otherwise requires,-

(12) “child” means a person who has not completed eighteen years of age;

(13) “child in conflict with law” means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence;

(20) “Children's Court” means a court established under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court under the Protection of Children from Sexual Offences Act, 2012 (32 of 2012), wherever existing and where such Courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act;

(33) “heinous offences” includes the offences for which the minimum punishment under the Penal Code, 1860 (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more;

(35) “juvenile” means a child below the age of eighteen years;

(40) “observation home” means an observation home established and maintained in every district or group of districts by a State Government, either by itself, or through a voluntary or non-governmental organisation, and is registered as such, for the purposes specified in sub-section (1) of section 47;

(45) “petty offences” includes the offences for which the maximum punishment under the Penal Code, 1860 (45 of 1860) or any other law for the time being in force is imprisonment up to three years;

(46) “place of safety” means any place or institution, not being a police lockup or jail, established separately or attached to an observation home or a special home, as the case may be, the person in-charge of which is willing to receive and take care of the children alleged or found to be in conflict with law, by an order of the Board or the Children's Court, both during inquiry and ongoing rehabilitation after having been found guilty for a period and purpose as specified in the order;

(54) “serious offences” includes the offences for which the punishment under the Penal Code, 1860 (45 of 1860) or any other law for the time being in force, is, -

(a) minimum imprisonment for a term more than three years and not exceeding seven years; or

(b) maximum imprisonment for a term more than seven years but no minimum imprisonment or minimum imprisonment of less than seven years is provided;

(55) “special juvenile police unit” means a unit of the police force of a district or city or, as the case may be, any other police unit like railway police, dealing with children and designated as such for handling children under section 107;

(61) all words and expressions used but not defined in this Act and defined in other Acts shall have the meanings respectively assigned to them in those Acts.”

6. The implementation of provisions of the Act 2015 are to be guided by the fundamental principles provided which in Section 3 of the Act 2015 and are as follows :-

“3. General principles to be followed in administration of Act.-

The Central Government, the State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely:--

(i) Principle of presumption of innocence: Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.

(ii) Principle of dignity and worth: All human beings shall be treated with equal dignity and rights.

(iii) Principle of participation: Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child's views shall be taken into consideration with due regard to the age and maturity of the child.

(iv) Principle of best interest: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.

(v) Principle of family responsibility: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.

(vi) Principle of safety: All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or

maltreatment while in contact with the care and protection system, and thereafter.

(vii) Positive measures: All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

(viii) Principle of non-stigmatising semantics: Adversarial or accusatory words are not to be used in the processes pertaining to a child.

(ix) Principle of non-waiver of rights: No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver.

(x) Principle of equality and non-discrimination: There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child.

(xi) Principle of right to privacy and confidentiality: Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process.

(xii) Principle of institutionalisation as a measure of last resort: A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.

(xiii) Principle of repatriation and restoration: Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.

(xiv) Principle of fresh start: All past records of any child under the Juvenile Justice system should be erased except in special circumstances.

(xv) Principle of diversion: Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole.

(xvi) Principles of natural justice: Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act.”

7. Sri Gaurav Kakkar, learned Amicus Curiae argued that the word “apprehension” in Section 10 of the Act 2015 is used to denote curtailing of the liberty of a child which would be his arrest as by being apprehended he would not be free to move freely, eat freely, live freely and do any work of his choice freely. It is argued that since the Act 2015 is a beneficial legislation, a child in conflict with law or a juvenile cannot, in any manner, be deprived of the benefit of anticipatory bail under Section 438 Cr.P.C. as the said section does not bar a juvenile or a child in conflict with law taking benefit of the same in the event a need so arises. It is argued that since there is no bar under Section 438 Cr.P.C. of a juvenile not filing an application for anticipatory bail, the same does not stand not maintainable for him. It is argued that although the Act 2015 is a self contained statute providing procedure to be followed in case of apprehending a juvenile or a child in conflict with law, but the same does not in any manner restrict the right of such person for exploring the remedy of anticipatory bail under Section 438 Cr.P.C. in a circumstance if needed. It is argued that although in the case of **Shahaab Ali (supra)** the learned Single Judge had permitted the filing of an application under Section 438 Cr.P.C. to a child in conflict with law to a stage prior to lodging of an F.I.R., but the said approach is incorrect and illegal inasmuch the applicant cannot in any manner be restricted to avail it only till a specific stage and its applicability would be refused after crossing of that stage. It is argued that in view of the same, opinion of the learned Single Judge in the case of **Mohammad Zaid (supra)** that anticipatory bail can be granted to a child in conflict with law is the right approach but the restriction that it will only be valid till the time of preliminary assessment, but cannot be granted to a child in conflict with law till conclusion of trial and further it would continue only till the inquiry is conducted by the Board

which is concluded as per Section 14 of the Act 2015 and the required preliminary assessment into heinous offences under Section 15 of the Act 2015 is done, would be restricting the grant of anticipatory bail to a specific period which would be illegal. It is argued that anticipatory bail under Section 438 Cr.P.C. cannot be restricted in any event of the matter and thus, the right of the applicant cannot be curtailed only till a specific stage after which, it would not be maintainable but operation of the order granting anticipatory bail could be restricted by the Courts for reasons to be recorded in writing till a limited period.

It is further argued that the Act 2015 is a beneficial legislation. It is argued that Section 5, being Saving of the Cr.P.C., states that nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force, which specifically states that the provisions of Code will apply if there is nothing contrary in any special or local law and the situation in the present matter is such that the Act of 2015 is silent with regard to the application of Section 438 Cr.P.C. and as such, there is nothing contrary to a specific provision of the Code which is Section 438 Cr.P.C. and as such, the same would apply in full.

8. Sri Rajrshi Gupta, learned counsel for the applicant also argued in the same terms as that of learned Amicus Curiae and in the same proposition of law that an anticipatory bail application is maintainable for a child in conflict with law as there are no restrictions in Section 438 Cr.P.C. with regards to such persons. It is argued that the restrictions under Section 438 Cr.P.C. are only limited to its application in various types of offences as mentioned in the said section itself, but with regard to a child in conflict with

law, the Act does not bar its application. It is argued that a child in conflict with law cannot remain remedy-less till the time of his apprehension or arrest whatever the case may be and then the law with regards to the procedure to be followed for him be followed. It is argued that since there is no bar in Section 438 Cr.P.C. with regard to its application for a child in conflict with law, it cannot be restricted for its application in respect of a child in conflict with law.

9. Learned counsel for the applicant Sri Rajrshi Gupta and Sri Gaurav Kakkar, learned Amicus Curiae, have relied upon an order dated 15.7.2022 passed by a Division Bench of Bombay High Court in **Raman and another vs. State of Maharashtra : 2022 SCC OnLine Bom 1470**, wherein the Division Bench has held that an anticipatory bail even for a child in conflict with law is maintainable. Further reliance has been placed on an order dated 23.8.2021 passed by a Division Bench of Calcutta High Court in the case of **Miss. Surabhi Jain (Minor) vs. State of West Bengal : C.R.M. 405 of 2021, decided on 23.08.2021**. It is argued that insofar as the fact that there is conflict between the special act and the Code and the Special Act is silent, the procedure prescribed under the Code shall apply as has been held in the order dated 3.3.2017 passed by a Division Bench of Chhattishgarh High Court in the case of **Sudhir Sharma vs. State of Chhattisgarh : 2017 SCC OnLine Chh 1554**. It is argued that welfare and protection of a child in conflict with law and a juvenile is the paramount consideration in a society and as such a beneficial legislation is there, protecting his rights and thus, benefit of Section 438 Cr.P.C. cannot be kept out for him. It is argued that even as per Article 14 of the Constitution of India, there has to be an equality before law and as such, the benefit has to be extended

to a child in conflict with law which is available in cases of other citizens.

10. Sri J.K. Upadhyay and Sri Amit Sinha, learned Additional Government Advocates, per contra, argued that since a child in conflict with law cannot be arrested, the provisions of Section 438 Cr.P.C. cannot be applicable to him. It is argued that Section 438 Cr.P.C. states that it is only applicable to a person who is apprehending his arrest, but since there is no provision of arrest of a child in conflict with law, he cannot explore the said remedy. It is argued that as soon as a person is apprehended and is brought to the knowledge of the said authority that the said person is a juvenile or it appears to the said authority that the said person is a juvenile, it would immediately proceed to forward the said person to a child care home and not arrest him and detain him at the police station. After forwarding the said person to a child care home, the procedure as prescribed under the Act 2015 would follow for determination of the age of the said person and also for preliminary inquiry regarding assessment of heinousness of the offences and the matter would proceed as per the Act 2015. It is argued that the view taken in the case of **Shahaab Ali (supra)** is a just and correct view. It is further argued that if Section 438 Cr.P.C. applies to a child in conflict with law, then the proviso of Section 12 of the Act 2015 will frustrate. It is argued that the legislation has not intentionally provided any benefit of Section 438 Cr.P.C. to a child in conflict with law for the reason that the Act relating to juvenile and child in conflict with law is sufficient in itself to deal with any type of situation. There is nothing left for being included in the Act for any purpose. The same would also be seen from Section 1(4) of the Act 2015 which starts with non-obstante clause and, therefore, it overrides any other law. It is argued that the legislature thus does not want to extend the benefit of Section 438 Cr.P.C. to a child in

conflict with law and as such has not made it applicable to it. It is argued that as such an application under Section 438 Cr.P.C. for a child in conflict with law would not be maintainable.

11. After having heard learned counsels for the parties and learned Amicus Curiae at length, the situation which arises is that a child in conflict with law cannot be left to be remedy-less till the time of his apprehension by the concerned authority or arrest whatever the case may be. Although Section 1(4) of the Act 2015 starts with a non-obstante clause excluding the operation of any act and specifically providing that the provisions of this Act shall apply to all matters concerning the child in need, care and protection and child in conflict with law, but does not, in any manner, bar the power of the Court to grant anticipatory bail under Section 438 Cr.P.C. Non-obstante clause although operates in the areas covered in sub-section (i) and (ii) of Section 1 of Act 2015, under sub-section (i) apprehension, detention, prosecution, penalty or imprisonment, rehabilitation and social integration of child in conflict with law is provided. In so far as in a stage prior to the apprehension or arrest by a child in conflict with law is concerned, the Act is silent. The Parliament has not overridden the provision of Section 438 Cr.P.C. There is no provision in Section 1 and Section 4 or elsewhere in the Act 2015 making Section 438 Cr.P.C. inapplicable for offences punishable under the Act 2015. The liberty of a citizen has to be regulated by law. It has to be procedural, substantial, just and reasonable under Article 21 of the Constitution of India. There is no bar for grant of anticipatory bail to a child in conflict with law or a juvenile, although Section 1(4) of the Act 2015 begins with a non-obstante clause which operates in relation to Code of Criminal Procedure, but the same does not, in any manner, is inconsistent with regard to the provisions of anticipatory bail under Section 438 Cr.P.C. for a juvenile or a child

in conflict with law although it is a discretion of the court concerned either to grant anticipatory bail or not, but the remedy of an anticipatory bail cannot be taken away for a juvenile or a child in conflict with law, if there is no specific bar to it. The Legislature has not expressly barred the application under Section 438 Cr.P.C. with regard to a juvenile or a child in conflict with law. If the Legislature had an intention to override the provision of Section 438 Cr.P.C. then the same should have been expressly stated that Section 438 Cr.P.C. shall not apply to a juvenile or a child in conflict with law. There is, however, no such provision in the Code. In these circumstances, therefore, the Legislature in its wisdom left it to the Court to bring about a harmonious construction of the two statutes, so that the two may work and stand together. This is also fully inconsonance with the principles laid down in construing the non-obstante clause in the statute. It would be relevant to point out that there are certain statutes which expressly excluded the provisions of Section 438 Cr.P.C. The exclusion of access to anticipatory bail as a remedy impinges upon human liberty. A child enjoys equal rights with other persons. Therefore, it would be in violation of all the principles and provisions to deny an opportunity to exercise right of preferring an application under Section 438 Cr.P.C.

12. If the legislature wanted not to extend the benefit of anticipatory bail to a child in conflict with law, the same would have been specifically barred to be in operation for such person.

In Section 18 of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, an absolute bar on the application of Section 438 Cr.P.C. has been created. Section 18 of the said act reads as under:

“18. Section 438 of the Code not to apply to persons committing an offence under the Act – 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 under this Act.”

13. Like it, no bar in the Act 2015 has been created for the application of Section 438 Cr.P.C. in it.

14. Section 14 of the Act 2015 provides for inquiry by Board regarding child in conflict with law and the procedure to be followed depending on the category of offences. Section 15 provides for preliminary assessment into heinous offences by Board to decide whether there is a need for trial of the said child as an adult and then, transfer the case for trial to the Children's Court having jurisdiction to try such offences.

15. Chapter III of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016 provides for procedure in relation to children in conflict with law. Rule 8 therein reads as under:

“8. Pre-production action of police and other agencies.-

(1) No First Information Report shall be registered except where a heinous offence is alleged to have been committed by the child, or when such offence is alleged to have been committed jointly with adults. In all other matters, the Special Juvenile Police Unit or the Child Welfare Police Officer shall record the information regarding the offence alleged to have been committed by the child in the general daily diary followed by a social background report of the child in Form 1 and circumstances under which the child was apprehended, wherever applicable, and forward it to the Board before the first hearing:

Provided that, the power to apprehend shall only be exercised with regard to heinous offences, unless it is in the best interest of the child. For all other cases involving petty and serious offences and cases where apprehending the child is not necessary in the interest of the child, the police or Special Juvenile Police Unit or Child Welfare Police Officer shall forward the information regarding the nature of offence alleged to be committed by the child along with his social background report in Form 1 to the Board and intimate the parents or guardian of the child as to when the child is to be produced for hearing before the Board.”

16. Thus, from the proviso, it is clear that such child has been given full protection and care, so as to see that he is not unnecessarily arrested and if he has been such, then safeguards are provided to take care of such a situation.

17. Sections 10, 12, 14 and 15 of the Act 2015, are as under:

“10. Apprehension of child alleged to be in conflict with law.- (1) As soon as a child alleged to be in conflict with law is apprehended by the police, such child shall be placed under the charge of the special juvenile police unit or the designated child welfare police officer, who shall produce the child before the Board without any loss of time but within a period of twenty-four hours of apprehending the child excluding the time necessary for the journey, from the place where such child was apprehended:

Provided that in no case, a child alleged to be in conflict with law shall be placed in a police lock-up or lodged in a jail.

(2) The State Government shall make rules consistent with this Act,-

(i) to provide for persons through whom (including registered voluntary or non-governmental organisations) any child alleged to be in conflict with law may be produced before the Board;

(ii) to provide for the manner in which the child alleged to be in conflict with law may be sent to an observation home or place of safety, as the case may be.”

“12. Bail to a person who is apparently a child alleged to be in conflict with law.-

(1) When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police or appears or brought before a Board, such person shall, notwithstanding anything contained in the Criminal Procedure Code, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person:

Provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.

(2) When such person having been apprehended is not released on bail under sub-section (1) by the officer-in-charge of the police station, such officer shall cause the person to be kept only in an observation home or a place of safety, as the case may be, in such manner as may be prescribed until the person can be brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board, it shall make an order sending him to an observation home or a place of safety, as the case may be, for such period during the pendency of the inquiry regarding the person, as may be specified in the order.

(4) When a child in conflict with law is unable to fulfil the conditions of bail order within seven days of the bail order, such child shall be produced before the Board for modification of the conditions of bail.”

“Section 14: Inquiry by Board regarding child in conflict with law.-

(1) Where a child alleged to be in conflict with law is produced before Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under sections 17 and 18 of this Act.

(2) The inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension.

(3) A preliminary assessment in case of heinous offences under section 15 shall be disposed of by the Board within a period of

three months from the date of first production of the child before the Board.

(4) If inquiry by the Board under sub-section(2) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated:

Provided that for serious or heinous offences, in case the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate, for reasons to be recorded in writing.

(5) The Board shall take the following steps to ensure fair and speedy inquiry, namely:—

(a) at the time of initiating the inquiry, the Board shall satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment;

(b) in all cases under the Act, the proceedings shall be conducted in simple manner as possible and care shall be taken to ensure that the child, against whom the proceedings have been instituted, is given child-friendly atmosphere during the proceedings;

(c) every child brought before the Board shall be given the opportunity of being heard and participate in the inquiry;

(d) cases of petty offences, shall be disposed of by the Board through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973 (2 of 1974);

(e) inquiry of serious offences shall be disposed of by the Board, by following the procedure, for trial in summons cases under the Code of Criminal Procedure, 1973 (2 of 1974);

(f) inquiry of heinous offences,—

(i) for child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Board under clause(e);

(ii) for child above the age of sixteen years as on the date of commission of an offence shall be dealt with in the manner prescribed under section 15.”

“Section 15: Preliminary assessment into heinous offences by Board.-

(1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation.—For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14.”

18. The importance of enacting Section 438 Cr.P.C. is explained by the Apex Court in the case of **Gurbaksh Singh Sibbia vs. The State of Punjab : (1980) 2 SCC 565**. It is observed in paragraph 12 of the said judgment that a person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail is generally sought brings about its striking dissimilarity with the situation in which a person, who is arrested for the commission of non-bailable offences asks for bail.

Further in paragraph 26, it has been observed that the beneficent provision contained in Section 438 Cr.P.C. must be saved, not jettisoned.

Further in paragraph 31, it was observed that in regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made.

The said paras read as under :-

“ 12. We find ourselves unable to accept, in their totality, the submissions of the learned Additional Solicitor General or the constraints which the Full Bench of the High Court has engrafted on the power conferred by Section 438. Clause (1) of Section 438 is couched in terms, broad and unqualified. By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute

restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence. Though the right to apply for anticipatory bail was conferred for the first time by Section 438, while enacting that provision the legislature was not writing on a clean slate in the sense of taking an unprecedented step, insofar as the right to apply for bail is concerned. It had before it two cognate provisions of the Code : Section 437 which deals with the power of courts other than the Court of Session and the High Court to grant bail in non-bailable cases and Section 439 which deals with the “special powers” of the High Court and the Court of Session regarding bail. The whole of Section 437 is riddled and hedged in by restrictions on the power of certain courts to grant bail. That section reads thus:

“437. *When bail may be taken in case of non-bailable offence.*
—(1) When any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court other than the High Court or Court of Session, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:

Provided that the court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail:

Provided further that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the court.

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

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

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or (b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice.

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

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

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

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

Section 439(1)(a) incorporates the conditions mentioned in Section 437(3) if the offence in respect of which the bail is sought is of the nature specified in that sub-section. Section 439 reads thus:

“439. *Special powers of High Court or Court of Session regarding bail.*— (1) A High Court or Court of Session may direct

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

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

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

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.”

The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a pattern which could easily be adopted with the necessary modifications, it would be wrong to

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

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

26. We find a great deal of substance in Mr Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in *Maneka Gandhi* [*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248] , that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground

that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein.

31. In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in *State v. Captain Jagjit Singh* [AIR 1962 SC 253 : (1962) 3 SCR 622 : (1962) 1 Cri LJ 216] , which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on

his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.”

19. The Apex Court in the case of **Sushila Aggarwal vs. State (NCT of Delhi) : (2020) 5 SCC 1** has taken a similar view as has been taken in the case of **Gurbaksh Singh Sibbia (supra)**. While referring to the case of **Gurbaksh Singh Sibbia (supra)** in para 56, it is observed that life and liberty are the cherished attributes of every individual. The urge for freedom is natural to each human being. Section 438 Cr.P.C. is a procedural provision concerned with the personal liberty of each individual, who is entitled to the benefit of the presumption of innocence. As denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438 Cr.P.C., especially when not imposed by the Legislature. In para 57, it is observed that the provision for anticipatory bail is pro-liberty and was enacted as a measure of protection against arbitrary arrests and humiliation. There is absolutely no reason why this valuable right should be denied to a child, which is available to every individual.

The said paras read as under :-

“56. The reason for enactment of Section 438 in the Code was parliamentary acceptance of the crucial underpinning of personal liberty in a free and democratic country. Parliament wished to foster respect for personal liberty and accord primacy to a fundamental tenet of criminal jurisprudence, that everyone is presumed to be innocent till he or she is found guilty. Life and liberty are the cherished attributes of every individual. The urge for freedom is natural to each human being. Section 438 is a procedural provision concerned with the personal liberty of each individual, who is entitled to the benefit of the presumption of innocence. As denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary

restrictions on the scope of Section 438, especially when not imposed by the legislature. In *Sibbia* [*Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565, it was observed that :

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

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

20. The argument that the Act 2015 does not make provision in the nature of Section 438 Cr.P.C. and that Sections 10 and 12 of the Act 2015 are complete Code in themselves; is also not acceptable. Sections 10 and 12 of the Act 2015 operate “after” a child alleged to be in conflict with law is apprehended. Thus, they refer to “post” apprehension stage. They do not refer to “pre” apprehension stage. Therefore, they cannot be in conflict with the provisions of Section 438 Cr.P.C. The non-obstante clause used in Section 12 operates only when there is a conflict between the provisions of the Cr.P.C. and the provisions of Section 12 of the Act 2015. Since there is no conflict between the provisions of Section 438 of the Cr.P.C. and Section 10 or 12 of the Act 2015, therefore, availability of right under Section 438 Cr.P.C. is not taken away to the detriment of a child. It in no manner creates an ouster for the application of Section 438 Cr.P.C.

21. A non-obstante clause is added to a provision in order to uphold its enforceability over another provision that is contradictory to it. It is well settled that the non-obstante clause has overriding effect only in case of inconsistency. (Reference: **Ajoy Kumar Banerjee Vs. Union of India : (1984) 3 SCC 127, Chief Information Commissioner Vs. High Court of Gujarat : (2020) 4 SCC 702**).

22. The non-obstante clause is in Sub-Section (4) of Section 1 and in Section 12 of the Act 2015. The same would come into play only if there is inconsistency in the provisions. That would only mean that in case of inconsistency alone, this provision under the Act 2015 would prevail. The Act 2015, as mentioned earlier, is enacted as a beneficial legislation and, therefore, if a child under the Act 2015 has any right under the general law, it cannot be taken away to the child's detriment by relying on these non-obstante clauses; particularly when there is no inconsistency between the Act 2015 and the provisions of Section 438 Cr.P.C.

23. In Section 5 Cr.P.C., it is stated that the Cr.P.C. shall not affect any special form of procedure prescribed by any other law for the time being in force.

24. This Court, thus, comes to the conclusion that a “child” or a “child in conflict with law” as per the Act 2015 can file an application for anticipatory bail under Section 438 of the Criminal Procedure Code, 1973 and the same would be maintainable. Since there is no bar under Section 438 Cr.P.C. restricting its application in so far a child in conflict with law is concerned, the same would be fully applicable. Further, since there is no bar for its applicability therein, the same would thus be applicable for a child in conflict with law as he cannot be left remedy-less till the time of his apprehension by the concerned authority or arrest whatever the case may be. The Legislature has not barred the application of

Section 438 Cr.P.C. while legislating the Act 2015. Even the fundamental right of a child in conflict with law would get infringed if he is not given equal treatment in so far as the right for anticipatory bail is concerned. The same would apply to him subject to inbuilt restrictions in Section 438 Cr.P.C.

25. The reference to this Larger Bench thus, stands answered as follows:-

(i) The limited window opened in the judgement of the learned Single Judge in the case of **Shahaab Ali (Minor)** for child in conflict with law confining his right to seek anticipatory bail before F.I.R. is lodged against him is incorrect. A child in conflict with law will have an equal and efficacious right to seek his remedy of anticipatory bail under Section 438 Cr.P.C. like any other citizen, but with the restrictions imposed in the said provision itself.

(ii) Section 1(4) of the Act, 2015 does not exclude the application of Section 438 Cr.P.C. to a child in conflict with law after the F.I.R. is registered against him as there is no provision contrary in the Act 2015 to the Cr.P.C. to make it inapplicable.

(iii) A child in conflict with law can be arrested/apprehended/granted bail if necessary and any such situation arises.

(iv) A juvenile or a child in conflict with law can be arrested and/or apprehended if such a need arises, but he cannot be left remedy-less till the time of his arrest and/or apprehension. He can explore the remedy of anticipatory bail under Section 438 Cr.P.C. if a need arises. The remedy of bail under Section 12 of the Act 2015 can be invoked by a juvenile or a child in conflict with law at the appropriate stage.

(v) An inquiry is required to be conducted by the concerned Board for declaring a person as a juvenile and then extending the benefit of the beneficial legislation to him.

(vi) The required enquiry under Section 14 and preliminary assessment into heinous offence under Section 15 of the Act 2015 where required can be done while the child in conflict with law is on anticipatory bail.

26. While answering the questions referred to by the learned Single Judge, let the anticipatory bail applications be now placed before the appropriate Bench in the week commencing 03.7.2023 for disposal.

(Samit Gopal)
Judge

(Pritinker Diwaker)
Chief Justice

Allahabad
May 24, 2023
{Naresh Kumar}