Educational Administration: Theory and Practice
2022, 28(4), 626-638
ISSN: 2148-2403
https://kuey.net/

Research Article

Decoding The Law Of Anticipatory Bail From The Lens Of The Supreme Court Of India

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Citation: Neha Sachdeva, et.al (2022). Decoding The Law Of Anticipatory Bail From The Lens Of The Supreme Court Of India, *Educational Administration: Theory and Practice*, 28(4) 626-638
Doi: 10.53555/kuey.v28i4.10751

ARTICLE INFO

ABSTRACT

This paper attempts to provide a comprehensive and critical appraisal of the various three or higher bench decisions of the Supreme Court of India in the matter of grant of anticipatory bail in an attempt to trace its evolution as a cherished right integral for preserving the right to life and right to fundamental freedoms available as basic human rights to each individual in India.

Keywords: Anticipatory bail, Supreme Court of India, Section 438, Code of Criminal Procedure, 1973.

Research Questions:

- Whether there is a need to rationalize and enlarge the scope of discretion for granting Anticipatory bail?
- Whether the scope and purpose of Anticipatory bail has been achieved as was envisaged?
- Whether the provisions of Anticipatory bail are in conformity with the classification of bail under Chapter-XXXIII of the Code of Criminal Procedure, 1973 dealing with bail?
- Whether the bail jurisprudence has served its purpose for which it was devised?

Introduction

The concept of presumption of innocence is a fundamental principle[1] of the common law[2]. Article 11 of the Universal Declaration of Human Rights (UDHR) recognises this when it provides that " Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence" . Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that " Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The presumption of innocence imposes the burden of proving the charge, on the prosecution. It ensures that no guilt can be presumed until the charge is proved beyond reasonable doubt.[3]

Arrest means the " placing of a person in custody or under restraint, usually for the purpose of compelling obedience to the law." [4] Article 9 of the ICCPR recognises the right to be free from arbitrary arrest and detention. In India, Article 21 of the Constitution which deals with protection of life and personal liberty lays down that " no person shall be deprived of his life or personal liberty except according to procedure established by law." Article 22 of the Constitution which deals with protection against arrest and detention in certain cases, provides for protection and rights granted in case of arbitrary arrest also known as punitive detention, and safeguards against preventive detention" .

While these provisions ensure security against arbitrary arrest thus securing personal liberty and freedom, they do not offer complete justice to the principle of presumption of innocence since they allow for detention of the accused even before there is any finding of guilt. The arguments are many to justify such detention,

[1] Jeffrey Reiman and Ernest Van Den Haag, On the Common Saying that it is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con, https://doi.org/10.1017/S0265052500000844.
[2]https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/presumption-innocence.
[3] Article 4, the International Covenant on Civil and Political Rights.
[4] https://www.britannica.com/topic/arrest.

like, to secure the presence of the accused for the trial, to prevent the accused from influencing witnesses, to prevent the accused from tampering with or destroying any evidence, to secure the safety of the accused, etc.
The term □bail□ is used to denote any security required by a court to release a person from custody to ensure his presence before the court in future.[5] The Code of Criminal Procedure, 1973 provides for differentiation of offences into bailable[6] and non-bailable based generally on the seriousness of the offence. While the former entitles the accused to claim bail as of right, the latter only provides for bail under the discretion of the judicial authorities.
Arrest of a person is not only about curtailment of liberty and freedom, it is also about loss of face, ignominy and humiliation of the individual.[7] The Law Commission of India in its 177th Report on Law Relating to Arrest observes that " arrests under the preventive provisions were more in number than the arrests for substantive offences and further that a large number of arrests were in respect of bailable offences which more often happen to be non-cognizable offences (wherein no arrest can be made without a warrant or order from a magistrate)." [8]
Following the recommendation of the Law Commission of India in its Forty First Report, the provision for anticipatory bail was introduced into the Code of Criminal Procedure, 1973.[9] It was envisaged that the provision should be made effective only when a person is arrested.The Law Commission recommended the provision for anticipatory bail to be an extraordinary power to be used sparingly and in special cases by the Courts.
Since, anticipatory bail enables the person to be free from custody, the police investigator finds it difficult to use coercive force to intimidate the accused as a method to gather evidence. Prosecution, hence, is less inclined to consent for grant of anticipatory bail by the Courts. The Law Commission envisaged the power to grant anticipatory bail to be exercised with notice to the prosecution. Under Section 438(1A) of the Code, in the interests of justice from the perspective of the State, a final order is made only after hearing the prosecution. This need to balance the interests of the prosecution with the liberty of the individual is perhaps the reason why this power is entrusted to higher judicial *fora* like the Sessions Court and the High Court.
In its Forty Eighth Report, the Law Commission stressed the need for safeguards to prevent abuse of the provision for anticipatory bail while commenting on the bail provision in the then proposed Bill for the same.[10]
The higher benches of the Supreme Court have been largely consistent in its application of this spirit behind the recommendations of the Law Commission in its judgements on anticipatory bail. The following is a compilation of judgements of the Supreme Court on the question of anticipatory bail. These cover issues concerning serious offences including those relating to atrocities against scheduled castes and tribes, dowry deaths, murder and terrorism related offences as well as less serious situations. Since, conclusiveness of the law is to be given a premium, only decisions of the Supreme Court with a higher bench strength is to be considered as laying down the correct law.

Balchand Jain *v.* State of Madhya Pradesh[11]

The question which arose for determination was whether an order of □anticipatory bail□ could be competently made by a Court of Session or a High Court under Section 438 of the Code of Criminal Procedure, 1973 in case of offences falling under Rule 184 of the Defence and Internal Security of India Rules, 1971 made under the Defence and Internal Security of India Act, 1971.
The Court observed thus: " We do not find in this section the words □anticipatory bail□□. In fact, □anticipatory bail□ is a misnomer. It is not as if bail is presently granted by the court in anticipation of arrest. When the court grants □anticipatory bail□, what it does is to make an order that in the event of arrest, a person shall be released on bail. Manifestly there is no question of release on bail unless a person is arrested and, therefore, it is only on arrest that the order granting □anticipatory bail□ becomes operative. Now, this power of granting □anticipatory bail□ is somewhat extraordinary in character and it is only an exceptional cases where it appears that a person might be falsely implicated, or a frivolous case might be launched against him, or " there are reasonable grounds for holding that a person accused of an offence is

[5] " In Black□s Law Dictionary, 9th Edition, the expression □bail□ is given the meaning, " A security such as cash or a bond; especially security required by a court for the release of a prisoner who must appear in court at a future time." "
[6] Code of Criminal Procedure, 1973, Section 2 (a) " bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and " non- bailable offence" means any other offence.
[7] Siddharam Satlingappa Mhetre v. The State of Maharashtra and others, (2011) 1 SCC 694.
[8] Law Commission of India, 177th *Report on Law Relating to Arrest*, Government of India, December, 2001, Page 2.
[9] Law Commission of India, 41st *Report on The Code of Criminal Procedure 1898*, Vol. I, Government of India, September, 1969.
[10] Law Commission observed, paragraph 31, the 48th Report.
[11] (1976) 4 SCC 572. Coram: P.N. Bhagwati, A.C. Gupta and S. Murtaza Fazal Ali, JJ.

not likely to abscond, or otherwise misuse his liberty while on bail" that such power is to be exercised. And this power being rather of an unusual nature, it is entrusted only to the higher echelons of judicial service, namely, a Court of Session and the High Court. It is a power exercisable in case of an anticipated accusation of non-bailable offence and there is no limitation as to the category of non-bailable offence in respect of which the power can be exercised by the appropriate court.[12]

"The non-obstante clause at the commencement of the Rule also emphasizes that the provision in the Rule is intended to restrict the power of granting bail under the Code of Criminal Procedure and not to confer a new power exercisable only on certain conditions. It is not possible to read Rule 184 as laying down a self-contained code for granting of bail in case of a person accused or convicted of contravention of any rule or order made under the Rules so that the power to grant bail in such case must be found only in Rule 184 and not in the Code of Criminal Procedure. Rule 184 cannot be construed as displacing altogether the provisions of the Code of Criminal Procedure in regard to bail in case of a person accused or convicted of contravention of any rule or order made under the Rules. ..."[13]

"If a person is not in custody but is merely under an apprehension of arrest and he applies for grant of ☐anticipatory bail☐ under Section 438, his case would clearly be outside the mischief of Rule 184, because when the court makes an order for grant of ☐anticipatory bail☐, it would not be directing release of a person who is in custody. It is an application for release of a person in custody that is contemplated by Rule 184 and not an application for grant of ☐anticipatory bail☐ by a person apprehending arrest. Section 438 and Rule 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. And consequently, it must follow as a necessary corollary that Rule 184 does not stand in the way of Court of Session or a High Court granting ☐anticipatory bail☐ under Section 438 to a person apprehending arrest on an accusation of having committed contravention of any rule or order made under the Rules." [14]

The Court deliberated on the policy behind the Rule to lay down the requisite consideration while granting anticipatory bail. " But even if Rule 184 does not apply in such a case, the policy behind this rule would have to be borne in mind by the court while exercising its power to grant ☐anticipatory bail☐ under Section 438. The rule-making authority obviously thought offences arising out of contravention of rules and orders made thereunder were serious offences as they might imperil the defence of India or civil defence or internal security or public safety or maintenance of public order or hamper maintenance of supplies and services to the life of the community and hence it provided in Rule 184 that no person accused or convicted of contravention of any rule or order made under the Rules, shall be released on bail unless the prosecution is given an opportunity to oppose the application for such release and in case the contravention is of a rule or order specified in this behalf in a notified order, there are reasonable grounds for believing that the person concerned is not guilty of such contravention. If these are the conditions provided by the rule making authority for releasing on bail a person arrested on an accusation of having committed contravention of any rule or order made under the Rules, it must follow a fortiori that the same conditions must provide the guidelines while exercising the power to grant ☐anticipatory bail☐ to a person apprehending arrest on such accusation, though they would not be strictly applicable. When a person apprehending arrest on an accusation of having committed contravention of any rule or order made under the Rules applies to the Court for a direction under Section 438, the Court should not ordinarily grant him ☐anticipatory bail☐ under that section unless a notice has been issued to the prosecution giving it an opportunity to oppose the application and in behalf, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention. These would be reasonably effective safeguards against improper exercise of power of granting ☐anticipatory bail☐ which might in conceivable cases turn out detrimental against public interest. When we say this, we must, of course, make it clear that we do not intend to lay down, that in no case should an ex parte order of ☐anticipatory bail☐ be made by the Court. There may be facts and circumstances in a given case, which may justify the making of an ex parte interim order of ☐anticipatory bail☐, but in such an event, a short dated notice should be issued and final order should be passed only after giving an opportunity to the prosecution to be heard in opposition." [15]

The above paragraphs are from the judgment delivered by Bhagwati, J. for himself and Gupta, J. Fazal Ali, J., in his concurring judgement dwelt on the absence of any specific repeal of section 438 of the Code of Criminal Procedure by the impugned Act.

" Now if the intention of the legislature were that the provisions of Section 438 should not be applicable in cases falling within Rule 184, it is difficult to see why the legislature should not have expressly saved Rule 184 which was already there when the new Code of 1973 was enacted and excepted Rule 184 out of the ambit of Section 438. In other words, if the intention of provision of Rule 184 of the Rules were to override the provisions of Section 438 of the Code, then the legislature should have expressly stated in so many words that the provisions of Section 438 of the Code should not apply to offences contemplated by Rule 184 of the

[12] (1976) 4 SCC 572 (576).
[13] (1976) 4 SCC 572 (577).
[14] (1976) 4 SCC 572 (578).
[15] (1976) 4 SCC 572 (578-79).

Rules." After referring to Northern India Caterers Pvt. Ltd. v. State of Punjab[16], and Aswini Kumar Ghosh v. Arabinda Bose[17]on the question of interpretation he went on to conclude that " 16. ☐ we feel that there does not appear to by any direct conflict between the provisions of Rule 184 of the Rules and Section 438 of the Code. However, we hold that the conditions required by Rule 184 of the Rules must be impliedly imported in Section 438 of the Code so as to form the main guidelines, which have to be followed while the court exercises its power under Section 438 of the Code in offences contemplated by Rule 184 of the Rules. Such an interpretation would meet the ends of justice, avoid all possible anomalies and would at the same time ensure and protect the liberty of the subject which appears to be the real intention of the legislature in enshrining Section 438 of the Code and Rule 184 of the Rules and therefore, the non-obstante clause cannot be interpreted in a manner so as to repeal or override the provisions of Section 438 of the Code in respect of cases where Rule 184 of the Rule applies."

Shri Gurbaksh Singh Sibbia and others v. State of Punjab[18]

The Court in this Five Bench decision tried to balance the interests of personal liberty and the investigational powers of the police while determining the scope of Section 438 of the Code of Criminal Procedure, 1973. The Court observed 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.*"

The Court also held that an order of bail may be passed under Section 438(1) without notice to the public prosecutor, but with the caveat that such notice should be issued to the public prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. It held that ad-interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage.

The Court observes that, " *A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a vacuum.*"

The Court further held that the operation of an order passed under Section 438(1) need not necessarily be limited in point of time. If it has reasons for the same, the Court may limit the operation of the order to a short period until after the filing of an F.I.R. in respect of the matter covered by the order. In such cases, the appellant may be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonably short period after the filing of the F.I.R. as aforesaid. But this need not be followed as an invariable rule. The normal rule should be not to limit the operation of the order in relation to a period of time.

The Court in this case interpreted the grant of anticipatory bail liberally on the basis of Article 21 of the Constitution.[19] This decision has come to be so extensively relied on in subsequent cases on anticipatory bail that most of the major judgements reviewed here quote profusely from this decision. In order to avoid repetition of the most essential aspects of this case, the observations of the Court in this case, is relied on wherever possible when they are reiterated in the subsequent decisions.

Pokar Ram *v.* State of Rajasthan and others[20]

In this case the Court made distinct anticipatory bail from regular bail during investigation and pending appeal. " *5. Relevant considerations governing the court' s decision in granting anticipatory bail under Section 438 are materially different from those when an application for bail by a person who is arrested in the course of investigation as also by a person who is convicted and his appeal is pending before the higher court and bail is sought during the pendency of the appeal. Three situations in which the question of granting or refusing to grant bail would arise, materially and substantially differ from each other and the relevant considerations on which the courts would exercise its discretion, one way or the other, are substantially different from each other.*

6. The decision of the Constitution Bench in Gurbaksh Singh Sibbia v. State of Punjab[21] clearly lays down that ☐the distinction between an ordinary order of bail and an order of anticipatory bail is that whereas

[16] (1967) 3 S.C.R. 399: A.I.R. 1967 S.C. 1581.
[17] 1953 S.C.R. 1: A.I.R. 1952 S.C. 369.
[18] (1980) 2 SCC 565. Coram: Chandrachud, Y.V., C.J., Bhagwati, P.N., Untwalia, N.L., Pathak, R.S., Reddy, O. Chinnappa, JJ.
[19] V.R. Krishna Iyer, J., in Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh
[20] (1985) 2 SCC 597. Coram: V.D. Tulzapurkar, D.A. Desai and A.P. Sen, JJ. Sri Desai, J.
[21] (1980) 2 SCC 565: 1980 SCC (Cri) 561.

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.' ☐ A direction under Section 438 is intended to confer conditional immunity from the touch as envisaged by Section 46(1) or confinement. In para 31, Chandrachud, C.J., clearly demarcated the distinction between the relevant considerations while examining an application for anticipatory bail and an application for bail after arrest in the course of investigation. Says the learned Chief Justice 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 or release of the applicant on bail in the event of his arrest would generally be made. It was observed that ☐it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by malafides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond.' Some of the relevant considerations which govern the discretion, noticed therein are " 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 witness 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☐. A caution was voiced that ☐in the evaluation of the consideration whether the applicant is likely to abscond, there can be no presumption that the wealthy and the mighty humble and poor will run away from the course of justice, any more than there can be a presumption that the former are not likely to commit a crime and the latter are more likely to commit it."

Further, the Court observed at paragraph 13 of its judgement that " ☐ *it must be made distinctly clear that some very compelling circumstances must be made out for granting bail to a person accused of committing murder and that too when the investigation is in progress*."

Somunder Singh *v.* State of Rajasthan and others[22]

The relevant consideration before the Courts is the seriousness of the offence and not just its non-bailable nature is made crystal clear by the Supreme Court in this case based on a dowry death. " *The widespread belief that dowry deaths are even now treated with some casualness at all levels seems to be well grounded. The High Court has granted anticipatory bail in such a matter. We are of the opinion that the High Court should not have exercised its jurisdiction to release the accused on anticipatory bail in disregard of the magnitude and seriousness of the matter. The matter regarding the unnatural death of the daughter-in-law at the house of her father-in-law was still under investigation and the appropriate course to adopt was to allow the concerned magistrate to deal with the same on the basis of time of their arrest in case they were arrested. It was neither prudent nor proper for the High Court to have granted anticipatory bail which order was very likely to occasion prejudice by its very nature and timing. We therefore consider it essential to sound a serious note of caution for future. The High Court is under no compulsion to exercise its jurisdiction to grant anticipatory bail in a matter of this nature*."

This is another decision that places the allegation against the accused on a higher footing as compared to his right to personal liberty on the basis of the seriousness of the offence. This kind of reasoning encourages filing of false complaints alleging serious offences just to see the accused suffering the ignominy of arrest.

Kartar Singh *v.* State of Punjab[23]

This case involved the question of constitutionality of certain provisions of the TADA as it then stood which removed the concept of anticipatory bail in TADA cases. The Court upheld the TADA provision. Among the reasons adduced for its decision was the rather tenuous claim that section 438 of the Code of Criminal Procedure being a new provision introduced a new right and hence its removal would not violate Article 21 of the Constitution of India. Perhaps, the Honourable Court does not consider section 438 of the Code an inherent right available to all human beings but a mere creation of the Code. The operative paragraphs of the judgement are reproduced herein. " *324. Sub-section (7) reads thus:*

" *Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under this Act or any rule made thereunder*." [24]

"*327. It is needless to emphasise that both the Parliament as well as the State Legislatures have got legislative competence to enact any law relating to the Code of Criminal Procedure. No provision relating to anticipatory bail was in the old Code and it was introduced for the first time in the present Code of 1973 on the suggestion made of the Forty-first Report of the Law Commission and the Joint Committee Report. It may be noted that this section is completely omitted in the State of Uttar Pradesh by Section 9 of the Code of*

[22] (1987) 1 SCC 466. Coram: M.P. Thakkar and B.C. Ray, JJ. Sri. Thakkar, J.

[23] (1994) 3 SCC 569. Coram: S. Ratnavel Pandian, M.M. Punchi, K. Ramaswamy, S.C. Agarwal, R.M. Sahai, JJ.

[24] (1994) 3 SCC 569 (698).

Criminal Procedure (Uttar Pradesh Amendment) Act, 1976 (U.P. Act No. 16 of 1976) w.e.f. 28-11-1975. In the State of West Bengal, proviso is inserted to Section 438(1) of the Code w.e.f. 24-12-1988 to the effect that no final order shall be made on an application filed by the accused praying for anticipatory bail in relation to an offence punishable with death, imprisonment for life or imprisonment for a term not less than seven years, without giving the State not less than seven days notice to present its case. In the State of Orissa, by Section 2 of Orissa Act 11 of 1988 w.e.f. 28-6-1988, a proviso is added to Section 438 stating that no final order shall be made on an application for anticipatory bail without giving the State notice to present its case for offence punishable with death imprisonment for life or imprisonment for a term of not less than seven years.

328. It is relevant to note one of the reasons given by the Law Commission for its suggestions to introduce the provision for anticipatory bail, that reason being " □where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail□. To put it differently, it can be deduced from the reasoning of the Report of the Law Commission that where a person accused of non-bailable offence is likely to abscond or otherwise misuse his liberty while on bail, will have no justification to claim the benefit for anticipatory bail. Can it be said with certainty that terrorists and disruption and inject sense of insecurity, are not likely to abscond or misuse their liberty if released on anticipatory bail. Evidently, the Parliament has thought it fit not to extend the benefit of Section 438 to such offenders.[25]

329. Further, at the risk of repetition, we may add that Section 438 is a new provision incorporated in the present Code creating a new right. If that new right is taken away, can it be said that the removal of Section 438 is violative of Article 21. In Gurubaksh Singh[26]*, there is no specific statement that the removal of Section 438 at any time will amount to violation of Article 21 of the Constitution.*

330. Hence for the aforementioned reasons, the attack made on the validity of sub-section (7) of Section has to fail." [27]

Dolat Ram and others *v.* State of Haryana[28]

Here, the Court considered the question of cancellation of anticipatory bail in a non-bailable offence. " □ *The High Court also fell in error in cancelling the anticipatory bail granted to the appellants□ The learned Additional Sessions Judge had noticed that even according to the statement in the FIR, the appellants were living separately from the deceased and her husband and that the factum of separate residence was also supported by the ration card. These considerations were relevant considerations for dealing with an application for grant of anticipatory bail.*

4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High Court it appears to us overlooked the distinction of the factors relevant for rejecting bail in a non bailable case in the first instance and the cancellation of bail already granted." [29]

State of M.P. *v.* Ram Krishna Balathia[30]

In this case the Court considered whether the denial of the right to apply for anticipatory bail in respect of offences committed under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was violative of Articles 14 and 21 of the Constitution" . [31]

[25] (1994) 3 SCC 569 (699).
[26] (1980) 2 SCC 565: 1980 SCC (Cri) 465: (1980) 3 S.C.R. 383.
[27] (1994) 3 SCC 569 (700).
[28] (1995) 1 SCC 349. Coram: Dr. A.S. Anand and M.K. Mukherjee, JJ.
[29] (1995) 1 SCC 349 (350-51).
[30] (1995) 3 SCC 221. Coram: B.P. Jeevan Reddy and Sujata V. Manohar, JJ.
[31] Section 18, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.

" 5. The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the said Act) was enacted in order to prevent the commission of atrocities against members of Scheduled Castes and Scheduled Tribes and to provide for special courts for the trial of offence under the said Act as also to provide for the relief and rehabilitation of victims of such offences.
"*It is pointed out in the above statement of objects and reasons that when members of the Scheduled Castes and Scheduled Tribes assert their rights and demand statutory protection, vested interest try to cow them down and terrorise them. In these circumstances, if anticipatory bail is not made available to persons who commit such offences, such a denial cannot be considered as unreasonable or violative of Article 14, as these offences form a distinct class by themselves and cannot be compared with other offences*." [32]
"*7. We have next to examine whether Section 18 of the said Act violates in any manner, Article 21 of the Constitution which protects the life and personal liberty of every person in this country. Article 21 enshrines the right to live with human dignity, a precious right to which every human being is entitled, those who have been, for centuries, denied this right more so. We find it difficult to accept the contention that section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to section 438 in the old Criminal Procedure Code. The Law Commission in its 41st report recommended introduction of a provision for grant of anticipatory bail. It observed:*
" We agree that this would be a useful advantage. Though we must add that it is in very exceptional cases that such power should be exercised.☐
In the light of this recommendation, section 438 was incorporated, for the first time, in the Criminal Procedure Code of 1973. Looking to the cautious recommendation of the Law commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. Also, anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21.[33]
The Court then referred to its decision in *Kartar Singh v. State of Punjab*[34], " *In the case of terrorists and disruptionists, there was every likelihood of their absconding and misusing their liberty if released on anticipatory bail and, therefore, there was nothing wrong in not extending the benefit of Section 438 to them.* ☐*Further at the risk of repetition, we may add that Section 438 is a new provision incorporated in the present Code creating a new right. If that new right is taken away, can it be said that the removal of Section 438 is violative of Article 21*☐ and went on to hold that " *Its answer was in the negative, Section 20(7) of the TADA, 1987 was upheld.*"
The Court then reasoned thus, " *9. Of course, the offences enumerated under the present case are very different from those under the TADA 1987. However, looking to the historical background relating to the practice of* ☐*untouchability' and the social attitudes which lead to the commission of such offences against Scheduled Castes and Scheduled Tribes, there is justification for an apprehension that if the benefit of anticipatory bail is made available to the person who are alleged to have committed such offences, there is every likelihood of their misusing their liberty while on anticipatory bail to terrorize their victims and to prevent a proper investigation. It is in this context that Section 18 has been incorporated in the said Act. It cannot be considered as in any manner violative of Article 21.*
10. It was submitted before us that while Section 438 is available for graver offences under the Penal Code, it is not available for even " minor offences☐ *under the said Act. This grievance also cannot be justified. The offence which are enumerated under Section 3 are offences which, to say the least, denigrate members of Scheduled Castes and Scheduled Tribes in the eyes of society and prevent them from leading a life of dignity and self-respect. Such offences are committed to humiliate and subjugate members of Scheduled Castes and Scheduled Tribes with a view to keeping them in a state of servitude. These offences constitute a separate class and cannot be compared with offences under the Penal Code.*
11. A similar view of Section 18 of the said Act has been taken by the Full Bench of Rajasthan High Court in the case of Jai Singh v. Union of India[35] *and we respectfully agree with its findings*."

Salauddin Abdulsamad Shaikh *v.* State of Maharashtra[36]

This case took a deviation from the liberal interpretation of the provision for anticipatory bail in non-bailable offences by limiting its period of operation at the discretion of the High Court and linked it to the grant of regular bail by the regular court. Though subsequently set aside in *Sushila Aggarwal* v. *State (NCT of Delhi)*[37], the logic of the Court is worth a consideration in so far as it tries to link the enlargement of the

[32] (1995) 3 SCC 221 (225).
[33] (1995) 3 SCC 221 (226).
[34] (1994) 3 SCC 569.
[35] AIR 1993 Raj 177.
[36] (1996) 1 SCC 667. Coram: A.M. Ahmadi, CJ. and S.C. Sen and K.S. Paripoornan, JJ.
[37] AIR 2020 SC 831 : 2020 SCC OnLine SC 98.

accused on anticipatory bail to the regular court which, due to its unique position, has the ability to consider all the peculiar facts and circumstances of the case.

The Court commented on the nature of anticipatory bail and why Courts attach conditions to an order granting anticipatory bail. " *Under Section 438 of the Code of Criminal Procedure when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High Court or the Court of Sessions may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail and in passing that order, it may include such conditions having regard to the facts of the particular case, as it may deem appropriate. Anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be bypassed and that is the reason why the High Court very rightly fixed the order date for the continuance of the bail and on the date of its expiry directed the petitioner to move the regular court for bail. That is the correct procedure to follow because it must be realized that when the Court of Session or the High Court is granting anticipatory bail, it is granted at a stage when the investigation is incomplete and, therefore, it is not informed about the nature of evidence against the alleged offence. It is, therefore, necessary □(to) leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted.*

3. It should be realized that an order of anticipatory bail could even be obtained in cases of serious nature as for example murder and, therefore, it is essential that the duration of that order should be limited and ordinarily the court granting anticipatory bail should not substitute itself for the original court which is expected to deal with the offence. It is that court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail." [38]

The net result of this judgement is that at least in some cases, the order of anticipatory bail becomes meaningless when it compels the accused to surrender before the court seized of the matter and to seek regular bail. By limiting the time for operation of the anticipatory bail, the essence of the legislative provision is lost since it imposes the condition of arrest and detention at the discretion of the trial court. It is as if the order granting the anticipatory bail has in fact rejected the petition for anticipatory bail.

State *v.* Anil Sharma[39]

In this case while extolling the virtues of placing an accused under mental pressure for exacting information from him, we find the Court placing a tremendous amount of faith in the responsible nature of police officers in their respect for human rights and the rule of law. " *We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well seconded with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring much useful information, which would elude if the suspected person knows that he is well protected and insulated by a pre arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders.*"

This faith in the police is belied by the fact that though custodial deaths abound in India, hardly any policeman ever gets punished. The overwhelming majority of the persons who are killed in police custody are not convicted prisoners, but undertrials or persons granted police custody or those who were picked up by the police but never brought before any magistrate. This makes a mockery of the principle of presumption of innocence.

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 (UN Convention on Torture) prohibits torture and defines psychological torture as " *any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*"[40]

Though India signed the Convention in 1997 and it has not yet ratified this instrument, the logic of the Court is suspect and shows scant regard to the ground realities facing persons in police custody.

In this case, the Court also distinguished between the qualitatively different nature of regular bail and anticipatory bail. " *The High Court has approached the issue as though it was considering a prayer for granting regular bail after arrest*□□□.

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[38] (1996) 1 SCC 667 (668).

[39] (1997) 7 SCC 187. Coram: M.K. Mukherjee and K.T. Thomas, JJ. Sri K.T. Thomas, J.

[40] Article 1.

☐*The consideration which should weigh with the court while dealing with a request for anticipatory bail need not be the same as for an application to release on bail after arrest. At any rate the learned Single Judge ought not to have sidestepped the apprehension expressed by the CBI (That the respondent would influence the witnesses) as one, which can be made against all accused person in all cases. The apprehension was quite reasonable when considering the high position which the respondent held and in the nature of accusation relating to a period during which he held such office*." [41]

State of A.P. *v.* Bimal Krishna Kundu and another[42]

The Court stressed the relevant considerations for the grant of anticipatory bail distinguishing serious nature of the offence with non-bailability criteria demanded in section 438 of the Criminal Procedure Code. " ☐ *It is apparent that learned Single Judge has chosen to exercise the discretion envisaged in Section 438 of the Code on the ground that the offences involved are not punishable with death or imprisonment for life. It must be remembered that Section 438 of the Code applies to all non-bailable offences and not merely to offences punishable with death or imprisonment for life. It is also to be remembered that applicability of the section is not confined to offences triable exclusively by the Court of Session.*

☐ *There is no indication in Section 438 of the code for justifying a hiatus to be made among non-bailable offences vivisecting those punishable with death or imprisonment for life and those others punishable with less than life imprisonment. No doubt such a classification is indicated in Section 437(1) of the Code, but that section is concerned only with post-arrest bail and not pre-arrest bail. Learned Single Judge seems to have telescoped considerations contemplated in Section 437 into the amplitude of the discretion envisaged in Section 438 of the Code.*

☐ *A three-judge bench of this Court has stated in Pokar Ram v. State of Rajasthan[43] that " 5. Relevant considerations governing the court' s decision in granting anticipatory bail under Section 438 are materially different from those when an application for bail by a person who is arrested in the course of investigation as also by a person who is convicted and his appeal is pending before the higher court and bail is sought during the pendency of the appeal.*☐[44]

☐ *Similar observations have been made by us in a recent judgment in State v. Anil Sharma*[45] *that " The consideration which should weigh with the Court while dealing with a request for anticipatory bail need not be the same as for an application to release on bail after arrest*." [46]"[47]

K.L. Verma *v.* State and another[48]

In this case which has been set aside subsequently in *Sushila Aggarwal* v. *State (NCT of Delhi)*[49], the Supreme Court clarified its position on the limited duration of and the conditions attached to an order granting anticipatory bail. " *The High Court placed reliance on this court' s decision in Salauddin Abdulsamad Shaikh v State of Maharashtra*[50]*, which was a case in which the High Court, while granting interim anticipatory bail, imposed certain conditions, one of which was that the accused should move for regular bail before the Court which was in seisin of the case pending against him. The High court also observed that the application should be disposed of uninfluenced by the observations made in the earlier order. The special leave petition was directed against that order of the High Court. While dealing with that order, this court observed that under Section 438 of the Code, when any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, the High Court or Court of Session may, if it thinks fit, direct that in the even of such arrest, he shall be released on bail and in passing that order, it may include such conditions as it may deem appropriate. This Court further observed that anticipatory bail is granted in anticipation of arrest in non-bailable cases, but that does not mean that the regular court, which is to try the offender, is sought to be by-passed. It was, therefore, pointed out that it was necessary that such anticipatory bail orders should be of limited duration only and ordinarily on the expiry of that duration or extended duration the Court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted. By this, what the court desired to convey was that an order of anticipatory bail does not enure till the end of trial but it must be of limited duration, as the regular court cannot be by-passed. The limited duration must be determined having regard to the facts of the case and the need to give the accused sufficient time to move the regular court for bail and to give the*

[41] (1997) 7 SCC 187 (189-190).
[42] (1997) 8 SCC 104. Coram: M.K. Mukherjee and K.T. Thomas, JJ. Sri. K.T. Thomas, J.
[43] (1985) 2 SCC 597: 1985 SCC (Cri) 297: A.I.R. 1985 S.C. 969.
[44] (1985) 2 SCC 597 (600), para 5).
[45] (1997) 7 SCC 187: 1997 SCC (Cri) 1039: JT (1997) 7 S.C. 651:
[46] (1997) 7 SCC 187 (189-90), para 8.
[47] (1997) 8 SCC 104 (106-7).
[48] (1998) 9 SCC 348. Coram: A.M. Ahmadi, CJ. and J.S. Verma, J.
[49]AIR 2020 SC 831 : 2020 SCC OnLine SC 98.
[50] (1996) 1 SCC 667: 1996 SCC (Cri) 198.

regular court sufficient time to determine the bail application. In other words, till the bail application is disposed of one way or the other the court may allow the accused to remain on anticipatory bail. To put it differently, anticipatory bail may be granted for a duration, which may extend to the date on which the bail application is disposed of or even a few days thereafter to enable the accused persons to move the higher court, if they so desire. This decision was not intended to convey that as soon as the accused persons are produced before the regular court the anticipatory bail ends even if the court is yet to decide the question of bail on merits. The decision in Salauddin case has to be so understood." [51]

This case provides an insight into the tussle between the prosecution□s case for custodial integration as early as possible and that of the accused to remain free as long as possible. The clash between the old school of thought that treats the liberty of an accused till conviction as an aberration and the overarching reliance of the police on custodial interrogation before grant of regular bail is a probable cause for decisions like this.

Siddharam Satlingappa Mhetre v State of Maharashtra[52]

In this case there is a very detailed discussion on the relevance and importance of personal liberty in the context of anticipatory bail. The Court provides a liberal approach to personal liberty and identifies that the law on bails " *dovetails two conflicting interests namely, on the one hand, the requirements of shielding the society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand absolute adherence of the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty.*"[53]

Further the Court relies extensively on *Sibbia' s* case and states thus:

"101. The proper course of action ought to be that after evaluating the averments and accusation available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the public prosecutor. After hearing the public prosecutor, the court may either reject the bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of bail. The public prosecutor or complainant would be at liberty to move the same court for cancellation or modifying the conditions of bail any time if liberty granted by the court is misused. The bail granted by the court should ordinarily be continued till the trial of the case.

102. The order granting anticipatory bail for a limited duration and thereafter directing the accused to surrender and apply before a regular bail is contrary to the legislative intention and the judgment of the Constitution Bench in Sibbia's case (supra).

103. It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the accused, the public prosecutor or the complainant on finding new material or circumstances at any point of time.□

The Court frowns on the previous judgements brought to its notice that allowed placing fetters on the grant of anticipatory bail subjecting it to limited time and other similar conditions. It observes such conditionalities to be beyond the statutory mandate and such decisions to be made *per incurium*.[54]

Subsequently, in the case of *Sushila Aggarwal* v. *State (NCT of Delhi)*[55], this reasoning of the Court is affirmed by a larger Bench and the matters are now made clear.

Dr. Subhash Kashinath Mahajan v. The State of Maharashtra[56]

In this case the Supreme Court revisited the issue of preventing the grant of anticipatory bail to persons accused of committing offences against the Scheduled Castes and Scheduled Tribes under Section 18[57] of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.It found the proceedings in the case before it to be a clear abuse of process of court and quashed the same. The Court then observed about Section 18, thus "*There is no absolute bar against grant of anticipatory bail in cases under the Atrocities Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide. We approve the view taken and approach of the Gujarat High Court in Pankaj D. Suthar*[58]*and Dr. N.T. Desai*[59]*and clarify the judgments of this Court in Balothia (supra) and Manju Devi*[60]*.*"[61]

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[51] (1998) 9 SCC 348 (350).
[52] (2011) 1 SCC 694. Coram: Dalveer Bhandari and K.S. Panicker Radhakrishnan, JJ.
[53] Id. at para 3.
[54] Id. at para 135, 136 and 149.
[55]AIR 2020 SC 831 : 2020 SCC OnLine SC 98.
[56] (2018) 6 SCC 454.
[57] The provision states thus: " 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."
[58] Pankaj D. Suthar v. State of Gujarat, (1992) 1 GLR 405.
[59] Dr. N.T. Desai v. State of Gujarat, (1997) 2 GLR 942.
[60] Manju Devi v. Onkarjit Singh Ahluwalia, (2017) SCC Online SC 348.
[61] (2018) 6 SCC 454 at paragraph 82.

The Court then went on to provide certain steps to be taken in cases registered under the 1989 statute which provisions were subsequently set aside by the Court on review. Meanwhile the Parliament introduced Section 18A to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The constitutionality of the newly introduced provision was upheld in the case of *Prathvi Raj Chauhan* v. *Union of India*[62]. But the Court reiterated its consistent position that " *if the complaint does not make out a prima facie case for applicability of the provisions of the Act of 1989, the bar created by section 18 and 18A (i) shall not apply.*"[63]

Sushila Aggarwal v. State (NCT of Delhi)[64]

In this case, a larger bench of the Supreme Court considered the questions of "*(1) Whether the protection granted to a person under Section 438 Cr.P.C. should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail, and (2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court.*"[65]

On the first question the Court held that "*the protection granted to a person under Section 438 Cr.P.C. should not invariably be limited to a fixed period; it should inure in favour of the accused without any restriction on time. Normal conditions under Section 437 (3) read with Section 438 (2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event) etc.*"

On the second question it was held that "*the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.*"

The Court went on to overrule the principle earlier laid down in the case of *Siddharam Satlingappa Mhetre* v. *State of Maharashtra*[66] (and other similar judgments) that no restrictive conditions at all can be imposed, while granting anticipatory bail.

It also overruled the decision in *Salauddin Abdulsamad Shaikh* v. *State of Maharashtra*[67] and subsequent decisions including *K.L. Verma* v. *State*[68], *Sunita Devi* v. *State of Bihar*[69], *Adri Dharan Das* v. *State of West Bengal*[70], *Nirmal Jeet Kaur* v. *State of M.P.*[71], *HDFC Bank Limited* v. *J.J. Mannan*[72]; *Satpal Singh* v. *State of Punjab*[73] and *Naresh Kumar Yadav* v *Ravindra Kumar*[74] which laid down such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time.

Further, in this case, the Supreme Court consolidated the principles to be followed and laid down the latest position of law on anticipatory bail in relation to various aspects.

In relation to the essential content of an anticipatory bail application and whether to move it before or after the filing of an FIR, the Court held thus: "*Consistent with the judgment in Shri Gurbaksh Singh Sibbia v. State of Punjab*[75]*, when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.*"[76]

On the question of notice to the public prosecutor and the concept of a limited interim anticipatory bail, the Court held that,"*It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the public prosecutor and obtain facts, even while granting limited interim anticipatory bail.*"[77]

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[62] 2020 SCC OnLine SC 159
[63] Id., at paragraph 10 of the main judgement.
[64] AIR 2020 SC 831: 2020 SCC OnLine SC 98.
[65] Id., at paragraph 1.
[66] (2011) 1 SCC694.
[67] (1996) 1 SCC 667.
[68] (1998) 9 SCC 348.
[69] (2005) 1 SCC 608.
[70] (2005) 4 SCC 303.
[71] (2004) 7 SCC 558.
[72](2010) 1 SCC 679.
[73](2018) SCCOnline SC 415.
[74] (2008) 1 SCC 632.
[75](1980) 2 SCC 565.
[76]AIR 2020 SC 831: 2020 SCC OnLine SC 98
[77]Id., at p.128.

With respect to mandatory imposition of conditions on the grant of anticipatory bail the Court found no provision for the same under Section 438, Cr.P.C. and held that conditions cannot be imposed in a routine manner and any condition that is imposed should be in consideration of the entirety of the matter before the Court. It held that, " *Nothing in Section 438 Cr.P.C., compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified □ and ought to impose conditions spelt out in Section 437 (3), Cr.P.C. [by virtue of Section 438 (2)]. The need to impose other restrictive conditions, would have to be judged on a case-by-case basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.*"[78]

The Court reiterated that the grant of anticipatory bail and whether any kind of special conditions are to be imposed or not, is a matter of discretion of the Court dependent on facts of the case. The anticipatory bail so granted can continue after filing of the charge sheet, till end of trial, depending on the conduct[79] and behaviour of the accused.[80]The Court further noted that grant of anticipatory bail is to be confined to the offence / incident, for which apprehension of arrest is there, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence nor should it enable the accused to commit further offences and claim relief of indefinite protection from arrest.[81]

With respect to the continuation of investigation, the Court observed that an order of anticipatory bail "*does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person*"[82] who seeks and is granted such bail. The Court directed that " *the observations in Sibbia*[83] *regarding " limited custody□ or " deemed custody□ to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27*[84], *in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e., deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail.*"[85]

The Court also stated that the grant of anticipatory bail maybe challenged by the state or investigating agency before the appellate or superior court, which may set it aside on the ground that material facts or crucial circumstances were not considered by the court granting bail. It observed that such setting aside of anticipatory bail does not amount to "cancellation" in terms of Section 439 (2) of the Cr. P.C.

Conclusion

It is seen that the Supreme Court has leaned in favour of giving the maximum benefit to favour the anticipatory bail seeker by a liberal interpretation of Section 438, Cr.P.C. This is in consonance with its stated position of the jail being an exception and grant of bail being the rule. Yet, during the course of time, some Benches of the Court, perhaps due to the nature of cases coming before it or because of the passing fads of the particular times or because of their own personal prejudices, brought in terms limiting the freedom and liberty of the individual to erode the true intent of the legislative provision by adding content into the section creating restriction not originally present. The decision of the Court in Sushila Aggarwal Case tries to correct the imbalances that had gradually crept in and give a renewed vigour to the provision.

Even while the Court restates the law, it has been reluctant to lay down any hard and fast rule in relation to grant of anticipatory bail and has left it largely to the Courts concerned to use their discretion depending on the circumstances. There is need to rationalize the scope of discretion in grant of Anticipatory bail.

A major area where there is cause for concern is the presence of statutory provisions which takes away the right of anticipatory bail due to which the objective of Anticipatory Bail has not been served. Court has interpreted with extreme confidence the law relating to anticipatory bail to deal with the major challenge of

[78]Id., at pp. 128-129.

[79]Id., at p. 131. The Court left it open to the investigating agency to move the court which granted the anticipatory bail in the first instance, for a direction under Section 439 (2) to arrest the accused, "*in the event of violation of any term, such as absconding, noncooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc.*".

[80]Id., at pp. 130.

[81]Ibid.

[82]Ibid.

[83](1980) 2 SCC 565.

[84]Indian Evidence Act, 1872.

[85]AIR 2020 SC 831: 2020 SCC OnLine SC 98

terrorism facing the country so much so that in terrorist offences there is no provision[86] for anticipatory bail at all.

Similarly, in the case of offences alleged to have been committed against the Scheduled Castes and Scheduled Tribes, the blanket denial of anticipatory bail is a cause for concern. This is particularly so since even the latest available statistics from the National Crimes Records Bureau, show that the conviction rate in such cases to be low[87] raising the serious probability that the provision is more misused than used, since the provisions are not in conformity with classification of bail under Chapter XXXIII of the Code of Criminal Procedure.[88]

A reform is needed in the legislations that provide for denial of anticipatory bail without allowing for any discretion at all to be exercised by the Courts. Our aim should not be to imprison people stealing their liberty from them on the basis of mere allegations. The presumption of innocence until proven guilty shall have no meaning at all in such situations. We must never forget that when the State becomes a bulldozer against the liberty of the individual, it is human rights that gets buried. The bail jurisprudence has not served the purpose for which it was devised.

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20. Dr. Subhash Kashinath Mahajan v. The State of Maharashtra, (2018) 6 SCC 454.
21. Sushila Aggarwal v. State (NCT of Delhi), AIR 2020 SC 83.

[86] Section 20(7) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in force during the period 1985□1995 first as Ordinance and then as statute); Section 49(5) of the Prevention of Terrorism Act, 2002 (in force during the period 2002□2004); and Section 43(d)(4) of the Unlawful Activities (Prevention) Act, 1967 (in force, presently with amendments to include terrorist activities introduced in 2019) prohibits the grant of bail in terrorist acts.

[87] NCRB, *Crime in India 2022*, Statistics, Ministry of Home Affairs, Government of India.

[88] Prathvi Raj Chauhan v. Union of India, 2020 SCC OnLine SC 159 at paragraph 49