Tripura Judicial Academy

Compilation of some relevant Judgments relating to Arrest and Bail.

Office Address: Narsingarh, Agartala, Phone – 03812341040
E-mail: tja.agt2014@gmail.com / Website : http://tja.tripura.gov.in

Introduction

In the Criminal Courts of original jurisdiction arrested persons accused of different offenses are produced by the police on regular basis and the Courts are required to deal with and dispose of such bail applications very frequently in accordance with Law. Therefore regular training programmes are required to be organized on Law relating to arrest and bail to keep the Judicial officers updated. To make easy for the Judicial Magistrates and Session Judges to deal with such bail applications, this compilation is being made comprising of some relevant judgments of Hon'ble Supreme Court of India and Hon'ble High Court of Tripura, so that the concerned Court may get such judgments readily available to them and can easily use the same as and when required without further loss of time. Any further suggestion for further improvement and updation of the compilation is always welcomed.

Sabyasachi Datta Purkayastha,
Director,
Tripura Judicial Academy.

INDEX

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IN THE SUPREME COURT OF INDIA

Equivalent Citations : 1980 AIR(SC) 1632 : 1980 CrLJ 1125 : 1980 (2) SCC 565 : 1980 SCC(Cri) 465 : 1980 (3) SCR 383 : 1980 (82) Bom.L.R. 518

[Before : Y.V.Chandrachud; CJI, P.N.Bhagwati, R.S.Pathak, N.L.Untwalia, O.Chinnappa Reddy]

Gurbaksh Singh Sibbia and others.

versus

State of Punjab

Case No. : Criminal Appeals Nos. 335 to 339, etc. of 1977 and 1, 15 to 17 etc. of 1978 and Spl. Leave Petn. (Criminal) Nos. 260, 272 to 274 etc. of 1978., Date of Decision : 09/04/1980

Anticipatory bail--Considerations for--Anticipation of foul play--The provision for grant of bail can be invoked to meet such contingency in addition to other grounds.

Advocates Appeared :

Mr. M. C. Bhandare, Sr. Advocate (335, 430, 431, 438)

Mr. Gobind Das, Sr. Advocate (153), Mr. K. S. Thapar, Advocate (506 and 154/78), Mr. Dilip Singh, Advocate (506 and 154/78)

Mrs. Sunanda Bhandare, Advocate, M/s. A. N. Karkhanis, Deepak Thaper, Advocates (in 335, 430, 431, 506/77 and 154/78) and Miss Malini, Advocate for Appellants in Crl. A. Nos. 335, 365, 430, 431, 506, 508, 499/77, 130, 141, 142, 153, 154 and Petitioners in SLPs. 272-274/78

Mr. Frank Anthony, Sr. Advocate (350), Mr. V. C. Mahajan, Sr. Advocate (338), Mr. O. P. Sharma, Advocate MR. R. C. Bhatia, Advocate for Appellants in Crl A. Nos. 336 to 338, 350, 396, 397-399, 473, 474/77 and 1, 15 to 17, 69, 70, 81,82, 98 and 149 and 109/78

Mr. Harjinder Singh, Advocate for Appellant in Crl. A. No. 339/77

Mr. B. S. Bindra, Sr. Advocate Mr. S. M. Ashri, Advocate Mrs. Lakshmi Arvind, Advocate for Appellants in Crl. As. Nos. 347, 366, 415-420, 477, 511, 512, 469/77 and 145/78

Mr. P.R. Mridul, Sr. Advocate (M/s. H. K. Puri, Aruneshwar Prasad and Vivek Seth, Advocate for Appellant in Crl. A. No. 346/77)

Mr. L. N. Sinha, Sr. Advocate (406 and 352), M/s. R. P. Singh, L. R. Singh, Suman Kapoor and Sukumar Sahu (406 and 352), Mr. M. C. Bhandare, Sr. Advocate (436), M/s. P. P. Singh, Advocate (435) and Mr. R. K. Jain, Advocate for Appellants in Crl. A. Nos. 351, 352, 406, 438-40, 463/77

Mr. S. K. Jain, Advocate for Appellant in Crl. A. No. 53/78

Mr. V. M. Tarkunde, Sr. Advocate (367), M/s. M. M. L. Srivastava R. Satish and E. C. Agrawala, Advocate for Appellant in Crl. A Nos. 367/77 and SLP 383/78

Mr. V. C. Mahajan, Sr. Advocate Mr. Harbhagwan Singh, Sr. Advocate M/s. S. K. Mehta, K. R. Nagaraja and P. N. Puri, Advocates for Appellant in Crl. A. Nos. 383/78 and 498/77

Mr. K. K. Mohan, Advocate for Appellant in SLP 260/78

Mr. A. K. Sen, Sr. Advocate Mr. Rathin Dass, Advocate for Appellant in Crl. A. Nos. 40, 41/78

Mr. M. M. L. Srivastava, Advocate for Appellant in SLP 388/78

Mr. L. M. Singhvi, Sr. Advocate Mr. N. S. Dass Behl, Advocate for Appellants in Crl. A. Nos. 38/78 and SLP 479/78

Mr. Soli J Sorabjee, Addl. Sol. Genl. (335), M/s. Bishamber Lal Khanna (355), Hardev Singh, R. S. Sodhi, and B. B. Singh, Advocates for Appellants in Cr. As. Nos. 447-449/77 and Respondents in Crl. A. Nos. 335-339, 347, 350-52 366, 367, 388, 396-398, 406, 415-420, 438-440, 463, 473, 474, 477, 498, 511/77, 1, 15-17/78, 469, 510/77, 109/78 and SLP Nos. 388/78, Crl. A. No. 98/78 and SLP No. 260/78

Mr. Soli J. Sorabjee, Addl. Sol Genl. (430), Mr. Thakur Naubat Singh, Dy. Adv. Genl. Haryana, (M/s. S. N. Anand, Advocate (431 and 499), Mr. R. N. Sachthey, Advocate for Respondents in Crl. A. Nos. 365, 430 and 431/77, 508, 499/77 and 38, 141

and 142/78

Mr. M. M. Kshatriya and G. S. Chatterjee, Advocates for Respondents in Crl. A. Nos. 40 and 41/78

Mr. M. M. Punchi and P. C. Bhartari, Advocates for Appellant in Crl. A. No. 346/77

M/s. J. K. Gupta, B. R. Agarwala, Janendra Lal, Advocates for Vice-Chancellor, Punjab University in Crl. A. No. 346/77.

Statutes Referred :

1. Code of Criminal Procedure -- S.438 2. Code of Criminal Procedure -- S.438 3. Code of Criminal Procedure -- S.46 4. Code of Criminal Procedure -- S.46 5. Evidence Act -- S.27 6. Constitution of India -- Art.21 7. Constitution of India -- Art.21

Cases Referred :

AIR 1978 SC179 : (1978) 1 SCC 118 : 1978 Cri LJ 129 29

AIR 1978 SC429 : (1978) 1 SCC 240 : 1978 Cri LJ 502 28, 32

AIR 1978 SC597 : (1978) 1 SCC 248 26

AIR 1977 SC366 : (1977) 2 SCR 52 : 1977 Cri LJ 225 24, 25

AIR 1962 SC253 : (1962) 3 SCR 662 : (1962) 1 Cri LJ 215 31

AIR 1960 SC1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504 19

AIR 1945 PC18 : 71 Ind App 203 : 46 Cri LJ 413 19

AIR 1931 All 356 : 32 Cri LJ 1271 27

AIR 1931 All 504 : 33 Cri LJ 94 (SB) 27

AIR 1924 Cal476 : 25 Cri LJ 732 27

1912 AC 623 : 106 LT 907, Hyman v. Rose 14

JUDGMENT/ORDER:
Chandrachud, CJ.:—

These appeals by Special Leave involve a question of great public importance bearing, at once, on personal liberty and the investigational powers of the police. The society has a vital stake in both of these interests, though their relative importance at any given time depends upon the complexion and restraints of political conditions. Our task in these appeals is how best to balance these interests while determining the scope of S. 438 of the Cr. P. C., 1973 (Act No. 2 of 1974).

2. Section 438 provides for the issuance of direction for the grant of bail to a person who apprehends arrest. It reads thus:

"488. (1) When any person has reason to believe that he may be arrested on an 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, and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub sec. (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including.

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

(ii) a condition that the person 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) a condition that the person shall not leave India without the previous permission of the Court;

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

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-sec. (1)."

3. Criminal Appeal No. 335 of 1975 which is the first of the many appeals before us, arises out of a judgment dated Sept. 13, 1977 of a Full Bench of the High Court of Punjab and Haryana. * The appellant therein, Shri Gurbaksh Singh Sibbia, was a Minister of Irrigation and Power in the Congress Ministry of the Government of Punjab. Grave allegations of political corruption were made

against him and others whereupon, applications were filed in the High Court of Punjab were filed in the High Court of Punjab and Haryana under S.438, praying that the appellants be directed to be released on bail, in the event of their arrest on the aforesaid charges. Considering the importance of the matter, a learned single Judge referred the applications to a Full Bench, which by its judgment dated Sept. 13, 1977 dismissed them.

* Reported in AIR 1978 Punj & Har 1 (FB)

4. The Cr. P.C. 1898 did not contain any specific provision corresponding to the present S. 438. Under the old Code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether courts had the inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did. not have such power. The need for extensive amendments to the Cr. P.C. was felt for a long time and various suggestions were made in different quarters in order to make the Code more effective and comprehensive. The Law Commission of India, in its 41st Report dated Sept. 24, 1969 pointed out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant "anticipatory bail".

It observed in para. 39.9 of its report (Vol. I):

"39.9. The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, 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.

We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter.

In order to settle the details of this suggestion, the following draft of a new section is placed for consideration:

"497A. (1) When any person has a reasonable apprehension that he would be arrested on an 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 Court may, in its discretion, direct that in the event of his arrest, he shall be released on bail.

(2) A Magistrate taking cognizance of an offence against that person shall, while taking steps under S. 204 (1), either issue summons or a bailable warrant as indicated in the direction of the Court under sub-sec. (1).

(3) If any person in respect of whom such a direction is made is arrested without warrant by an officer-in-charge of a police station on an accusation of having committed that offence, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, such person shall be released on bail."

We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion of the court and prefer not to fetter such discretion in the statutory provision itself. Superior Courts will, undoubtedly, exercise their discretion properly, and not make any observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused."

5. The suggestion made by the Law Commission was, in principle, accepted by the Central Government which introduced cl. 447 in the Draft Bill of the Cr. P.C. 1970 with a view to conferring an express power on the High Court and the Court of Session to grant anticipatory bail. That Clause read thus:

"447. (1) When any person has reason to believe that he would be arrested on an 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; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) If such person is thereafter arrested without warrant by an officer-in-charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-sec. (1)"

6. The Law Commission, in para. 31 of its 48th Report (1972). made the following comments on the aforesaid Clause.

"31. The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied

that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith."

Clause 447 of the Draft Bill of 1970 was enacted with certain modifications and became S.438 of the Cr.P.C. 1973 which we have extracted at the outset of this judgment.

7. The facility which S. 438 affords is generally referred to as 'anticipatory bail' an expression which was used by the Law Commission in its 41st report. Neither the section nor its marginal note so describes it but, the expression 'anticipatory bail' is a convenient mode of conveying that it is possible to apply for bail in anticipation of arrest. Any order of bail can, of course, be effective only from the time of arrest because, to grant bail, as stated in Wharton's Law Lexicon, is to 'set at liberty a person arrested or imprisoned, on security being taken for his appearance'. Thus, bail is basically release from restraint, more particularly, release from the custody of the police. The act of arrest directly affects freedom of movement of the person arrested by the police, and speaking generally, an order of bail gives back to the accused that freedom on condition that he will appear to take his trial. Personal recognisance, suretyship bonds and such other modalities are the means by which an assurance is secured from the accused that though he has been released on bail, he will present himself at the trial of offence or offences of which he is charged and for which he was arrested. The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of he police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. Police custody is an inevitable concomitant of arrest for non-bailable offences. An order of anticipatory bail constitutes, so to say, an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is threrafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail. S. 46 (1) of the Code of Criminal Procedure which deals with how arrests are to be made, provides that in making the arrest, the police officer or other person making the arrest" shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action". A direction under S. 438 is intended to confer conditional immunity from this 'touch' or confinement.

8. No one can accuse the police of possessing a healing tough nor indeed does anyone have misgivings in regard to constraints consequent upon confinement in police custody. But, society has come to accept and acquiesce in all that follows upon a police arrest with a certain amount of sang-froid, in so far as the ordinary rule of criminal investigation is concerned. It is the normal day-to-day business of the police to investigate into charges brought before them and, broadly and generally, they have nothing to gain, not favours at any rate, by subjecting ordinary criminals to needless harassment. But the crimes, the criminals and even the complainants can occasionally possess extraordinary features. When the even flow of life becomes turbid, the police can be called upon to inquire into charges arising out of political antagonism . The powerful processes of criminal law can then be perverted for achieving extraneous ends. Attendant upon such investigations, when the police are not free agents within their sphere of duty is a great amount of inconvenience, harassment and humiliation. That can even take the form of the parading of a respectable person in hand-cuffs, apparently on way to a court of justice. The foul deed is done when an adversary, is exposed to social ridicule and obloquy, no matter when and whether a conviction is secured or is at all possible. It is in order to meet such situations, though not limited to these contingencies, that the power to grant anticipatory bail was introduced into the Code of 1973.

9. Are we right in saying that the power conferred by S. 438 to grant anticipatory bail is "not limited to these contingencies"? In fact that is one of the main points of controversy between the parties. Whereas it is argued by Shri M. C. Bhandare. Shri. O. P. Sharma and the other learned counsel who appear for the appellants that the power to grant anticipatory bail ought to be left to the discretion of the court concerned, depending on the facts and circumstances of each particular case, it is argued by the learned Additional Solicitor General on behalf of the State Government that the grant of anticipatory bail should at least be conditional upon the applicant showing that he is likely to be arrested for an ulterior motive, that is to say, that the proposed charge or charges are evidently baseless and are actuated by mala fides. It is argued that anticipatory bail is an extraordinary remedy and therefore. Whenever it appears that the proposed accusations are prima facie plausible, the applicant should be left to the ordinary remedy of applying for bail under S. 437 or S. 439, Criminal Procedure Code, after he is arrested.

10. Shri V. M. Tarkunde, appearing on behalf of some of the appellants, while supporting the contentions of the other appellants, said that since the denial of bail amounts to deprivation of personal liberty, courts should lean against the imposition of unnecessary restrictions on the scope of S. 438, when no such restrictions are imposed by the legislature in the terms of that Section. The learned counsel added a new dimension to the argument by invoking Art. 21 of the Constitution. He urged that S. 438 is a procedural provision which is concerned with the personal liberty of an individual who has not been convicted of the offence in respect of which he seeks bail and who must therefore be presumed to be innocent. The validity of that section must accordingly be examined by the test of fairness and reasonableness which is implicit in Art. 21. If the legislature itself were to impose an unreasonable restriction on the grant of anticipatory bail, such a restriction could have been struck down as being violating of Art. 21. Therefore, while determining the scope of S. 438, the Court should not impose any unfair or unreasonable limitation on the individual's right to obtain an order of anticipatory bail. Imposition of an unfair or unreasonable limitation, according to the learned counsel, would be violative of Art. 21. irrespective of whether it is imposed by legislation or by judicial decision.

11. The Full Bench of the Punjab and Haryana High Court rejected the appellant's application for bail after summarising, what according to it is the true legal position, thus :

(1) The power under S. 438, Cr. P. C. is of an extraordinary character and must be exercised sparingly in exceptional cases only.

(2) Neither S. 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offence not yet committed or with regard to accusations not so far levelled:

(3) The said power is not unguided or uncanalised but all the limitations imposed in the preceding S. 437, are implicit therein and must be read into S. 438.

(4) In addition to the limitations mentioned in S. 437, the petitioner must make out a special case for the exercise of the power to grant anticipatory bail.

(5) Where a legitimate case for the remand of the offender to the police custody under S. 167 (2) can be made out by the investigating agency or a reasonable claim to secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act can be made out, the power under S. 438 should not be exercised.

(6) The discretion under S. 438 cannot be exercised with regard to offences punishable with death or imprisonment for life unless the court at that very stage is satisfied that such a charge appears to be false or groundless.

(7) The larger interest of the public ad State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under S. 438 of the Code should not be exercised; and

(8) Mere general allegations of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless.

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

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 S. 438. Cl. (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 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 S.438, while enacting that provision the legislature was not writing on a clean slate in the sense of taking an unprecedented step, in so far saw the right to apply for bail is concerned. It had before it two cognate provisions of the Code: S. 437 which deals with the power of courts other than the Court of Session and the High Court of grant bail in non-bailable cases and S. 439 which deals with the "special powers" of the High Court and the Court and the Court of Session regarding bail. The whole 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 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 a 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 or 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 Chap. VI, Chap. XVI or Chap. XVII of the I.P.C. 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-sec. (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-sec. (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 S. 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-sec. (3) of S. 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 Ss. 437 and 439 furnished a convenient model for the legislature to copy while enaction S. 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 Ss.437 and 439, S. 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 S. 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 Cls. (i) to (iv) of sub-sec. (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, in so far 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 imposing of all or any of the conditions mentioned in S. 437.

13. This is not to say that anticipatory bail, if granted, must be granted, must be granted without the imposition of any conditions. That will be plainly contrary to the very terms of S. 438. Though sub-sec. (1) of that section says that the Court "may, if it thinks fit" issue the necessary direction for bail, sub-sec. (2) confers on the Court the power to include such conditions in he direction as it may think fit in the light of the facts of the particular case, including the conditions mentioned in Cls. (i) to (iv) of that sub-section. The controversy therefore is not whether the Court has the power to impose conditions while granting anticipatory bail. It clearly and expressly has that power. The true question is whether by a process of construction, the amplitude of judicial discretion which is given to the High Court and the Court of Session, to impose such conditions as they may think fit while granting anticipatory bail, should be cut down by reading into the statute conditions which are not to be found therein, like those evolved by the High Court or canvassed by the learned Additional Solicitor General. Our answer, clearly and emphatically, is in the negative. The High

Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in S. 437 or which are generally considered to be relevant under S. 439 of the Code.

14. Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, Courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be excised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion unhampered by rules of general application, Earl Loreburn L.C. said in Hyman v. Rose, 1912 AC 623.

"I desire in the first instance to point out that the discretion given by the section is very wide ..... Now it seems to me that when the Act is so express to provide a wide discretion ..... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the Court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the Court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the Court wish it had kept a free hand."

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

16. A close look at some of the rules in the eight-point code formulated by the High Court will show how difficult it is to apply them in practice. The seventh proposition says:

"The larger interest of the public and State demand that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under S. 438 of the Code should not be exercised."

17. How can the Court, even if it had a third eye, assess the blatantness of corruption at the stage of anticipatory bail? And will it be correct to say that blatantness of the accusation will suffice for rejecting bail, even if the applicant's conduct is painted in colours too lurid to be true? The eighth proposition framed by the High Court says:

Mere general allegations of mala fides in the petition are inadequate. The Court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless."

Does this rule mean, and that is the argument of the learned Additional Solicitor General, that anticipatory bail cannot be granted unless it is alleged (and naturally, also shown, because mere allegation is never enough) that the proposed accusations are mala fide? It is understandable that if mala fides are shown, anticipatory bail should be granted in the generality of cases. But it is not easy to appreciate why an application for anticipatory bail must be rejected unless the accusation is shown to be mala fide. This, truly, is the risk involved in framing rules by judicial construction. Discretion, therefore, ought to be permitted to remain in the domain of discretion, to be exercised objectively and open to correction by the higher courts. The safety of discretionary power lies in this twin protection which provides a safeguard against its abuse.

18. According to the sixth proposition framed by the High Court, the discretion under S. 438 cannot be exercised in regard to offences punishable with death or imprisonment for life unless, the court at the stage of granting anticipatory bail, is satisfied that such a charge appears to be false or groundless. Now. S. 438 confers on the High Court and the Court of Session the power to grant anticipatory bail if the applicant has reason to believe that he may be arrested on an accusation of having committed "a non-bailable offence". We see no warrant for reading into this provision the conditions subject to which bail can be granted under S. 437 (1) of the Code. That section, while conferring the power to grant bail in cases of non-bailable offences, provides by way of an exception that a person accused or suspected of the commission of a non-bailable offence "shall not be so released" if there appears to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. If it was intended that the exception contained in S. 437 91) should govern the grant of relief S. 438 (1), nothing would have been easier for

the legislature than to introduce into the latter section a similar provision. We have already pointer out the basic distinction between these two sections. S. 437 applies only after a person, who is alleged to have committed a non-bailable offence, is arrested or detained without warrant or appears or is brought before a court. Section 438 applies before the arrest is made and, in fact, one of the pre-conditions of its application is that the person, who applies for relief under it. must be able to show that he has reason to believe that "he may be arrested", which plainly means that he is not yet arrested. The nexus which this distinction bears with the grant or refusal of bail is that in cases falling under S. 437, there is some concrete data on the basis of which it is possible to show that there appear to be reasonable grounds for believing that the applicant has been guilty of an offence punishable with death or imprisonment for life. In cases falling under S. 438 that stage is still to arrive and, in the generality of cases thereunder, it would be premature and indeed difficult to predicate that there are or are not reasonable grounds for so believing. The foundation of the belief spoken of in S. 437 (1), by reason of which the court cannot release the applicant on bail is, normally, the credibility of the allegations contained in the First Information Report. In the majority of cases falling under S. 438, that data will be lacking for forming the requisite belief. If at all the conditions mentioned in S. 437 are to be read into the provisions of S. 438, the transplantation shall have to be done without amputation.That is to say, on the reasoning of the High Court, S. 438 (1) shall have to read as containing the clause that the applicant "shall not" be released on bail "if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life." In this process one shall have overlooked that whereas, the poser under S. 438 (1) can be exercised if the High Court or the Court of Session "thinks fit to do so, S. 437 (1) does not confer the power to grant bail in the same wide terms. The expression "if it thinks fit" which occurs in S. 438 (1) in relation to the power of the High Court or the Court of Session is conspicuously absent in Section 437(1). We see no valid reason for re-writing S. 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the Court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

19. A great deal has been said by the High Court on the fifth proposition framed by it, according to which, inter alia, the power under S. 438 should not be exercised if the investigating agency can make a reasonable claim that it can secure incriminating material from information likely to be received from the offender under S. 27 of the Evidence Act. According to the High Court, it is the right and the duty of the police to investigate into offences brought to their notice and therefore, courts should be careful not to exercise their powers in a manner which is calculated to cause interference therewith. It is true that the functions of the Judiciary and the police are in a sense complementary and not overlapping. And, as observed by the Privy Council in King Emperor v. Khwaja Nazir Ahmed, 71 Ind App 203: (AIR 1945 PC 18):

"Just as it is essential that every one accuse of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry ..... The functions of the judiciary and the police are complementary, not overlapping, and the combination of the individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function....".

But, these remarks, may it be remembered, were made by the Privy Council while rejecting the view of the Lahore High Court that it had inherent jurisdiction under the old S. 561-A, Cr. P.C. to quash all proceedings taken by the police in pursuance of two F.I.Rs. made to them. An order quashing such proceedings puts an end to the proceedings with the inevitable result that all investigation into the accusation comes to a halt. Therefore, it was held that the Court cannot, in the exercise of its inherent powers, virtually direct that the police shall not investigate into the charges contained in the F.I.R. We are concerned here with a situation of an altogether different kind. An order of anticipatory bail does not in any way, directly or indirectly, take away from the police their right to investigate into charges made or to be made against the person released on bail. In fact, two of the e usual conditions incorporated in a direction issued under S. 438 (1) are those recommended in sub-sec. (2) (i) and (ii) which require the applicant to co-operate with the police and to assure that he shall not tamper with the witness during and after the investigation. While granting relief under S. 438 (1), appropriate conditions can be imposed under S. 438 (2) so as to ensure an uninterrupted investigation. One of such conditions can even be that in the event of the police making out a case of a likely discovery under S. 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the discovery. Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of S. 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in State of U. P. v. Deoman Upadhyaya, (1961) 1 SCR 14 at p. 26: (AIR 1960 SC 1125) to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. The broad foundation of this rule is stated to be that S. 46 of the Cr. P. C. does not contemplate any formality before a person can be said to be taken in custody sub-mission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under S. 167 (2) of the Code is made out by the investigating agency.

20. It is unnecessary to consider the third proposition of the High Court in any great details because we have already indicated that there is no justification for reading into S. 438 the limitations mentioned in S. 437. The High Court says that such limitations are implicit in S. 438 but, with respect, no such implications arise or can be read into that section. The plenitude of the section must be given its full play.

21. The High Court says in its fourth proposition that in addition to the limitations mentioned in S. 437, the petitioner must make out a "special case" for the exercise of the power to grant anticipatory bail. This, virtually, reduced the salutary power conferred by S. 438 to a dead letter. In its anxiety, otherwise just, to show that the power conferred by S. 438 is not "unguided or uncanalised", the High Court has subjected that power to a restraint which will have the effect of making the power utterly unguided. To say that the applicant must make out a "special case" for the exercise of the power to grant anticipatory bail is really to say nothing. The

applicant has undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a "special case." We do not see why the provisions of S. 438 should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable. A wise exercise of judicial power inevitable takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonable foreseeable consequences of its use, is the hall-mark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

22. By proposition No. 1 the High Court says that the power conferred by Section 438 is "of an extraordinary character and must be exercised sparingly in exceptional cases only". It may perhaps be right to describe the power as of an extraordinary character because ordinarily the bail is applied for under S. 437 or Section 439. These Sections deal with the power to grant or refuse bail to a person who is in the custody of the police and that is the ordinary situation in which bail is generally applied for. But this does not justify the conclusion that the power must be exercised in exceptional cases only, because it is of an extraordinary character. We will really be saying once too often that all discretion has to be exercised with care and circumspection. depending on circumstances justifying its exercise. It is unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self-imposed limitations.

23. It remains only to consider the second proposition formulated by the High Court, which is the only one with which we are disposed to agree but we will say more about it a little later.

24. It will be appropriate at this stage to refer to a decision of this Court in Balchand Jain v. State of Madhya Pradesh (1977) 2 SCR 562 : (AIR 1977 SC 366) on which the High Court has leaned heavenly in formulating its propositions. One of us, Bhagwati J. who spoke for himself and A. C. Gupta, J. observed in that case that:

"the power of granting 'anticipatory bail is somewhat extraordinary in character and it is only in 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 not likely to abscond, or otherwise misuse his liberty while on bail" that such power is to be exercised."

Fazal Ali, J. who delivered a separate judgment of concurrence also observed that:

"an order for anticipatory bail is an extraordinary remedy available in special cases."

and proceeded to say:

"As S. 438 immediately follows S. 437 which is the main provision for bail in respect of non-bailable offences, it is manifest that the conditions imposed by S. 437 (1) are implicity contained in Section 438 of the Code. Otherwise the result would be that a person who is accused of murder can get away under S. 438 by obtaining an order for anticipatory bail without the necessity of proving that there were reasonable grounds for believing that he was not guilty of offence punishable with death or imprisonment for life. Such a course would render the provisions of S. 437 nugatory and will give a free license to the accused persons charged with non-bailable offences to get easy bail by approaching the Court under S. 438 and by-passing S. 437 of the Code. This, we feel, could never have been the intention of the Legislature. Section 438 does not contain unguided or uncanalised powers to pass an order for anticipatory bail, but such an order being of an exceptional type can only be passed if, apart from the conditions mentioned in S. 437, there is a special case made out for passing, the order. The words "for a direction under this section" and "Court may, if it thinks fit, direct" clearly slow that the Court has to be guided by a large number of considerations including those mentioned in S. 437 of the Code."

While stating his conclusion Fazal Ali, J. reiterated in conclusion No. 3 that "S. 438 of the Code is an extraordinary remedy and should be restorted to only in special cases."

25. We hold the decision in Balchand Jain (AIR 1977 SC 366) in great respect but it is necessary to remember that the question as regards the interpretation of Section 438 did not at all arise in that case. Fazal Ali, J. has stated in Para 3 of his judgment that "the only point" which arose for consideration before the Court was whether the provisions of Section 438 relating to anticipatory bail stand overruled and repealed by virtue of R. 184 of the Defence and Internal Security of India Rules, 1971 or whether both the provisions can. By the rule of harmonious interpretation, exist side by side. Bhagwati, J. has also stated in his judgment, after adverting to S. 438 that Rule 184 is what the Court was concerned with in the appeal. The observations made in Balchand Jain regarding the nature of the power conferred by S. 438 and regarding the question whether the conditions mentioned in S. 437 should be read into S. 438 cannot therefore be treated as conclusion the points which arise directly for our consideration. We agree, with respect, that the power conferred by S. 438 is of an extraordinary character in the sense indicated above, namely that it is not ordinarily resorted to like the power conferred by Ss. 437 and 439. We also agree that the power to grant anticipatory bail should be exercised with due care and circumspection but beyond that, it is not possible to agree with the observations made in Balchand Jain in an altogether different context on an altogether different point.

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 S. 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. S. 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in S. 438 can make its provisions constitutionally vulnerable since the right to

personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in S. 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi, (1978) 1 SCC 248 : (AIR 1978 SC 597) that in order to meet the challenge of Art. 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. S. 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 of 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.

27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in Nagendra v. King Emperor, AIR 1924 Cal 476 . (479, 480) that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment. In two other cases which, significantly, are the 'Meerut Conspiracy cases observations are to be found regarding the right to bail which deserve a special mention. In K.N. Joglekar v. Emperor AIR 1931 All 504 (SB) it was observed, while dealing with S. 498 which corresponds to the present S. 439 of the Code, that it conferred upon the Sessions Judge or the High Court wide powers to grant bail which were not handicapped by the restrictions in the preceding S. 497 which corresponds to the present S. 437. It was observed by the Court that there was no hard and fast rule and no inflexible principle governing the exercise of the discretion conferred by S. 498 and that the only principle which was established was that the discretion should be exercised judiciously. In Emperor v. H. L. Hutchinson AIR 1931 All 356 at p. 358 it was said that it was very unwise to make an attempt to lay down any particular rules which bind the High Court, having regard to the fact that the legistature itself left the discretion of the Court unfettered. According to the High Court, the variety of cases that may arise from time to time cannot be safely classified and it is dangerous to make an attempt to classify the cases and to say that in particular classes a bail may be granted but not in other classes. It was observed that the privciple to be deduced from the various sections in the Cr. P.C. was that grant of bail is the rule and refusal is the exception. An accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he were in custody. As a presumably innocent person he is therefore entitled to freedom and every opportunity to look after his own case. A presumably innocent person must have his freedom to enable him to establish his innocence.

28. Coming nearer home, it was observed by Krishna Iyer. J., in Gudikanti Narasimhulu v. Public Prosecutor. High Court of Andhra Pradesh (1978) 1 SCC 240 : (AIR 1978 SC 429) that "the issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law. The last four words of Art. 21 are the life of that human right."

29. In Gurcharan Sing v. State (Delhi Admn.) (1978) 1 SCC 118 : (AIR 1978 SC 179) it was observed by Goswami, J., who spoke for the Court, that "there cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail".

30. In American Jurisprudence (2d, Vol. 8, page 806, para 39) it is stated:

"Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circimstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgment of the court, the primary inquiry is whether a recognizance or bond would effect that end."

It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail

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. (1962) 3 SCR 622 : (AIR 1962 SC 253) which, though, was a case under the old S. 498 which corresponds to the present S. 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.

32. A word of caution may perhaps be necessary in the evaluation of the consideration whether the applicant is likely to abscond. There can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the 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. In his charge to the grand jury at Salisbury Assizes, 1899 (to which Krishna Iyer, J. has referred in Gudikanti (AIR 1978 SC 429)), Lord Russell of Killowen said:

"..... it was the duty of magistrates to admit accused persons to bail, wherever practicable, unless there were strong grounds for supposing that such persons would not appear to take their trial. It was not the poorer classes who did not appear for their circumstances were such as to tie them to the place where they carried on their work. They had not the golden wings with which to fly from justice."

This, incidentally, will serve to show how no hard and fast rules can be laid down in discretionary matters like the grant or refusal of bail, whether anticipatory or otherwise. No such rules can be laid down for the simple reason that a circumstance which, in a given case, turns out to be conclusive, may have no more than ordinary signification in another case.

33. We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under S. 438 by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting, them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the ground that, after all. "the legislature in its wisdom" has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to excercise their discretionary powers in their wisdom, especially when the discretion is entrusted in their care by the legislature in its wisdom. if they err, they are liable to be corrected.

34. This should be the end of the matter, but it is necessary to clarify a few points which have given rise to certain misgivings.

35. Section 438 (1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe' that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that 'some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested S. 438 (1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. 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.

Secondly, if an application for anticipatory bail is made to the High Court or the Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for grant-in such relief. It cannot leave the question for the decision of the Magistrate concerned under S. 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438;

Thirdly, the filing of a First Information Report is not a condition precedent to the excercise of the power under S. 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F. I. R. is not yet filed.

Fourthly, anticipatory bail can be granted even after in F. I. R. is filed, so long as the applicant has not been arrested.

Fifthly, the provisions of S. 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, in so far as the offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under S. 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested.

36. We have said that there is one proposition formulated by the High Court with which we are inclined to agree. That is proposition No. (2). We agree that a 'blanket order' of anticipatory bail should not generally be passed. this flows from the very language of the section which, as discussed above, requires the applicant to show that he has "reason to believe" that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. That is why, normally, a direction should not issue under S. 438 (1) to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". That is what is meant by a 'blanket order' of anticipatory bail, an order which serves as a blanket to cover or protect any and every kind of allegedly unlawful activity, in fact any eventuality, likely or unlikely regarding which. no concrete information can possible be had. The rationale of a direction under Section 438(1) is the belief of the applicant founded on reasonable grounds that he may be arrested for a non-bailable offence. It is unrealistic to expect the applicant to draw up his application with the meticulousness of a pleading in a civil case and such is not requirement of the section. But specific events and facts must be disclosed by the applicant in order to enable the court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the section.

37. Apart from the fact that the very language of the statute compels this construction, there is an important principle involved in the insistence that facts, on the basis of which a direction under S. 438 (1) is sought, must be clear and specific, not vague and general. It is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them can be avoided.

A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter

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

38. There was some discussion before us on certain minor modalities regarding the passing of bail orders under S. 438 (1). Can an order of bail be passed under that section without notice to the public prosecutor ? It can be. But notice should issue to the public prosecutor or the Government Advocate forthwith and the question of bail should be re-examined in the light of the respective contentions of the parties. The ad interim order too must conform to the requirements of the section and suitable conditions should be imposed on the applicant even at that stage. Should the operation of an order passed under Section 438 (1) be limited in point of time? Not necessarily. The Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of an F.I.R. in respect of the matter covered by the order. The applicant may in such cases be directed to obtain an order of bail under S. 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.

39. During the last couple of years this Court, while dealing with appeals against orders passed by various High Courts, has granted anticipatory bail to many a person by imposing conditions set out in S. 438 (2) (i),(ii) and (iii). The Court has, in addition, directed in most of those cases that (a) the applicant should surrender himself to the police for a brief period if a discovery is to be made under S.27 of the Evidence Act or that he should be deemed to have surrendered himself if such a discovery is to be made. In certain exceptional cases, the Court has, in view of the material placed before it, directed that the order of anticipatory bail will remain in operation only for a week or so until after the filing of the F.I.R. in respect of matters covered by the order. These orders, on the whole, have worked satisfactorily, causing the least inconvenience to the individuals concerned and least interference with the investigational rights of the police. The Court has attempted through those orders to strike a balance between the individual's right to personal freedom and the investigational rights of the police. The appellants who were refused anticipatory bail by various courts have long since been released by this Court under Section 438 (1) of the Code.

40. The various Appeals and Special Leave Petitions before us will stand disposed of in terms of this judgment. The judgment of the Full Bench of the Punjab and Haryana High Court, which was treated as the main case under appeal, is substantially set aside as indicated during the course of this judgment.

Order accordingly.

1981 Legal Eagle (SC) 404

IN THE SUPREME COURT OF INDIA

Equivalent Citations : 1982 AIR(SC) 1463 : 1982 CrLJ 1943 : 1982 (3) SCC 378 : 1983 SCC(Cri) 53

[Before : P.N.Bhagwati, A.N.Sen]

Free Legal Aid Committee, Jamshedpur

versus

State of Bihar

Case No. : Writ Petn. No. 1344 of 1981, Date of Decision : 10/09/1981

CODE OF CRIMINAL PROCEDURE, 1973

Section 437 -- Bail -- To be granted by Magistrate not only for appearance before himself but also before the Sessions Court in case the offence is triable by Session Court -- Normally the Magistrate should not require the accused to appear before himself unless the charge-sheet has been filed.

The law does not require that an accused on bail need appear before the Court before the charge-sheet is filed and process issued by the Court. Whenever, an accused is released on bail he need not be required to appear before the Court until the charge-sheet is filed and the process is issued by the Court. There is also another difficulty that in cases triable by the Court of Sessions, the practice followed is that when an accused is released on bail by the Magistrate, the bail is granted to him only during the pendency of the inquiry before the Magistrate with the result that when the case is committed to the Court of Session, he is arrested and brought before the Court of Session where he has to apply once again for fresh bail. This causes considerable inconvenience to the accused without any corresponding advantage so far as the administration of criminal justice is concerned. The situation can however easily be avoided because there is a provision in Section 441 sub-section (3) of the Code of Criminal Procedure under which bail can be granted to an accused so as to bind him to appear before the Court of Session. It is also clear from Section 209 clause (b) of the Code of Criminal Procedure that the Magistrate has discretion to release the accused on bail 'during and until completion of trial' even in cases where the offence is triable by the Court of Session. It would avoid hardship to the accused if the Magistrate, while releasing the accused on bail, requires execution of a bond with or without securities, as the case may be, binding the accused not only to appear as and when required before him but also to appear when called upon in the Court of Session.

Statutes Referred :

1. Code of Criminal Procedure -- S.437 2. Code of Criminal Procedure -- S.437 3. Code of Criminal Procedure -- S.209(b) 4. Code of Criminal Procedure -- S.209(b) 5. Code of Criminal Procedure -- S.441(3) 6. Code of Criminal Procedure -- S.441(3)

Cases Referred :

(1980) Writ Petn. No. 53 of 1980, D/- 25-7-1980 (SC) 3

JUDGMENT/ORDER:

It is not possible to take up this writ petition for hearing before the Dussehra holidays due to lack of time. We are, therefore, constrained to adjourn it to 12th October, 1981. In the meanwhile, Mr. Sibal on behalf of the petitioner has applied for certain interim directions and we propose to deal with his application in this order.

2. The first interim direction sought by Mr. Sibal is that when an accused is released on bail, he should not be required to appear in court until the charge-sheet is filed and process issued by the Court. Mr. Sibal states that today what happens in many of the Magistrates Courts in Bihar is that the accused is required to appear before the Court every fourteen days even though he is on bail and this causes considerable harassment to the accused. He submits and in our opinion rightly that this is not required by law and Mr. K. G. Bhagat, learned advocate appearing on behalf of the State of Bihar, fairly concedes that law does not require that an accused on bail need appear before the Court before the charge-sheet is filed and process issued by the Court. We, therefore, direct that whenever an accused is released on bail he need not be required to appear before the Court until the charge-sheet is filed and the process is issued by the Court. There is also another difficulty pointed out by Mr. Sibal and it is that in cases triable by the Court of Session, the practice followed is that when an accused is released on bail by the Magistrate, the bail is granted to him only during the pendency of the inquiry before the Magistrate, with the result that when the case is committed to the Court of Session, he is rearrested and brought before the Court of Session where he has to apply once again for fresh bail. This causes considerable inconvenience to the accused without any corresponding advantage so far as the administration of criminal justice is concerned. This situation can however easily be avoided because there is a provision in S. 441 sub-sec. (3) of the Cr. P.C. under which bail can be granted to an accused so as to bind him to appear before the Court of Session, in which event, on committal, he would not have to be re-arrested and brought before the Court of Session. It. is also clear from S. 209, cl. (b) of the Cr. P.C. that the Magistrate has discretion to release the accused on bail "during and until completion of trial" even in cases where the offence is triable by the Court of Session. We, therefore, feel that it would avoid hardship to an accused if the Magistrate, while releasing the accused on bail, requires execution of a bond with or without surety, as the case may be, binding the accused not only to appear as and when required before him but also to appear when called upon in the Court of Session. Mr. K. G. . Bhagat on behalf of the State of Bihar also agrees that this is a procedure which can be legitimately followed by the Magistrates. We hope and trust that hereafter this

procedure will be followed by the Magistrates unless there are any particular reasons for not doing so.

3. Mr. Sibal on behalf of the petitioner has also pointed out to us that a Bench of this Court, while disposing of Writ Petn. No. 53 of 1980, made an order on 25th July, 1980 suggesting that the State Government should take expeditious measures for reducing congestion in Sakchi Jail at Jamshedpur. We are not aware whether the State Government has complied with this suggestion made. by the Court. We would. therefore, like the State Government to inform us by appropriate affidavit as to what steps have been taken by the State Government in compliance with the order of the Court since the date of making of that order. This affidavit may be filed by the State Government on or before 15th Oct; 1991. The office will supply a copy of Writ Petn. No 53/80 to the learned advocate appearing on behalf of the State Government.

4. Lastly, Mr. Sibal on behalf of the petitioner, has drawn our attention to an article, in a journal complaining about the conditions in the General Hospital in Jamshedpur. We stated to Mr. Sibal that the petitioner should file an affidavit in regard to these complaints and Mr. Sibal on behalf of the petitioner has agreed to do so on or before 21st Sept. 1981 The State Government will file a to this affidavit on or before 10th Oct. 1981. After the affidavits are filed the Court will consider whether any and if so what relief should be granted to the petitioner with regard to these complaints.

5. The writ petition is adjourned to 19th October, 1981.

Order accordingly.

1992 Legal Eagle (SC) 375

IN THE SUPREME COURT OF INDIA

Equivalent Citations : 1992 (3) SCC 141 : 1992 SCC(Cri) 554 : 1992 (3) SCR 158 : 1992 (1) Scale 1024 : 1992 AIR(SC) 1768 : 1992 (3) Bom.C.R. 562 : 1992 (2) Crimes 310 : 1992 CrLJ 2768 : 1992 (3) JT 366 : 1992 (94) Bom.L.R. 770

[Before : A.M.Ahmadi, K.Jayachandra Reddy]

Central Bureau of Investigation, Special Investigation Cell 1, New Delhi

versus

Anupam J.Kulkarni

Case No. : 310 , 311 of 1992, Date of Decision : 08/05/1992

Criminal Procedure Code, 1973

Sections 167(2), 167(2) Proviso (a) and 309 -- Remand of the accused to custody after arrest -- Initially such custody cannot exceed period of 15 days whether it is police custody or judicial custody -- Thereafter further remand during period of 90 days or 60 days as the case may be can only be judicial one -- One combined reading of Section 167(2) and (2A) it emerges that judicial magistrate to whom executive magistrate had forwarded the arrested accused can order detention in such custody, police or judicial under Section 161(2) for the rest of the 15 days after deducting the period of detention ordered by the executive magistrate -Detention thereafter could only be in judicial custody.

By the Cr. P.C. Amendment Act, 1978 Proviso (a) to sub-section (2) of Section 167 has been amended and the magistrate is empowered to authorised the detention of the accused during the investigation for an aggregate period of 90 days in case relating to major offences and in other cases for 60 days. A new sub-section 2(A) also has been inserted empowering the executive magistrate to make an order for remand but only for a period not exceeding 7 days in the aggregate and in case where the judicial magistrate is not available. This provision further lays down that the period of detention ordered by such executive magistrate should be taken into account in computing the total period specified in clause (a) of sub-section (2) of Section 167; It is clear from Section 57 that investigation should be completed in the first instance within 24 hours if not the arrested should be brought before the magistrate as provided under Section 167, exclusive of the time necessary for journey from place of arrest to the magistrate court If the magistrate or the judicial officer is satisfied that further remand is necessary then subsection (2) comes into operation under which the accused can be put under such custody but it should not exceed IS days in the whole and this custody can be police custody or judicial one. The period of 15 days start running as soon as the accused is produced before the magistrate. The proviso to Section 167(2) comes into operation where the magistrate thinks fit that further detention beyond 15 days is necessary. The words "otherwise than in custody of police beyond the period of 15 days" are significant which means that after 15 days the remand can be only in judicial custody and not in the police custody. The contention that the proviso does not exclude or precludes police custody even after 15 days rejected.

On a combined reading of Sections 167(2) and (2A) it emerges that detention after 15 days could only in the judicial custody. Likewise, the remand under Section 309 Cr.P.C. can be only to judicial custody in these terms.

Section 167(2) -- Complexities of the accused in several offences discovered during investigation of the case in which he was arrested -Police custody after expiry of 15 days cannot be permitted on that ground -- But when complexities of the accused is found in some Other transaction while in judicial custody, the said limitation will not apply.

In one occurrence it may so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences. If during investigation, his complicity in more serious offences is disclosed, that does not authorise the police to ask for police custody for a further period after an expiry of 15 days. However, this limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed since that would be a different transaction and if the accused is in judicial custody in connection with one case and to enable the police to complete their investigation of other case, they can require his detention in police custody for the purpose of associating him with the investigation of that case.

REMAND

Remand -- Initial custody of the accused after arrest cannot exceed period of 15 days, either police or judicial custody -- The words "such custody" and "for a term not exceeding 15 days in whole" are very significant -- Held further that under Section 167(2), Proviso (a) remand of the accused to the Police custody can be for 15 days only -- Taking the plain language into consideration particularly the words "otherwise than in the custody of the police beyond the period of 15 days" in the Proviso, the custody after the expiry of first 15 days can only be judicial custody during the rest of the period of 90 days or 60 days and that policy custody if found necessary can be ordered during the first period of 15 days.

Section 167(2A) which has been introduced for pragmatic reasons state that if an arrested person is produced before an

executive magistrate for remand the said magistrate may authorise the detention of the accused not exceeding 7 days in aggregate. It further proves that a period of remand by the executive magistrate should also be taken into account for computing the period specified in the proviso, that is the aggregate period of 90 days or 60 days. Since the executive magistrate is empowered to order detention only for seven days in such custody as he thinks fit, he should, therefore, either leave the accused or transmit to the nearest judicial magistrate together with the entries in the diary before the expiry of seven days. Likewise the remand under Section 309 Cr. P.C. can be only to the judicial custody in terms of mentioned therein.

Advocates Appeared :

Vasudev Kailash, Tulsi K.T.S., Tarnta Binu, Mathur Dinesh, Kirpal Alpana, Jethmalani Ram

Statutes Referred :

1. Code of Criminal Procedure -- S.167

JUDGMENT/ORDER:
K. JAYACHANDRA REDDY, J. :-

Leave granted.

2. An important question that arises for consideration is whether a person arrested and produced before the nearest Magistrate as required under S. 167(1) Code of Criminal Procedure can still be remanded to police custody after the expiry of the initial period of 15 days. We propose to consider the issue elaborately as there is no judgment of this Court on this point. The facts giving rise to this question may briefly be stated. A case relating to abduction of four Bombay based diamond merchants and one Shri Kulkarni was registered at Police Station Tughlak Road New Delhi on 16-9-91 and the investigation was entrusted to C.B.I. During investigation it was disclosed that not only the four diamond merchants but also Shri Kulkarni, who is the respondent before us and one driver Babulal were kidnapped between 14th and 15th September, 1991 from two Hotels at Delhi. It emerged during investigation that the said Shri Kulkarni was one of the associates of the accused one Shri R. Chaudhary responsible for the kidnapping of the diamond merchants. On the basis of some available material Shri Kulkarni was arrested on 4.-10-91 and was produced before the Chief Metropolitan Magistrate, Delhi on 5-10-91. On the request of the C.B.I. Shri Kulkarni was remanded to judicial custody till 11-10-91. On 10-10-91 a test identification parade was arranged but Shri Kulkarni refused to cooperate and his refusal was recorded by the concerned Munsif Magistrate. On 11-10-91 an application was moved by the investigating officer seeking police custody of Shri Kulkarni which was allowed. When he was being taken on the way Shri Kulkarni pretended to be indisposed and he was taken to the Hospital the same evening where he remained confined on the ground of illness up to 21-10-91 and then he was referred to Cardic Out-patient Department of G.B. Pant Hospital. Up to 29-10-91 Shri Kulkarni was again remanded to judicial custody by the Magistrate and thereafter was sent to Jail. In view of the fact that the Police could not take him into police custody all these days the investigating officer Again applied to the Court of Chief Metropolitan Magistrate for police custody of Shri Kulkarni. The Chief Metropolitan Magistrate relying on ajudgment of the Delhi High Court in State (Delhi Admn.) v. Dharam Pal, 1982 Cri LJ 1103 refused police remand. Questioning the same a revision was filed before the High Court of Delhi. The learned single Judge in the first instance considered whether there was material to make out a case of kidnapping or abduction against Shri Kulkarni and observed that even the abducted persons namely the four diamond merchants do not point an accusing finger against Shri Kulkarni and that at any rate Shri Kulkarni himself has been interrogated in jail for almost seven days by the C.B.I and nothing has been divulged by him, therefore it is not desirable to confine him in jail and in that view of the matter he granted him ball. The High Court, however, did not decide the question whether or not after the expiry of the initial period of 15 days a person can still be remanded to police custody by the magistrate before whom he was produced. The said order is challenged in these appeals.

3. The learned Additional Solicitor General appearing for the C.B.I. the appellant contended that the Chief Metropolitan Magistrate erred in not granting police custody and that Dharam Pal' s case (1982 Cri LJ 1103) on which he placed reliance has been wrongly decided. The further contention is that the High Court has erred in granting bail to Shri Kulkarni without deciding the question whether he can be remanded to police custody as prayed for by the C. B. I. Shri Ram Jethmalani, learned counsel for the respondent accused submitted that the language of S. 167, Cr.P.C. is clear and that the police custody if at all be granted by the Magistrate should be only during the period of first 15 days from the date of production of the accused before the magistrate and not later and that subsequent custody if any should only be judicial custody and the question of granting police custody after the expiry of first 15 days remand does not arise.

4. Section 167, Cr.P.C., 1973 after some changes reads as under:

"167. Procedure when investigation cannot be completed in twenty-four hours.- (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twent -four hours fixed by S. 57, and there are grounds for believing that the accusation or information is well founded, the officer-incharge of the police station or the police officer making the investigation, he if is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether, he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence.,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be so detained in custody so long as he does not furnish bail.

Explanation II- If any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorising detention.

(2A) Notwithstanding anything contained in sub-sec. (1) or sub-sec. (2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody, as he may think for a term not exceeding seven days in the aggregate, and, on the expiry of the period of the detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this subsection, shall be taken into account in computing the period specified in paragraph 2(a) of the proviso to sub-section (2);

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him, or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify."

Before proceeding further it may be necessary to advert to the legislative history of this section. The old Section 167 of 1898 Code provided for the detention of an accused in custody for a term not exceeding 15 days on the whole. It was noted that this was honoured more in the breach than in the observance and that a practice of doubtful legality grew up namely the police used to file an incomplete preliminary charge-sheet and move the Court for remand under Section 344 corresponding to the present Section 309 which was not meant for during investigation. Having regard to the fact that there may be genuine cases where investigation might not be completed in 15 days, the Law Commission made certain recommendations to confer power on the Magistrate to extend the period of 15 days detention. These recommendations are noticed in the objects and reasons of the Bill thus:

"..... At present, Section 167 enables the Magistrate to authorise detention of an accused in custody for a term not exceeding 15 days on the whole. There is a complaint that this provision is honoured more in the breach than in the observance and that the police investigation takes a much longer period in practice. A practice of doubtful legality has grown whereby the police file a "preliminary" or incomplete chargesheet and move the Court for remand under Section 344 which is not intended to apply to the stage of investigation. While in some cases the delay in investigation may be due to the fault of the police, it cannot be denied that

there may be genuine cases where it may not be practicable to complete the investigation in 15 days. The Commission recommended that the period should be extended to 60 days, but if this is done, 60 days would become the rule and there is no guarantee that the illegal practice referred to above would not continue. It is considered that the most satisfactory solution of the problem would be to confer on the Magistrate the power to extend the period of extension beyond 15 days, whenever he is satisfied that adequate grounds exist for granting. such extension....."

The Joint Committee, however, with a view to have the desired effect made provision for the release of the accused if investigation is not duly completed in case where accused has been in custody for some period. Sub-sections (5) and (6) relating to offences punishable for imprisonment for two years were inserted and the Magistrate was authorised to stop further investigation and discharge the accused if the investigation could not be completed within six months. By the Cr. P. C. Amendment Act, 1978 Proviso (a) to sub-section (2) of Section 167 has been further amended and the Magistrate is empowered to authorise the detention of accused in custody during investigation for an aggregate period of 90 days in cases relating to major offences and in other cases 60 days. This provision for custody for 90 days is intended to remove difficulties which actually arise in completion of the investigation of offences of serious nature. A new sub-section (2A) also has been inserted empowering the Executive Magistrate to make an order for remand but only for a period not exceeding seven days in the aggregate and in cases where Judicial Magistrate is not available. This provision further lays down that period of detention ordered by such Executive Magistrate should be taken into account in computing the total period specified in clause (a) of sub-section (2) of Section 167; Now coming to the object and scope of Section 167 it is well settled that it is supplementary to Section 57. It is clear from Section 57 that the investigation should be completed in the first instance within 24 hours if not the arrested person should be brought by the police before a magistrate as provided under Section 167; The law does not authorise a police officer to detain an arrested person for more than 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate Court. Sub-section (1) of Section -167 covers all this procedure and also lays down that the police officer while forwarding the accused to the nearest magistrate should also transmit a copy of the entries in the diary relating to the case. The entries in the diary are meant to afford to the magistrate the necessary information upon which he can take the decision whether the accused should be detained in the custody further or not. It may be noted even at this stage the magistrate can release him on ball if an application is made and if he is satisfied that there are no grounds to remand him to custody but if he is satisfied that further remand is necessary then he should act as provided under Section 167; It is at this stage sub-section (2) comes into operation which is very much relevant for our purpose. It lays down that the magistrate to whom the accused person is thus forwarded may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as he thinks fit for a term not exceeding fifteen days in the whole. If such magistrate has no jurisdiction to try the case or commit it for trial and if he considers further detention unnecessary, he may order the accused to be forwarded to a magistrate having such jurisdiction. The section is clear in its terms. The magistrate under this section can authorise the detention of the accused in such custody as he thinks fit but it should not exceed fifteen days in the whole. Therefore the custody initially should not exceed fifteen days in the whole. The custody can be police custody or judicial custody as the magistrate thinks fit. The words "such custody" and "for a term not exceeding fifteen days in the whole" are very significant. It is also well settled now that the period of fifteen days starts running as soon as the accused is produced before the Magistrate.

5. Now comes the proviso inserted by Act No. 45 of 1978 which is of vital importance in deciding the question before us. This proviso comes into operation where the magistrate thinks fit that further detention beyond the period of fifteen days is necessary and it lays down that the magistrate may authorise the detention of the accused person otherwise than in the custody of the police beyond the period of fifteen days. The words "otherwise than in the custody of the police beyond the period of fifteen days" are again very significant.

6. The learned Additional Solicitor General appearing for the C.B.I. contended that a combined reading of Section 167(2) and the proviso therein would make it clear that if for any reason the police custody cannot be obtained during the period of first fifteen days yet a remand to the police custody even later is not precluded and what all that is required is that such police custody in the whole should not exceed fifteen days. According to him there could be cases where a remand to police custody would become absolutely necessary at a later stage even though such an accused is under Judicial custody as per the orders of the magistrate passed under the proviso. The learned Additional Solicitor General gave some instances like holding an identification parade or interrogation on the basis of the new material discovered during the investigation. He also submitted that some of the judgments of the High Courts particularly that of the Delhi High Court relied upon by the Chief Metropolitan Magistrate do not lay down the correct position of law in this regard. In Gian Singh v. State (Delhi Administration), 1981 Cri LJ 100 (Delhi) a learned single Judge of the High Court held that once the accused is remanded to judicial custody he cannot be sent back again to police custody in connection with or in continuation of the same investigation even though the first period of fifteen days has not exhausted. Again the same learned Judge Justice M. L. Jain in Trilochan Singh v. The State (Delhi Administration), 1981 Cri LJ 1773 (Delhi), took the same view. In State (Delhi Administration) v. Dharam Pal, 1982 Cri LJ 1103 a Division Bench of the Delhi High Court overruled the learned single Judge's judgments in Gian Singh's case, (1981 Cri LJ 100) and Trilochan Singh's case, (1981 Cri LJ 1773). The Division Bench held that the words "from time to time" occurring in the Section show that several orders can be passed under Section 167(2) and that the nature of the custody can be altered from judicial custody to police custody and vice-versa during the first period of fifteen days mentioned in Section 167(2) of the Code and that after fifteen days the accused could only be kept in judicial custody or any other custody as ordered by the magistrate but not in the custody of the police. In arriving at this conclusion the Division Bench sought support on an earlier decision in State v. Mehar Chand, (1969) 5 Delhi Law Times 179. In that case the accused had been arrested for an offence of kidnapping and after the expiry of the first period of fifteen days the accused was in judicial custody under Section 344, Cr. P.C. (old Code). At that stage the police found on investigation that an offence of murder also was prima facie made out against the said accused. Then the question arose whether the said accused who was in judicial custody should be sent to the police custody on the basis of the discovery that there was an aggravated offence. The magistrate refused to permit the accused to be put in police custody. The same was questioned before the High Court. Hardy, J. held that an accused who is in magisterial custody in one case can be allowed to be remanded to police custody in other case and on the same rule he can be remanded to police custody at a subsequent stage of investigation in the same case when the information discloses his complicity in more serious offences and that on principle, there is no difference at all between the two types of cases. The learned Judge further stated as under (1982 Cri LJ 1103, para 8):

"I see no insuperable difficulty in the way of the police arresting the accused for the second time for the offence for which he is now wanted by them. The accused being already in magisterial custody it is open to the,learned Magistrate under S. 167(2) to take the accused out of jail or judicial custody and hand him over to the police for the maximum period of 15 days provided in that section. All that he is required to do is to satisfy himself that a good case is made out for detaining the accused in police custody in connection with investigation of the case. It may be that the offences for which the accused is now wanted by the police relate to the same case but these are altogether different offences and in a way therefore it is quite legitimate to say that it is a different case in which the complicity of the accused has been discovered and police in order to complete their investigation of that case require that the accused should be associated with that Investigation in some way."

The Division Bench in Dharam Pal's case referring to these observations of Hardy, J. observed that "We completely agree with Hardy, J. in coming to the conclusion that the Magistrate has to find out whether there is a good case for grant of police custody". A perusal of the later part of the judgment in Dharam Pal's case would show that the Division Bench referred to these observations in support of the view that the nature of the custody can be altered from judicial custody to police custody or vice-versa during the first period of fifteen days mentioned in S. 167(2) of the Code, but however firmly concluded that after fifteen days the accused could only be in judicial custody or any other custody as ordered by the magistrate but not in police custody. Then there is one more decision of the Delhi High Court in State (Delhi Administration v. Ravinder Kumar Bhatnagar, 1982 Cri LJ 2366, where a single Judge after relying on the judgment of the Division Bench in Dharam Pal's case, (1982 Cri LJ 1103), held that the language of Section 167(2) is plain and that words "for a term not exceeding fifteen days in the whole" would clearly indicate that those fifteen days begin to run immediately after the accused is produced before the magistrate in accordance with sub-section (1) and the police custody cannot be granted after the lapse of the "first fifteen days". In State of Kerala v. Sadanadan, 1984 Ker LT 747: (1984 Cri LJ 1823) a single Judge of the Kerala High Court held that the initial detention of the accused by the magistrate can be only for fifteen days in the whole and it may be either police custody or judicial custody and during the period the magistrate has jurisdiction to convert judicial custody to police custody and vice versa and the maximum period under which the accused can be so detained is only fifteen days and that after the expiry of fifteen days the proviso comes into operation which expressly refers to police custody and enjoins that there shall be no police custody and judicial custody alone is possible when power is exercised under the proviso. The learned single Judge stated that in the case before him the accused has already been in police custody for fifteen days and therefore he could not be remanded to police custody either under Section 167 or Section 309, Cr. P.C.

7. The learned Additional Solicitor General submitted that the observations made by Hardy, J. in Mehar Chand's case, (1969 (5) Delhi LT 179), would indicate that during the investigation of the same case in which the accused is arrested and is already in custody if more offences committed in the same case come to light there should be no bar to turn over the accused to police custody even after the first period of fifteen days and during the period of ninety days or sixty days in respect of the investigation of the cases mentioned in provisos (a)(i) and (ii) respectively. It may be noted firstly that the Mehar Chand's case was decided in respect of a case arising under the old Code. If we examine the background in enacting the new Section 167(2) and the proviso (a) as well as Section 309 of the new Code it becomes clear that the legislature recognised that such custody namely police, judicial or any other custody like detaining the arrested person in Nari Sadans etc. should be in the whole for fifteen days and the further custody under the proviso to Section 167 or under Section 309 should only be judicial. In Chaganti Satyanarayana v. State of Andhra Pradesh, (1986) 3 SCC 141 : (AIR 1986 SC 2130), this Court examined the scope of Section 167(2) provisos (a)(i) and (ii) and held that the period of fifteen days, ninety days or sixty days prescribed therein are to be computed from the date of remand of the accused and not from the date of his arrest under Section 57 and that remand to police custody cannot be beyond the period of fifteen days and the further remand must be to judicial custody. Though the point that precisely arose before this Court was whether the period of remand prescribed should be computed from the date of remand or from the date of arrest under Section 57, there are certain observations throwing some light on the scope of the nature of custody after the expiry of the first remand of fifteen days and when the proviso comes into operation. It was observed thus (para 15, at p. 2135 of AIR):

"As sub-section (2) of Section 167 as well as proviso (1) of sub-section (2) of Section 309 relate to the powers of remand of a magistrate, though under different situations, the two provisions call for a harmonious reading insofar as the periods of remand are concerned. It would, therefore, follow that the words "15 days in the whole occurring in sub-section (2)of Section 167 would be tantamount to a period of "15 days at atime" but subject to the condition that if the accused is to be remanded to police custody the remand should be for such period as is commensurate with the requirements of a case with provision for further extensions for restricted periods, if need be, but in no case should the total period of remand to police custody exceed 15 days. Where an accused is placed in police custody for the maximum period of 15 days allowed underlaw either pursuant to a single order of remand or to more than one order, when the remand is restricted on each occasion to a lesser number of days, further detention of the accused, if warranted, has to be necessarily to Judicial custody and not otherwise. The legislature having provided for an accused being placed under police custody under orders of remand for effective investigation of cases has at the same time taken care to see that the interests of the accused are not jeopardised by his being placed under police custody beyond a total period of 15 days, under any circumstances, irrespective of the gravity of the offence or the serious nature of the case.

(emphasis supplied)

These observations make it clear that if an accused is detained in police custody the maximum period during which he can be kept in such custody is only fifteen days either pursuant to a single order or more than one when such orders are for lesser number of days but on the whole such custody cannot be beyond fifteen days and the further remand to facilitate the investigation can only be by detention of the accused in judicial custody.

8. Having regard to the words "in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole" occurring in sub-section (2) of Section 167 now the, question is whether it can be construed that the police custody, if any, should be within this period of first fifteen days and not later or alternatively in a case if such remand had not been obtained or the number of days of police custody in the first fifteen days are less whether the police can ask subsequently for police custody for full period

of fifteen days not availed earlier or for the remaining days during the rest of the periods of ninety days or sixty days covered by the proviso. The decisions mentioned above do not deal with this question precisely except the judgment of the Delhi High Court in Dharam Pal's case, (1982 Cri LJ 1103). Taking the plain language into consideration particularly the words "otherwise than in the custody of the police beyond the period of fifteen days" in the proviso it has to be held that the custody after the expiry of the first fifteen days can only be judicial custody during the rest of the periods of ninety days or sixty days and that police custody if found necessary can be ordered only during the first period of fifteen days. To this extent the view taken in Dharam Pal's case is correct.

9. At this juncture we want to make another aspect clear namely the computation of period of remand. The proviso to Section 167 (2) clearly lays down that the total period of detention should not exceed ninety days in cases where the investigation relates to serious offences mentioned therein and sixty days in other cases and if by that time cognizance is not taken on the expiry of the said periods the accused shall be released on bail as mentioned therein. In Chaganti Satyanarayana's case, (AIR 1986 SC 2130), it was held that . "It, therefore, stands to reason that the total period of 90 days or 60 days can begin to run from the date of order of remand". Therefore the first period of detention should be computed from the date of order of remand. Section 167(2A) which has been introduced for pragmatic reasons states that if an arrested person is produced before an Executive Magistrate for remand the said Magistrate may authorise the detention of the accused not exceeding seven days in aggregate. It further provides that the period of remand by the Executive Magistrate should also be taken into account for computing the period specified in the proviso i.e. aggregate periods of ninety days or sixty days. Since the Executive Magistrate is empowered to order detention only for seven days in such custody as he thinks fit, he should therefore either release the accused or transmit him to the nearest Judicial Magistrate together with the entries in the diary before the expiry of seven days. The section also lays down that the Judicial Magistrate who is competent to make further orders of detention, for the purposes of computing the period of detention has to take into consideration the period of detention ordered by the Executive Magistrate. Therefore on a combined reading of Section 167(2) and (2A) it emerges that the Judicial Magistrate to whom the Executive Magistrate has forwarded the arrested accused can order detention in such custody namely police custody or judicial custody under Section 167(2) for the rest of the first fifteen days after deducting the period of detention ordered by the Executive Magistrate. The detention thereafter could only be in Judicial custody . Likewise the remand under Section 309, Cr. P.C. can be only to judicial custody in terms mentioned therein. This has been concluded by this Court and the language of the Section also is clear. Section 309 comes into operation after taking cognizance and not during the period of investigation and the remand under this provision can only be to judicial custody and there cannot be any controversy about the same. (vide Natabar Parida v. State of Orissa, (1975) 2 SCC 220 : (AIR 1975 SC 1465).

10. The learned Additional Solicitor General, however, submitted that in some of the cases of grave crimes it would be impossible for the police to gather all the materials within first fifteen days and if some valuable information is disclosed at a later stage and if police custody is denied the investigation will be hampered and will result in failure of justice. There may be some force in this submission but the purpose of police custody and the approach of the legislature in placing limitations on this are obvious. The proviso to 9 Section 167 is explicit on this aspect. The detention in police custody is generally disfavoured by law. The provisions of law lay down that such detention can be allowed only in special circumstances and that can be only by a remand granted by a magistrate for reasons judicially scrutinised and for such limited purposes as the necessities of the case may require. The scheme of Section 167 is obvious and is intended to protect the accused from the methods which may be adopted by some overzealous and unscrupulous police officers. Article 22 (2) of the Constitution of India and Section 57 of Cr. P.C. give a mandate that every person who is arrested and detained in police custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of the arrest to the Court of the magistrate and no such person shall be detained in the custody beyond the said period without the authority of a magistrate. These two provisions clearly manifest the intention of the law in this regard and therefore it is the magistrate who has to judicially scrutinise circumstances and if satisfied can order the detention of the accused in police custody. Section 167(3) requires that the magistrate should give reasons for authorising the detention in the custody of the police. It can be thus seen that the whole scheme underlying the section is intended to limit the period of police custody. However, taking into account the difficulties which may arise in completion of the investigation of cases of serious nature the legislature added the proviso providing for further detention of the accused for a period of ninety days but in clear terms it is mentioned in the proviso that such detention could only be in the judicial custody. During this period the police are expected to complete the investigation even in serious cases. Likewise within the period of sixty days they are expected to complete the investigation in respect of other offences. The legislature however disfavoured even the prolonged judicial custody during investigation. That is why the proviso lays down that on the expiry of ninety days or sixty days the accused shall be released on bail if he is prepared to and does furnish bail. If as contended by the learned Additional Solicitor General a further interrogation is necessary after the expiry of the period of first fifteen days there is no bar for interrogating the accused who is in judicial custody during the periods of 90 days or 60 days. We are therefore unable to accept this contention.

11. A question may then arise whether a person arrested in respect of an offence alleged to have been committed by him during an occurrence can be detained again in police custody in respect of another offence committed by him in the same case and which fact comes to light after the expiry of the period of first fifteen days of his arrest. The learned Additional Solicitor General submitted that as a result of the investigation carried on and the evidence collected by the police the arrested accused may be found to be involved in more serious offences than the one for which he was originally arrested and that in such a case there is no reason as to why the accused who is in magisterial custody should not be turned over to police custody at a subsequent stage of investigation when the information discloses his complicity in more serious offences. We are unable to agree. In one occurrence it may so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If during the investigation his complicity in more serious offences during the same occurrence is disclosed that does not authorise the police to ask for police custody for a further period after the expiry of the first fifteen-days. If that is permitted then the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly, this would defeat the very object underlying Section 167; However, we must clarify that this limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. That would be a different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case they can require his detention in police custody for the purpose of associating him with the investigation of the other case. In such a situation he must be formally arrested in connection with other case and then

obtain the order of the magistrate for detention in police custody. The learned Additional Solicitor General however strongly relied on some of the observations made by Hardy, J. in Mehar Chand's case, (1969 (5) Delhi LT 179), extracted above in support of his contention namely that an arrested accused who is in judicial custody can be, turned over to police custody even after the expiry of first fifteen days at a subsequent stage of the investigation in the same case if the information discloses his complicity in more serious offences. We are unable to agree that the mere fact that some more offences alleged to have been committed by the arrested accused in the same case are discovered in the same case would by itself render it to be a different case. All these offences including the so-called serious offences discovered at a later stage arise out of the same transaction in connection with which the accused was arrested. Therefore there is a marked difference between the two situations. The occurrences constituting two different transactions give rise to two different cases and the exercise of power under Section 167(1) and (2) should be in consonance with the object underlying the said provision in respect of each of those occurrences which constitute two different cases. Investigation in one specific case cannot be the same as in the other. Arrest and detention in custody in the context of Section 167(1) and (2) of the Code has to be truly viewed with regard to the investigation of that specific case in which the accused person has been taken into custody. In S. Harsimran Singh v. State of Punjab, 1984 Cr LJ 253, a Division Bench of the Punjab and Haryana High Court considered the question whether the limits of police custody exceeding fifteen days as prescribed by Section 167(2) is applicable only to a single case or is attracted to a series of different cases requiring investigation against the same accused and held thus (para 10A):

"We see no inflexible bar against a person in custody with regard to the investigation of a particular offence being either re-arrested for the purpose of the investigation of an altogether different offence. To put it in other words, there is no insurmountable hurdle in the conversion of judicial custody into police custody by an order of the Magistrate under S. 167(2) of the Code for investigating another offence. Therefore, a re-arrest or second arrest in a different case is not necessarily beyond the ken of law".

This view of the Division Bench of the Punjab & Haryana High Court appears to be practicable and also conforms to Section 167; We may, however, like to make it explicit that such re-arrest or second arrest and seeking police custody after the expiry of the period of first fifteen days should be with regard to the investigation of a different case other than the specific one in respect of which the accused is already in custody. A literal construction of Section 167 (2) to the effect that a fresh remand for police custody of a person already in judicial custody during investigation of a specific case cannot under any circumstances be issued, would seriously hamper the very investigation of the other case the importance of which needs no special emphasis. The procedural law is meant to further the ends of justice and not to frustrate the same. It is an accepted rule that an interpretation which furthers the ends of justice should be preferred. It is true that the police custody is not the, be all and end-all of the whole investigation but yet it is one of its primary requisites particularly in the investigation of serious and heinous crimes. The legislature also noticed this and permitted limited police custody. The period of first fifteen days should naturally apply in respect of the investigation of that specific case for which the accused is held in custody. But such custody cannot further be held to be a bar for invoking a fresh remand to such custody like police custody in respect of an altogether different case involving the same accused.

12. As the points considered above have an important bearing in discharge of the day-to-day magisterial powers contemplated under Section 167(2), we thihk it appropriate to sum up briefly our conclusions as under:

13. Whenever any person is arrested under Section 57, Cr. P.C. he should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. If Judicial magistrate is not available, the police officer may transmit the arrested accused to the nearest Executive Magistrate on whom the judicial powers have been conferred. The Judicial Magistrate can in the first instance authorise the detention of the accused in such custody i.e. either police or judicial from time to time but the total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice versa. If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate along with the records . When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of the first period of fifteen days the further remand during the period of investigation can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction. Even if he is in judicial custody in connection with the investigation of the earlier case he can formally be arrested regarding his involvement in the different case and associate him with the investigation of that other case and the Magistrate can act as provided under Section 167(2) and the proviso and can remand him to such custody as mentioned therein during the first period of fifteen days and thereafter in accordance with the proviso as discussed above. If the Investigation is not completed within the period of ninety days or sixty days then the accused has to be released on bail as provided under the proviso to Section 167(2). The period of ninety days or sixty days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police. Consequently the first period of fifteen days mentioned in Section 167(2) has to be computed from the date of such detention and after the expiry of the period of first fifteen days it should be only judicial custody.

14. We may, however, in the end clarify that the position of law stated above applies to Section 167 as it stands in the Code. If there are any State amendments enlarging the periods of detention, different considerations may arise on the basis of the language employed in those amendments.

15. The appeals are accordingly dismissed.

Appeals dismissed.

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IN THE SUPREME COURT OF INDIA

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[Before : S.R.Pandian, K.Jayachandra Reddy]

Directorate of Enforcement

versus

Deepak Mahajan and another

Case No. : Criminal Appeal No. 537 of 1990., Date of Decision : 31/01/1994

Arrest and Custody -- Powers of the Court under Foreign Exchange Regulation Act, 1973 -- Criminal Procedure Code gives powers of arrest not only to the police officer and a Magistrate but also under certain circumstances or given situation to private persons.

When an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. To put it differently, the taking of the person into judicial custody is followed after the arrest of person concerned by the Magistrate on appearance or surrender. It will be appropriate, to note that in every arrest there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms.

Criminal Procedure Code, 1973

Sections 2(4), 156,174 and Chapter XII -- The authorised officer under Foreign Exchange Regulation Act or the Customs Act is empowered with the power of investigation even though he is not authorised to file final report -- The word 'investigation' cannot be limited only to the police investigation but on the other hand the said word is with wider connotation and flexible so as to include the investigation carried by any agency whether empower or authorised person not being a police officer under the direction of the magistrate to make an investigation.

It should not be lost sight of the fact that a police officer making an investigation of an offence representing the state files a report under Section 173 of the Code and becomes the complainant, whereas the prosecuting agency under the Special Act files a complaint as a complainant like under Section 61 of FERA and under Section 137 of Customs Act. After taking cognizance of the offence either upon a police reprot or upon receiving a complaint of facts, the magistrate has to proceed with the case. Therefore, the word 'investigation' cannot be limited only to police investigation but on the other hand the said word is with wider connotation and flexible and includes investigation carried on by any agency whether he be a police officer or empowered or authorised officer or a person not being a police officer under the directions of the magistrate to make a investigation vested with the power of investigation.

Criminal Procedure Code, 1973

Sections 4(2) and 167 -- Foreign Exchange Regulations Act, 1973; Section 35 -- Customs Act, 1962; Section 104 -- The operation of Section 4(2) of the Code is straight way attracted to be area of investigation, inquiry and trial of the offences under the special laws including FERA and Customs Act and therefore, Section 167 of the Code can be made applicable during the investigation or inquiry of an offence under Special Acts also in as much as there is no specific provision contrary to that excluding the opeation.

Section 4 is comprehensive and Section 5 is not in derogation of Section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). Thus the provision of the Code would apply to the extent in the absence of any contrary provisions in the Special Act or any special provision excluding the jurisdiction or applicability of the Code. In fact the second limb of Section 4(2) itself limits the application of the provision of the Code. The submission that there is no investigation within the terms of the Code in the field of FERA or Customs Act, Section 4(2) can have no part to play rejected. Therefore, operation of Section 4(2) is straightway attracted to the area of investigation and inquiry under the special laws including FERA and Customs Act and therefore, Section 167 Cr. P.C. would be applicable.

Sections 41,42,43 and 167 -- Powers regarding arrest and custody under Foreign Exchange Regulation Act, 1973 and Customs Act, 1962 -- The Code gives power of arrest not only to a police officer and a magistrate but also under certain circumstances or given situation to private persons -- Further when an accused appears before a magistrate or surrenders voluntarily, magistrate is empowered to take that accused person into custody and deal with him according to law -- Thus taking of a person into judicial custody is followed after the arrest of a person concerned by the magistrate on apearance or surrender.

Taking of a person into judicial custody is followed after the arrest of the person concerned by the magistrate on appearance or surrender. It will be appropriate to note that in every arrest, there is custody but not vice-versa and that both the words 'custody' and 'arrest' are not synonymous terms. If these two terms are interpreted as synonymous it is nothing but an ultra legalist interpretation which it under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences.

Section 167 -- Power of the Magistrate to invoke provisions of Section 167 -- For that purpose it is not necessary that arrest must be affected by police only and the Magistrate can himself arrest or order any person to arrest any offender if that offender has committed offence in his presence or within his local jurisdiction -- And if thereafter upon investigation the accused surrenders or is brought before the Magistrate, can exercise power under Section 167 and can order his judicial custody -- Thus when person arrested under Section 35 of Foreign Exchange Regulation Act or under Section 104 of Custom Act is brought before the Magistrate, the accused can be detained under Section 167(2).

To exercise power under Section 167, mere production of an arrestee before a competent Magistrate, by authorised officer or an officer empowered to arrest on a reasonable belief that he has been guilty of an offence punishable under the provisions of special act, the arresting officer is legally competent to make arrest. Sub-sections (1) and (2) of Section 167 would be applicable with regard to the production and detention of a person arrested under Section 35 of FERA and Section 104 of Customs Act and the Magistrate has jurisdiction under Section 167(2) to authorise detention of a person arrested by any authorised officer.

CUSTOMS ACT, 1962

Preamble -- Foreign Exchange Regulation Act, 1973; Preamble -These Acts were passed for economic development of the country and augumentation of revenue and the court can look into the intention of the legislature and can go behind the words to give effect to the intention of the legislature -- Otherwise a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislature inane.

Normally the courts should be slow to pronounce the legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will and take its plain ordinary grammatical meaning of the words of the enactment but to winch up the legislative intent it is permissible to take into account that ostensible purpose and object and the real legislative intent. Therefore, it cannot be believed that the provisions of FERA and Customs Act were passed for any other purpose rather than their ostensible purpose, the vital of which being the economic development of the country.

Section 104 -- Criminal Procedure Code, 1973; Section 167(1) and (2) -- Persons arrested under Section 104 of Customs Act or under Section 35 of Foreign Exchange Regulation Act, are liable to be detained under Section 167(2) By the Magistrate when produced before him, such person being characteristics of the accused.

The word 'Accused' or 'Accused person' is used only in a generic sense in Section 167(1) and (2) denoting the 'person' whose liberty is restrained on his arrest by a competent authority on well founded information or formal accusation or incident. Therefore, the word 'accused' limited to the scope of Section 167(1) and (2) particularly in the light of explanation to Section 273 of the Code, includes 'any person arrested'. The inevitable consequence that follows is that 'any person is arrested' occurring in Section 167 (1) takes within its ambit 'every person arrested' under Section 35 of FERA or Section 104 of Customs Act also as the case may be and such person arrested can be detained by the Magistrate in exercise of his power under Section 167(2) of the Code.

Statutes Referred :

1. Code of Criminal Procedure -- S.4(2) 2. Code of Criminal Procedure -- S.167 3. Code of Criminal Procedure -- S.26(b) 4. Code of Criminal Procedure -- S.26(b) 5. Code of Criminal Procedure -- S.2(h) 6. Code of Criminal Procedure -- S.2(h) 7. Code of Criminal Procedure -- S.167(2) 8. Code of Criminal Procedure -- S.167(2) 9. Code of Criminal Procedure -- S.167(1) 10. Code of Criminal Procedure -- S.167 11. Code of Criminal Procedure -- S.4(2) 12. Code of Criminal Procedure -- Ch.12 13. Code of Criminal Procedure -- Ch.12 14. Code of Criminal Procedure -- S.5 15. Code of Criminal Procedure -- S.5 16. Code of Criminal Procedure -- S.167(1) 17. Customs Act -- S.104 18. Foreign Exchange Regulation Act -- S.35 19. Customs Act -- Ch.13 20. Foreign Exchange Regulation Act -- S.35(2) 21. Foreign Exchange Regulation Act -- S.38 22. Foreign Exchange Regulation Act -- S.33(4)(0) 23. Foreign Exchange Regulation Act -- S.104(2) 24. Foreign Exchange Regulation Act -- S.45 25. Foreign Exchange Regulation Act -- S.104(1) 26. Constitution of India -- Art.20(3) 27. Constitution of India -- Art.20(3)

Cases Referred :

AIR 1992 SC1795 : (1992) 3 SCC 259 : 1992 Cri LJ 2761 92, 93

(1990) 2 DL 23 (FB) (Approved) 4, 5, 6, 7, 8, 35, 100, 103, 104, 137

1990 Cri LJ 704 : 1989 LW (Cri) 325 (Approved) 103, 104

AIR 1986 SC2130 : (1986) 2 SCR 1128 : (1986) 3 SCC 141 7, 44

AIR 1984 SC718 : (1984) 2 SCR 914 : 1984 Cri LJ 647 126

AIR 1984 SC5 : (1983) 4 SCC 701 : 1984 Cri LJ 1 125

(1984) 15 ELT 353 : 1982 (2) 23 Guj LR 792 (Approved) 103, 117

1984 Cri LJ 949 : 1984 Ker LT 215 (Approved) 103

1984 Cri LJ 134 : AIR 1984 NOC 103 : 1983 Mad LW (Cri) 289 (FB) 48, 50

1983 Cri LJ 1860 : 1984 Ker LT 1 (Approved) 103

1982 Cri LJ 747 : (1982) 2 Chand LR (Cri) 134 (Delhi) 4

AIR 1981 SC928 : (1981) 1 SCC 627 : 1981 Cri LJ 470 43

AIR 1980 SC 1632 : (1980) 3 SCR 383 53

AIR 1980 SC785 : (1980) 2 SCC 559 : 1980 Cri LJ 426 51

AIR 1979 SC1803 : (1980) 1 SCR 69 : 1979 Lab IC 1261 30

AIR 1979 SC1360 : (1979) 3 SCR 169 : 1979 Cri LJ 1036 43

AIR 1978 SC1025 : (1978) 2 SCC 424 : 1978 Cri LJ 968 83

AIR 1978 SC548 : 1978 Lab IC 467 : (1978) 2 SCC 213 28

AIR 1977 SC965 : (1977) 2 SCR 904 31

AIR 1976 SC1167 : (1976) 2 SCC 302 : 1976 Cri LJ 860 91

AIR 1975 SC1465 : (1975) 2 SCC 220 : 1975 Cri LJ 1465 42

AIR 1973 SC1196 : (1973) 1 SCC 696 : 1973 Cri LJ 921 93

AIR 1972 SC711 : (1972) 1 SCC 564 : 1972 Cri LJ 505 42

AIR 1971 SC1087 : (1971) 1 SCC 847 : 1971 Cri LJ 933 92

AIR 1971 SC186 : (1970) 3 SCC 501 : 1971 Cri LJ 253 42

AIR 1970 SC1065 : (1969) 2 SCR 613 : 1970 Cri LJ 998 98, 108

AIR 1970 SC940 : (1969) 2 SCR 461 : 1970 Cri LJ 863 90, 91, 93, 98, 108

AIR 1966 SC1987 : (1967) 1 SCR 77 : 1966 All LJ 778 30

AIR 1966 SC1746 : (1966) 3 SCR 698 : 1966 Cri LJ 1353 108

AIR 1962 SC276 : (1962) 2 SCR 338: 1962(1) Cri LJ 217 108

AIR 1962 SC63 : (1962) 2 SCR 694 : 1962(1) Cri LJ 106 133

AIR 1961 SC1808 : (1962) 3 SCR 10 : 1961(2) Cri LJ 856 87, 89

AIR 1961 SC1107 : 1961) 2 SCR 295 28

AIR 1961 SC29 : (1961) 1 SCR 417 80, 88

AIR 1960 SC1125 : (1961) 1 SCR 14 : 1960 Cri LJ 1504 88, 89

AIR 1959 SC707 : 1989 Supp (2) SCR 201 : 1959 Cri LJ 920 107

AIR 1955 SC435 : 1955 Cri LJ 1010 : 1955 SCJ 403 133

AIR 1955 SC196 : (1955) 1 SCR 1150 : 1955 Cri LJ 526 106, 107

AIR 1954 SC300 : 1954 SCR 1077 : 1954 Cri LJ 865 78, 80

(1951) 1 All ER 839 (HL) 28

(1949) 2 All ER 155 : (1949) 2 KB 481, Seaford Court Estates Ltd. v. Asher 27

(1944) 144 F (2d) 608 (CCA), Guiseppi v. Walling 29

(1910) 11 Cri LJ 251 (2) : 7 Mad LT 104 72

JUDGMENT/ORDER:
S. Ratnavel Pandian, J.:—

The salient and indeed substantial legal question which looms for determination in this appeal may be formulated as follows:-

Whether a Magistrate before whom a person arrested under sub-section (1) of S. 35 of the Foreign Exchange Regulation Act of 1973 which is in pari materia with sub-section (1) of S. 104 of the Customs Act of 1962, is produced under sub-section (2) of S. 35 of the Foreign Exchange Regulation Act, has jurisdiction to authorise detention of that person under S. 167(2) of the Code of Criminal Procedure?

2. As a preclude to the judgment, we would like to state that though the appellant in the present case has been arrested under sub-section (1) of S. 35 of Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the 'FERA') and taken to the Magistrate under sub-section (2) thereof, we while disposing the legal questions posed for determination, are inclined to deal with the corresponding provisions under the Customs Act also for the reasons -(i) that the scheme for both the FERA and the Customs Act is more or less the same; (ii) the provisions relating to the arrest and production of the arrestee before the Magistrate are identical; (iii) the arguments by both the parties have been advanced pertaining to provisions of both the Acts; and (iv) almost all the decisions cited relate to the provisions of both the Acts.

3. There is a vertical cleavage of opinion amongst the various High Courts on the above legal question which has come up for adjudication in the present appeal.

4. This appeal, by special leave is directed against the judgment of the High Court of Delhi dated 6th April 1990* rendered by a five-Judges Bench in Criminal Writ No. 316 of 1989 overruling the decision of the same High Court in Union of India v. O. P. Gupta, 1990 (2) Delhi Lawyer 23 (FB) rendered in Criminal Writ Nos. 104 and 116 of 1984 by a three-Judges Bench reversing an earlier decision in Dhalam Chand Baid v. Union of India, 1982 Cri LJ 747 (Delhi) which was decided by a Division Bench of the same High Court holding that a Magistrate has no power to remand a person accused of an offence punishable under the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as 'FERA') to judicial custody.

* Reported in 1991 Cri LJ 1124 (FB)

5. Though normally, it may not be necessary to make any reference about the constitution of a particular Bench which is the prerogative right of the Chief Justice of the High Court concerned, yet regrettably in this case, it has become unavoidable to make reference concerning the constitution of the Bench since during the course of the arguments, a diatribe, though not justifiable was made about the formation of the Bench, presided over by Charanjit Talwar, J. who gave a dissenting judgment in the case of O. P. Gupta ((1990) 2 DL 23 (FB)).

6. In Gupta's case ((1990) 2 DL 23 (FB)) the Bench was presided over by Yogeshwar Dayal, J. (as he then was)-and two other learned Judges, namely, Charanjit Talwar and Malik Sharief-ud-din, JJ. of whom Charanjit Talwar, J. gave his dissenting judgment.

7. When the decision of Gupta's case ((1990) 2 DL 23 (FB)) was holding the field, the respondent No. 1, namely. Deepak Mahajan was arrested on 13th March, 1989 by the officers of the Enforcement Directorate for an offence punishable under the provisions of FERA and taken before the Additional Chief Metropolitan Magistrate, New Delhi on the next date as per the mandate of sub-section (2) of Section 35 of the said Act. An application under S. 167(2) of the Code of Criminal Procedure (hereinafter referred to as 'the Code') was moved by the Enforcement Officer seeking petitioner's detention under judicial custody commonly known in the legal parlance as 'judicial remand' on the ground that it was necessary to complete the investigation. On the very same day, the respondent unsuccessfully moved the Court for bail. The Magistrate remanded the first respondent to judicial custody for fourteen days and subsequently extended the detention period. The first respondent challenged the jurisdiction of the Magistrate in authorising the detention (remand) and the subsequent consecutive extensions. But his plea was rejected on the basis of the decision in Gupta's case. This order of the Magistrate was impugned before the High Court. The Division Bench of the High Court comprising of Charanjit Talwar, V. B. Bansal, JJ. in the light of the decision of this Court in Chaganti Satyaranayana v. State of Andhra Pradesh, AIR 1986 SC 2130 : 1986 (2) SCR 1128 holding that the powers of remand vested in a Magistrate become exercisable only after an accused is produced before him in terms of sub-section(l) of S.167 of the Code, referred the matter by its order dated 12th March, 1980 to a larger Bench opining that the law laid down in Gupta's case was no longer a good law and it required re-consideration. The learned Chief Justice of the High Court on such reference constituted a Full Bench comprising of Charanjit Talwar, J. C. Jam and V. B. Bansal, JJ. This three-Judges Bench after hearing the matter for sometime expressed their view that the case should be heard and decided by a five-Judges Bench since the judgment in Gupta's case was already decided by a three-Judges Bench. It was under those circumstances, the Bench was constituted comprising of Charanjit Talwar, Malik Sharief-ud-Din, Sunanda Bhandare, P. K. Bahri and R. L. Gupta, JJ. Thus the said case was heard by a five-Judges Bench.

8. By majority (per Charanjit Talwar, Sunanda Bhandare and P. K. Bahri, JJ.) the decision in Gupta's case ((1990) 2 DL 23 (FB)) has been overruled though Malik Sharief-ud-Din and R. L. Gupta, JJ. gave their separate dissenting judgment. The result was that the dictum laid down in Gupta's case to the effect that there is "power available to a Magistrate under S. 167(2) of the Code to commit to custody a person produced before him by a Customs Officer under S. 104 of the Customs Act", has been overruled. However, the conclusion of Gupta's case that "Section 437 of the Code of Criminal Procedure does not confer implied power of

remand on a Magistrate" has been upheld.

9. Consequent upon the above dictum by majority, it has been held in the present case that the Magistrate has no power to remand a person produced before him in accordance with S. 35(2) of FERA.

10. In this connection, be it noted that the provisions of S. 35 of FERA (which corresponds to S. 19-B of the old FERA (Act VII of 1947) and sub-sections (1) to (3) of S. 104 of the Customs Act are identical and they do not explicitly lay down the procedure as to how the Magistrate should deal with an arrestee, when brought before him either by the Offic6-of the - Enforcement Directorate or the Customs Officer, as the case may be.

11. For proper understanding and scrutiny of this rule, let us reproduce the relevant provisions of S. 35 of FERA and S. 104 of the Customs Act.

" Section 35 of FERA

(1) If any officer of Enforcement authorised in this behalf by the Central Government, by general or special order, has reason to believe that any person in India or within the Indian customs waters has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

(2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a Magistrate.

(3) Where any officer of Enforcement has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has, and is subject to, under the Code of Criminal Procedure, 1898 (5 of 1898).

Section 104 of the Customs Act

(1) If any officer of Customs empowered in this behalf by general or special order of the Collector of Customs has reason to believe that any person in India or within the Indian Customs Waters has been guilty of an offence punishable under S. 135, he may arrest such person and shall, as soon as may be, informed him of the grounds for such arrest.

(2) Every person arrested under sub-section (1) shall, without unnecessary delay, be taken to a Magistrate.

(3) Where an officer of Customs has arrested any person under sub-section (1), he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police station has, and is subject to, under the Code of Criminal Procedure, 1898 (5 of 1898).

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence under this Act shall not be cognizable.

12. Though there is no specific provision in FERA as sub-section (4) of S. 104 of the Customs Act, Section 62 speaks of non-cognizable offences and that Section reads as follows:

"62. Certain offences to be non-cognizable - Subject to the provisions of S. 45 and notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), an offence punishable under S. 56 shall be deemed to be non-cognizable within the meaning of that Code."

13. Sub-section (2) of S. 61 restricts a Court in taking cognizance of certain offences and also in cases of certain offences except under certain conditions. That provision reads thus:

"61. Cognizance of offences..... ....

(2) No Court shall take cognizance -

(i) of any offence punishable under sub-section (2) of Section 44 or sub-section (1) of Section 58,-

(a) Where the offence is alleged to have been committed by an officer of Enforcement not lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Central Government;

(b) Where the offence is alleged to have been committed by an officer of Enforcement lower in rank than an Assistant Director of Enforcement, except with the previous sanction of the Director of Enforcement; or

(ii) of any offence punishable u/ S. 56 or Section 57, except upon complaint in writing made by -

(a) the Director of Enforcement; or

(b) any officer authorised in writing in this behalf by the Director of Enforcement or the Central Government; or

(c) any officer of the Reserve Bank authorised by the Reserve Bank by a general or special order:

Provided that where any such offence is the contravention of any of t6e provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission."

14. The key questions that come up for consideration are whether a Magistrate before whom a person arrested under S. 35 is taken can detain that arrestee to judicial custody and if not, what the Magistrate is expected to do? To answer those questions, we have to examine sub-section (2) of S. 35 of FERA and sub-section (2) of S. 104 of the Customs Act which are in pari materia reading:

"Every person arrested under sub-section (1) shall, without unnecessary delay be taken to a Magistrate."

15. Apart from the power of arrest provided under S. 35 of the FERA, Section 45 of that Act empowers any police officer not below the rank of a Sub-Inspector of Police, or any other officer of the Central Government or State Government authorised by the Central Government in this behalf to enter into any public place and search and also arrest without warrant any person found therein who is reasonably suspected of having committed or of committing or of being about to commit any contravention of the provisions of sub-section (1) of Section 8. The procedure to be followed, after effecting such arrest is contemplated under sub-section (2) of S. 45 which states that 'where any person is arrested under sub-section (1) by an officer other than a police officer, such officer shall, without unnecessary delay, take or send the person arrested before a Magistrate having jurisdiction or before the officer-in-charge of a police station. In this context, a perplexed question arises as to what the Magistrate or the police officer has to do in case the arrestee under S. 45(1) of FERA is taken or sent before him? Section 46 lays down the procedure in respect of foreign exchange or any other goods seized by police officers. Though we are not very much concerned, in this case, with the procedure laid down in S. 46, the fact remains that in the FERA, the police officers are given some independent authority to act in exercise of certain provisions of this Act. There is no provision in the Customs Act similar to Ss. 45 and 46 of the FERA. However, S. 151 of Customs Act empowers and requires certain specified officers enumerated under clauses (a) to (e) to assist officers of Customs in the execution of the Act. One of the officers enumerated under clause (c) is 'officers of police'. But this section does not empower police officers to exercise the powers conferred upon customs officers by and under the Act but only authorises and requires the police officers to assist the customs officer in the exercise of their powers.

16. The 'proper officer' referred to in various provisions of the Customs Act, who is to perform any function under the said Act, means the officer of Customs who is assigned those functions by the Board or Collector of Customs as defined under clause (34) of S. 2 of Customs Act, but it does not include the Officers of Police or any other Officers enumerated under S. 151. Therefore, the police officers have no independent role to play in exercise of the powers under the Customs Act as in Ss. 45 and 46 of the FERA.

17. For the disposal of this appeal, we have to deal with the intendment and application of various provisions of the FERA particularly Ss. 35, 45, 416, S. 104 of Customs Act, S. 68 of the Gold Control Act and various provisions of the Code of Criminal Procedure in particular Ss. 4(2), 41, 56, 57, 157(2), 167(1)(2), 436,437 and the allied provisions, in the light of the principles of law enunciated by the judicial pronouncements of this Court as well as of some High Courts. In fact, in the impugned judgment, the High Court also has examined all those provisions from various angles, but the question would be whether the interpretation given and the conclusion arrived at by the majority of the Court below can be sustained ?

18. Reverting to the judgment under challenge, Charanjit Talwar, J. in his separate judgment with which Sunanda Bhandare and P. K. Bahri, JJ. have agreed, has given the following reasons for his conclusions. Those being:

(1) Neither an officer of Enforcement nor the Customs Officer within the meaning of the provisions of FERA or Customs Act respectively is a police officer, in charge of a police station or a police officer making an investigation as contemplated under S. 167(1) of the Code and, therefore, a Magistrate before whom an arrestee is taken or sent by an Enforcement Officer or Customs Officer, as the case may be, cannot authorise the detention of the persons, so produced or presented, either to judicial custody or to the custody of the arrestor or make subsequent periodical extension of detention or remand in exercise of the powers under S. 167(2) of the Code. In other words, the power to arrest a person coupled with the duty to produce or present him before a Magistrate under S. 35 of FERA or S. 104 of Customs Act ipso facto does not attract the operation of clauses (1) and (2) of S.167 of the Code.

(2) Neither the Officer of Enforcement authorised under S. 35 of FERA nor the Officer of Customs empowered under S. 104 is a police officer nor is the person arrested by any of them is yet an accused triable by a Magistrate having jurisdiction or an accused to be committed for trial at that stage.

(3) Neither the Officer of Enforcement nor the Customs Officer is empowered with the power of investigation as contemplated under Chapter XII of the Code or under any specific provisions of the special laws.

(4) Neither the Officer holding inquiry under the provisions of FERA or the Customs Act can exercise the power of investigation as contemplated under Chapter XII of the Code by virtue of S. 4(2) of the Code.

(5) The power conferred on such authorised or empowered Officer to make arrest of any person on reasonable belief that such person has been guilty of an offence punishable under the provisions of FERA or Section 135 of the Customs Act, as the case may be, and to produce the arrestee before a Magistrate is though similar with a duty cast on a police officer as under Ss. 56 and 57 of the Code, those officers are riot equivalent to police officers with the power of investigation into the commission of an offence as empowered under Chapter XII of the Code though they are enjoying the limited power, as given to the officer in charge of a police station under the Code for the purpose of releasing an arrestee on bail or otherwise.

19. Ere, we turn to the legal issues raised by the respective parties, it has become inevitably necessary to first examine the issues on the legal principle and then to interpret the construction of the language of the statute, deployed both implicitly and explicitly with

reference to the provisions of the Code and of the other allied special laws.

20. Manifestly, the significant and axial issue that arises in this appeal for decision is pristinely a legal question which we have indicated in the psoemial (sic) part of this judgment and which we have to examine in the backdrop of the various provisions of the general procedural laws, keeping in mind of the dividing arguendo and the shades of divergent judicial opinions of various High Courts though the controversy centers around a short point.

21. In order to resolve that controversy, it has become essential to focus our attention on the task of proper application of the concerned law by ascertaining the purposeful meaning of the language deployed, the spirit and sense which the legislature has aimed and intended to convey and the conclusions to be drawn which are in the tenor of the law though not within the letter of the law.

22. In the background of the above principle of statutory interpretation, now coming to and dealing with the legal challenges, several vital queries have to be considered and answered. Those are:

(1) Whether the jurisdiction of the Magistrate to authorise detention of an arrestee produced before him either in judicial custody or otherwise under S. 167(2) of the Code is completely excluded or ousted by the absence of any specific provision in the FERA or the Customs Act empowering the Magistrate to 'authorise the detention' of the arrestee under the Code?

(2) When the Jurisdiction of the Magistrate to authorise detention is not expressly forbidden by any specific exclusionary provision and when such exclusion of Jurisdiction cannot be clearly implied or readily inferred, does the detention authorised by the Magistrate either to judicial custody or otherwise become ab initio void and illegal and can the Magistrate be said to have exceeded or abused his authority?

(3) What is the procedure to be followed and the order required to be passed by the Magistrate when a person arrested under the FERA or Customs Act is presented before him?

(4) When the Officer of Enforcement or Customs Officer is not inclined to release the arrestee on bail or otherwise by exercising the power under sub-section (3) of S. 35 of FERA or S. 104 of the Customs Act, as the case may be, but produces the arrestee before a Magistrate as mandated by sub-section (2) of the above said provisions, will it not be a legal absurdity to say that the Magistrate should forthwith let go the arrestee without ordering detention and also extension of further detention or remand? and

(5) Whether the Magistrate has no other alternative except to release that arrested person, produced before him on bail or direct him to be freed unconditionally and whether the Magistrate is completely stripped off his authority to refuse bail and take him to judicial custody?

23. The above questions are some of the legal challenges canvassed before the Full Bench of the High Court which by a majority opinion has negatively answered.

24. Keeping in view the cardinal principle of law that every law is designed to further the ends of justice but not to frustrate on the mere technicalities, we shall deal with all those challenges in the background of the principles of statutory interpretations and of the purpose and the spirit of the concerned Acts as gathered from their intendment.

25. The concerned relevant provisions of the Acts with which we are concerned, no doubt, pose some difficulty in resolving the question with regard to the jurisdiction of the Magistrate authorising detention and subsequent extension of the same when the provisions of those Acts are narrowly and literally interpreted. Though the function of the Courts is only to expound the law and not to legislate, nonetheless the legislature cannot be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of the law. In such circumstances, it is the duty of the Court to mould or creatively interpret the legislation by liberally interpreting the statute.

26. In Maxwell on Statutes (10th Edn.) at page 229, the following passage is found:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence..... Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

27. In Seaford Court Estates Ltd. v. Asher, 1949-2 All ER 155 at p. 164, Denning, L. J. said:

"When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and then he must supplement the written word so as to give "force and life" to the intention of the legislature..... A Judge should ask himself the question how if the, makers of the Act had themselves come across this ruck in the texture of it, they would have strengthened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

28. Though the above observations of Lord Denning were disapproved in appeal by the House of Lords in 1951 (1) All England Law Reports 839 (HL), Sarkar, J. speaking for the Constitution Bench in M. Pentiah v. Muddala Veeramallapa 1961 (2) SCR 295 : (AIR 1961 SC 1107) adopted that reasoning of Lord Denning. Subsequently also, Beg, C. J. in Bangalore Water Supply v. A. Rajappa, AIR 1978 SC 548 approved the observations of Lord stating thus (at p. 552 of AIR 1978):

"Perhaps with the passage of time, what may be described as the extension of a method resembling the "armchair rule" in the construction of wills, Judges can more frankly step into the shoes o the legislature where an enactment leaves its own intentions in much too nebulous or uncertain a state. "

(Emphasis supplied)

29. It will be befitting, in this context, to recall the view expressed by Judge Frank in Guise pi v. Walling, 144F (2d) 608 pp. 620, p 622 (CCA 2d, 1944) which is quoted in 60 Harvard Law Review 370, p. 372 reading thus:

"The necessary generality in the wordings of many statutes, and ineptness of drafting in others frequently compels the Court, as best as they can, to fill in the gaps, an activity which no matter how one may label it, is in part legislative. Thus the Courts in their way, as administrators in their way perform the task of supplementing statutes. In the case of Courts, we call it 'interpretation' or 'filling in the gaps'; in the case of administrators we call it 'delegation' or authority to supply the details.

30. Subba Rao, C. J. speaking for the Bench in Chandra Mohan v. State of Uttar Pradesh, 1967 (1) SCR 77 : (AIR 1966 SC 1987) has pointed out that the fundamental rule of interpretation is that in construing the provisions of the Constitution or the Act of the Parliament, the Court "will have to find out the express intention from the words of the Constitution or the Act, as the case may be ....." and eschew the construction which will lead to absurdity and give rise to practical inconvenience or make the provisions of the existing law nugatory.

A. P. Sen, J. in Organo Chemical Industries v. Union of India, 1980 (1) SCR, 69 : (AIR 1979 SC 1803) has stated thus (atp. 1817 of AIR 1979):

"A bare mechanical interpretation of the words 'devoid of concept or purpose' will reduce most of legislation to futility. It is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole."

31. Krishna Iyer, J. has pointed out in his inimitable style in Chairman, Board of Mining Examination and Chief Inspector of Mines v. Ramjee, AIR 1977 SC 965 . "To be literal in meaning is to see the skin and miss the soul of the Regulation."

32. True, normally Courts should be slow to pronounce the legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will and take its plain ordinary grammatical meaning of the words of the enactment as affording the best guide, but to winch up the legislative intent, it is permissible for Courts to take into account of the ostensible purpose and object and the real legislative intent. Otherwise, a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislature inane. In cases of this kind, the question is not what the words in the relevant provision mean but whether there are certain grounds for infering that the legislature intended to exclude jurisdiction of the Courts from authorising the detention of an arrestee whose arrest was effected on the ground that there is reason to believe that the said person has been guilty of an offence punishable under the provisions of FERA or the Customs Act which kind of offences seriously create a dent on the economy of the nation and lead to hazardous consequences. Authorising, a few of which we have referred to above, show that in given circumstances, it is permissible for Courts to have functional approaches and look into the legislative intention and sometimes may be even necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result and the legislative exercise and its scope and object may not become futile.

33. In the light of the above exposition of the principle of law, we have no reason to believe and in fact do not believe that the provisions of the FERA and Customs Act were passed for any other purpose rather than their ostensible purposes, the vital of which being the economic development of the country and augmentation of revenue.

34. Bearing in mind the above principles of interpretation and the legal proposition, we shall now approach all the challenges canvassed and examine the legal issue on the principle of interpretation of law, more so with the aid of some other provisions of the procedural law so that no obscurity or absurdity may result in resolving the legal intricacy posed for consideration in this case.

35. To begin with, we shall examine the primary question whether Section 35(2) of FERA or 104 (2) of the Customs Act serves as, a substitute to Section 167(1) of the Code. To say in other words, whether Section 167(1) is replaced or substituted by the abovesaid provisions of two special Acts. The majority of the Judges in O. P. Gupta ((1990) 2 DL 23 (FB)) in paragraph 37 has posed a similar question for their consideration and answered that question in the following words:

"Section 167(1) of the Code is already replaced by Section 104(2) of the Customs Act and S. 35(2) of the Foreign Exchange Regulation Act. What is to be done to a person who is so produced before the Magistrate is dealt with only under Section 167(2) of the Code and not under Section 167(1) of the Code."

36. But Talwar, J. dissented from that view observing, "the power to arrest a person coupled with the duty to produce him or present him before the Magistrate ipso facto does not attract the provisions of Section 167 of the Code."

37. The same learned Judge (Talwar, J.) in his judgment in Deepak Mahajan (1991 Cri LJ 1124 (FB) (Delhi)) which is impugned herein again considered that question and reaffirmed his earlier stand rejecting altogether the contention that Section 35(2) and 104(2) of the Customs Act are substituted to Section 167(1) of the Code and that it is nothing but only a mismatch of the provisions of the Code and the provisions of the Customs Act and FERA, mainly on the ground that the prerequisite conditions required for invocation of Section 167(1) are conspicuously absent in the provisions of the other two special Acts, those being; (1) Section 167 of the Code specifically refers only a person arrested and detained in custody by a police officer on well founded

accusation or information; (2) there must be an investigation by a police officer as explained in S. 167(1) of the Code; (3) the words 'officer in charge of a police station or a police officer making the investigation, if he is not below the rank of Sub-Inspector' cannot be substituted by the words 'customs officer or officer of enforcement'; (4) there is no question of transmission of a copy of the entries in the diary as prescribed relating to the case in respect of the accused arrested, and (5) the person arrested by the officer of enforcement or customs officer is not an accused within the purview of the Code and that the officer concerned is not investigating the commission of an offence triable by a Magistrate though they have been given a limited power of the officer in charge of a police station "to grant or not to grant bail" and nothing more.

38. The majority of the Judges in Deepak Mahajan (1991 Cri LJ 1124 (FB) (Delhi)) have gone to the extent of holding that Section 4(2) of the Code cannot come in aid to invoke Section 167(2) even on interpretation of the provisions of those two special Acts read with Section 4(2) of the Code.

39. We shall now examine the provisions of Section 167(1) and (2) of the Code vis a vis Section 35(2) of FERA and Section 104(2) of the Customs Act having regard to the purpose for which these provisions are enacted.

40. The caption of Section 167 reads "Procedure when investigation cannot be completed in twenty-four hours". A conjoint reading of S. 57 (corresponding to Section 61 of the old Code) and S. 167(1) and (2) barring the provisos to sub-section (2) of the Code together, manifestly shows that the legislature has contemplated that the investigation of the offence in case of a person arrested without a warrant should be completed in the first instance within twenty-four hours and if the investigation cannot be completed within that period, then the Magistrate can authorise the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days.

41. The original proviso added to sub-see. (2) of Section 167 of the Code empowered the Magistrate to authorise detention of the accused persons otherwise than in custody Of the police, beyond the period of fifteen days for a total period not exceeding sixty days and on the expiry of the said period of sixty days, the accused person shall be released on bail. But subsequently, in place of the original proviso, the present proviso was substituted by Section 13A of Cr. P. C. (Amendment) Act, 1978 w.e.f. 18-12-1978 whereby the period of sixty days prescribed in general for all kinds of cases under the original proviso has been modified as ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and sixty days, where the investigation relates to any other offence. By Section 13-B of the said Amendment Act, original Explanation 1 was renumbered as Explanation II and Explanation I was added.

42. Sub-section (2A) to Section 167 of the Code has been inserted by Section 13(c) of the above said Amendment Act w.e.f. 18-12-1978. Before the introduction of the proviso to Section 167(2), further remand on the expiry of fifteen days was made on the strength of the Explanation to Section 344 of the old Code under the heading "Reasonable cause for remand" which corresponded to the present Explanation I of Section 309 of the new Code. The reasonable cause for such extension of remand was the collection of sufficient evidence within the first period of fifteen days to raise a suspicion that the accused might have committed an offence and that it appeared likely that further evidence might be obtained by such a remand. This extension of remand was for enabling the investigating agency to collect further material pertaining to the offence under investigation. See (1) A. Lakshmanrao v. Judicial Magistrate, Parvatipuram 1970 (3) S CC 501 (AIR 1971 SC 186); (2) Gouri Shankar Jha V. The State of Bihar 1972 (1) SCC 564 : (AIR 1972 SC 711), and (3) Natabir Parida v. State of Orissa 1975 (2) SCC 220 : (AIR 1975 SC 1465).

43. The present proviso a(i) and (ii) of Section 167(2) empowers the Magistrate to authorise the detention of the accused person otherwise than in the custody of the police beyond the period of fifteen days, if the Magistrate is satisfied that adequate grounds exist for doing so, but no Magistrate can authorise the detention of the accused person in custody for a total period exceeding ninety days or sixty days as the case may be. If the investigation is not completed within the prescribed period, the accused entitled to bail as embodied in the statute itself, provided the accused person is 'prepared to and does furnish bail' and the person released on bail under Section 167(2) of the Code should be deemed to have been so released under the provisions of Chapter XXXII for the purposes of that Chapter. Reference may be made to Hussainara Khatoon v. State of Bihar, 1979 (3) SCR 169: (AIR 1979 SC 1360), and Khatri v. State of Bihar. 1981 (1) SCC 627 : (AIR 1981 SC 928).

44. A doubtful question may arise as to whether the Magistrate can detain the accused person for further period beyond the prescribed period of ninety or sixty days if the accused is not prepared to and does riot furnish bail. This doubt is cleared by Explanation I of Section 167(2) stating that notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail. We feel that it is not necessary, in this context, to go in detail of the powers of the Magistrate to extend the period of detention u/S. 167(2) or to remand the accused resorting to Explanation I of S. 309 corresponding to Explanation of S. 344 of the old Code since that question is not germane to the issue pertaining to this case. However, reference may be made to Chaganti Satyanarayana v. State of Andhra Pradesh, 1986 (3)SCC 141: (AIR 1986 SC 2130) paragraph 10.

45. To say differently, Section 167(2) in its entirety uses the expression only 'detention' but not 'remand' (as found in Section 309 of the Code). Under Section 167(2), the Magistrate to whom the accused person is forwarded irrespective of the fact that whether he has or has not jurisdiction to try the case, authorises the detention of the accused in such custody as he thinks fit for a term not exceeding fifteen days and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction. Under the proviso, the Magistrate can authorise the detention for a specified period as envisaged in the proviso to subsection (2) of Section 167 of the Code beyond the period of fifteen days, on his being satisfied with the existence of adequate grounds.

46. Section 167 is one of the provisions failing under Chapter XII of the Code commencing from Section 154 and ending with Section 176 under the captain 'Information to the police and other powers to investigate'. Though Section 167(1) refers to the investigation by the police and the transmission of the case diary to the nearest Magistrate as prescribed under the Code etc., the

main object of sub-section (1) of Section 167 is the production of an arrestee before a Magistrate within twenty-four hours as fixed by Section 57 when the investigation cannot be completed within that period so that the Magistrate can take further course of action as contemplated under sub-section (2) of Section 167;

47. The first limb of sub-section (1) of Section 167 uses the expression "person is arrested and detained in custody". The word "accused" occurring in the second limb of sub-section (1) and in sub-section (2) of Section 167 refers only that person "arrested and detained in custody."

48. The word 'arrest' is derived from the French 'Arreter' meaning 'to stop or stay' and signifies a restraint of the person. Lexicologically, the meaning of the word 'arrest' is given in various dictionaries depending upon the circumstances in which the said expression is used. One of us, (S. Ratnavel Pandian, J. as he then was being the Judge of the High Court of Madras) in Roshan Beevi v. Joint Secretary, Government of Tamil Nadu, 1984 Cri LJ 134: (AIR 1984 NOC 103 (FB)) had an occasion to go into the gamut of the meaning of the word 'arrest' with reference to various text books and dictionaries, the New Encyclopedia Britanica, Halsbury's Laws of England, 'A Dictionary of Law' by L.B. Curzon, Black's Law Dictionary and 'Words and Phrases'. On the basis of the meaning given in those text books and laxicons, it has been held that "the word 'arrest' when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go wherever he pleases. When used in the legal sense in connection with criminal offences, an 'arrest' consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by seizure or detention of the person in the manner known to law, which is so understood by the person arrested."

49. There are various Sections in Chapter V of the Code titled "Arrest of persons" of which Sections 41, 42, 43 and 44 empower different authorities and even private persons to arrest a person in given situation. Section 41 deals with the power of a police officer to arrest any person without an order from a Magistrate and without a warrant. Section 42 deals with the power of a police officer to arrest any person who in the presence of a police officer has committed or has been accused of committing a non-cognizable offence and who refuses on demand "to give his name and residence or gives a name or residence which such officer has reason to believe to be false." Section 43 empowers any private person to arrest any person who in his presence commits a non-cognizable offence, or any proclaimed offender. Section 44 states that when any offence is committed in the presence of a Magistrate whether Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender and may thereupon subject to the provisions contained in the Code as to bail commit the offender to custody.

50. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice-versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomally resulting in serious consequences, vide Roshan Beevi (1984 Cri Li 134 (FB) (Mad)) (supra).

51. While interpreting the expression 'in custody' within the meaning of Section 439, Cr. P. C., Krishna Iyer, J. speaking for the in, Narain Singh v. Prabhakar Rajaram Kharote, 1980 (2) SCC 559 at 563: (AIR 1980 SC 785 at p. 787) observed that "He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the Court and submits to its directions. "

52. The next vital question, in this connection, that crops up for consideration is as to whether the registration of a case and the entries in the diary relating to that case as prescribed by the Code are sine-qua-non for a Magistrate taking into custody of a person when that person appears or surrenders or is brought before the Magistrate and whether that person should have assimilated the characteristic of 'an accused of an offence' at that stage itself within the meaning of subsection (1) of Section 167 or sub-section (1) of Section 437, Cr. P. C.

53. This question is in a way answered in Gurbaksh Singh Sibbia v. State of Punjab, 1980 (3) SCR 383 : (AIR 1980 SC l632). While examining the scope of Section 438 of the Code in that case, Chandrachud, C. J. speaking for the Constitution Bench held that "the filing of a first information re port is not a condition precedent to the exercise of the powers under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed."

54. The dictum laid down in that case indicates that the registration of a case and the entries of the case diary are not necessary for entertaining an application for grant of anticipatory bail, but the mere imminence of a likely arrest on a reasonable belief on an accusation of having committed a non-bailable offence, will be sufficient to invoke that provision.

55. In the backdrop of the above legal position, the conclusion that can be derived is that a Magistrate can himself arrest or order any person to arrest any offender if that offender has committed an offence in his presence and within his local jurisdiction or on his appearance or surrender or is produced before him and take that person (offender) into his custody subject to the bail provisions. If a case is registered against an offender arrested by the Magistrate and a follow up investigation is initiated, or if an investigation has emanated qua the accusation levelled against the person appearing or surrendering or being brought before the Magistrate, the Magistrate can in exercise of the powers conferred on him by Section 167(2) keep that offender or person under Judicial custody in

case the Magistrate is not inclined to admit that offender or person to bail.

56. The above deliberation leads to a derivation that to invoke Section 167(1), it is not an indispensable prerequisite condition that in all circumstances, the arrest should have been effected only by a police officer and none else and that there must necessarily be records of entries of a case diary. Therefore, it necessarily follows that a mere production of an arrestee before a competent Magistrate by an authorised officer or an officer empowered to arrest (notwithstanding the fact that he is not a police officer in its stricto sensu) on a reasonable belief that the arrestee "has been guilty of an offence punishable" under the provisions of the special Act is sufficient for the Magistrate to take that person into his custody on his being satisfied of the three preliminary conditions, namely, (1) the arresting officer is legally Competent to make the arrest. (2) that the particulars of the offence or the accusation for which the person is arrested or other grounds for such arrest do exist and are well-founded, and (3) that the provisions of the special Act in regard to the arrest of the persons and the production of the arrestee serve the purpose of Section 167(1) of the Code.

57. In this background, it has become obligatory and imperative to settle the spinal issue as to whether Section 35(2) of FERA and 104(2) of the Customs Act serve as a substitute of S. 167(1) substantially fulfilling the basic conditions contained therein.

58. No doubt, there is no investigation by any officer equivalent or comparable to an Officer in charge of police station or a police officer in a proceeding under any of these two special Acts as contemplated under Chapter XII of the Code. But what Section 167 envisages is that the arrestee is an accused or accused person against whom there is well-founded information or accusation requiring an investigation. Firstly the reason, given in the impugned judgment, for holding that Section 167(1) is neither replaced nor substituted by any provision of the special Acts is that the arrestee by the authorised officer or empowered officer under the FERA or Customs Act respectively cannot be said to be 'an accused' or 'accused person' which expressions are used in Section 167 or 'accused of an offence' which expression is used in Article 20(3) of the Constitution and in Sections 25 and 27 of the Evidence Act. In support of this reasoning, some decisions of this Court have been relied upon about which we would deal at the later part of this judgment.

59. We shall presently ponder over the true meaning of the word/words "person", accused", "accused person", "person accused of an offence" and "person accused of any offence" used in various provisions of the varied laws in different context and scrutinise as to whether they are interchangeable words and have the same connotation in and under all situations and circumstances which exercise will render much assistance in ascertaining the significance and import of the words, "persons", "accused" appearing in Section 167 of the Code.

60. It is germane to note that though the word "person" is defined in the Indian Penal Code (Section 11) and the General Clauses Act (Section 3(42)) which are identical and are not exhaustive but an inclusive one, the words "accused" or "accused person" or "accused of an offence" are not defined either in the Indian Penal Code or in the Indian Evidence Act or in the General Clauses Act, 1897. In the Code of Criminal Procedure also, these words are not defined except an inclusive meaning of the word "accused" is given in the Explanation to Section 273 of the Code of 1973, of course, confined only to the mode of taking and recording evidence in the course of the trial or other proceedings as envisaged in the said Section. Though this explanation of the word 'accused' limited to that Section 273 cannot and should not be strained and stretched to such an extreme extent to make it applicable in all circumstances wherever the word 'accused' appears in the Code, this explanation gives a clue, providing or suggesting an answer to the problem that we are trying to solve.

61. To perfectly understand the vital significance and impetus of the introduction of this new explanation, one must take note of the legislative change in the substantive provision of Section 273 which corresponds to Section 353 of the old Code which Section laid down the general rule that at any inquiry or trial, all evidence "shall be taken in the presence of the accused....." As recommended by the Joint Committee to make it clear that the provision of this Section would apply not only to proceedings against an accused but also other proceedings inclusive of the security proceedings under Chapter VIII of the Code, the words and figures "under Chapters XVIII, XX, XXI, XXII, XXIII" occurring in old Section 353 have been substituted in the present Section by the words "in the course of the trial or other proceeding". Consequent upon the change in the substantive part of the Section, it had become necessary to introduce the explanation so that the evidence in security proceeding against a person also shall be taken in his presence or in the presence of his pleader when his personal attendance is dispensed with.

The relevant explanation reads:

"In this section, 'accused' includes a person in relation to whom any proceeding under Chapter XIII has been commenced under this Code. " (Emphasis supplied)

62. Chapter VIII deals with (1) security for keeping the peace (a) on conviction. (b) on information; and (2) with security for good behaviour, covering Sections 106 to 124 of the Code. The provisions of this Chapter are preventive in their scope and object and they are not intended to punish but to prevent against possible hazard to the community as well as commission of crimes. There is no question of making any investigation by any police officer as contemplated under Chapter XII of the Code and forwarding of any report under S. 173(2) of the Code to a Magistrate pertaining to security proceedings under this Chapter though such proceedings are criminal in nature but not relating to any offence.

63. In none of the Sections in Chapter VIII, the words "accused" or "accused person" or "accused of an offence" or "accused of any offence" are used barring the word "person" as deployed in Section 35 of the FERA and 104 of the Customs Act.

64. We shall now examine this aspect of the matter in relation to other provisions of the Code.

65. The proviso to Section 113 of the Code states that if it appears to a Magistrate "that there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person

may at any time issue a warrant of his arrest". The necessary corollary is that when the person after his arrest on such warrant is produced before the Magistrate, the Magistrate has either to detain him or to release him on bail. For the enforcement of preventive action under Chapter VIII of the Code, the officer in charge of a police station is authorised under Section 41(2) of the Code to arrest or cause to be arrested any person belonging to one or some of the categories of persons specified in Section 109 or 110 of the Code. It may be recalled in this context, that Magistrate under Section 122 of the Code can commit any person to prison if that person ordered to give security under Section 106 or Section 117 of the Code does not give such security. Similarly, under Section 151 which falls under Chapter XI under the heading "Preventive action of the police", the police officer is empowered to arrest a person so as to prevent the commission of a cognizable offence which commission of the offence cannot be otherwise prevented. Sub-section (2) of Section 151 restricts the period of detention of the person arrested in custody for a period exceeding 24 hours unless his further detention is required or authorised under any of the provisions of the Code or for any other law for the time being in force. In all the above provisions of the Code, the word used is 'person" alone.

66. Likewise, Section 41(1) of the Code which gives authority to a police officer to arrest a person without warrant does not use the expression 'accused' or 'accused person' under any of the enumerated categories (a) to (i) but uses the expression 'person'. However, the person arrested under the provision of Section 41(1) when produced before the Magistrate is detained in exercise of the power vested on the Magistrate under subsections (1) and (2) of Section 167; We have already referred to various Sections empowering the Magistrate or any private person to effect an arrest and in that case also, the subsequent detention is made by the Magistrate only in exercise of his powers under Section 167(2) of the Code.

67. As we have pointed out in the preceding part of this judgment, that in the first limb of Section 167(1), the expression used is 'person..... arrested and detained in custody' and the word 'accused' occurs only in the second limb of the same provision denoting that 'person arrested and detained in custody' as envisaged in the first limb of that section.

68. Section 35 of FERA and 104 of the Customs Act which confer power on the prescribed officer to effect the arrest deploy only the word 'person' and not 'accused' or 'accused person' or 'accused of any offence'. In fact, the word 'accused' appears only in the penal provisions of the special Acts, namely, sub-section (4) of Section 56 of FERA and sub-section (3) of Section 135 of the Customs Act while explaining as to what would be the special and adequate reasons for awarding the sentence of imprisonment for a sub-minimum period. Though sub-sections (1) to (3) of Sections 56 of FERA and sub-sections (1) and (2) of Section 135 of Customs Act use the expression 'person' who becomes punishable on conviction under the penal provisions by the Court trying the offence.

69. In this context, a relevant doubtful question arises for deliberation whether the expressions "person", "accused" or "accused person" found in Section 167 of the code and "person accused of any offence" used in Article 20(3) of the Constitution and Sections 25 and 27 of the Evidence Act denote one and the same meaning. Though it is not absolutely essential to exhaustively examine the connotations of these two expressions and render our considered and reasoned opinion, yet it has become necessary confined to the limited question as to whether the expression "accused" and "accused person" appearing in Section 167(1) and (2) denote "a person accused of any offence" at the stage of authorising detention on production of an arrestee before a Magistrate.

70. The legislative change in Section 436 of the old Code (about which we shall deal with presently) and the introduction of the explanation to Section 273 of the new Code as well as the legislative intendment of some other provisions of the Code to be mentioned hereafter insunate (sic) in finding out the answer to the above query.

71. It may be noted in Section 436 of the old Code (1898) which corresponded to Section 437 of the Code of' 1861 and Section 298 of the Code of 1872, the expression "accused person" alone was employed but subsequently, the expression was substituted by "person accused of an offence" by Section 117 of Act of XVIII of 1923. This legislative change by substituting the new expression was made in order to supersede a number of rulings, rendered under the old Code (Section 437) employing the words, "accused person" which held the Section applicable to proceedings against person proceeded under Chapter VIII also as "persons against whom there is an accusation in the ordinary acceptation of the word."

72. In this connection. reference may be made to a judgment of the Madras High Court in which Justice Miller in re Kora Ayyappa, (1910) 11 Cri LJ page 251(2) held that persons ordered to give security for keeping peace or to be of good behaviour are not persons accused of an offence.

73. The. present Section 398 (power to order further inquiry) of the new Code which corresponds to Section 436 of the old Code are similar except for the substitution of the words 'Chief Judicial Magistrate' in place of the words 'District Magistrate'.

74. In other words, by the introduction of the expression "person accused of an offence" Section 398 is made inapplicable to the security proceedings as well as to proceedings under Sections 133, 144 and 145 of the Code.

75. The above legislative change of the expression in Section 436 of the old Code serves as a guide in adjudging the distinction between the two expressions "accused person" and "accused of an offence".

76. Let us now approach this aspect of the matter from different angle with reference to the provisions of Article 20(3) of the Constitution as well as to Sections 24 to 27 of the Evidence Act.

77. The prohibitive sweep of Article 20(3) which imposes the ban on self-accusation reads, "No person accused of any offence shall be compelled to be a witness against himself."

78. In explaining the intendment of Article 20(3), relating to search and seizure of documents under Sections 94 and 96 of the old Code, a eight-Judges Bench of this Court in M. P. Sharma v. Satish Chandra, District Magistrate, Delhi, 1954 SCR 1077 : (AIR

1954 SC 300), held that one of the components for invoking sub-clause (3) of Article 20 should be that it is a right pertaining to a person 'accused of an offence.'

79. Having regard to the facts therein, it has been held:

"The cases with which we are concerned have been presented to us on the footing that the persons against whom the search warrants were issued, were all of them persons against whom the First Information Report was lodged and who were included in the category of accused therein and that therefore they are persons "accused of an offence" within the meaning of Article 20(3) and also that the documents for whose search the warrants were issued, being required for investigation into the alleged offences, such searches were for incriminating material."

80. Thereafter, a Constitution Bench of this Court in Raja Narayanlal Bansilal v. Maneck, 1961 (1) SCR 417 at 438: (AIR 1961 SC 29 at Pp. 38, 39) while dealing with the import of. Article 20(3) with reference to certain provisions of the Indian Companies Act made the following observation, relying on the decision in M. P. Sharma (AIR 1954 SC 300) (supra):

".....Similarly for invoking the constitutional right against testimonial compulsion guaranteed under Article 20(3) it must appear that a formal accusation has been made against the party pleading the guarantee and that it relates to the commission of an offence which in the normal course may result in prosecution. Here again the nature of the accusation and its probable sequel or consequence are regarded as important."

81. In the above two judgments, both the Benches have not discussed the distinction between the expression 'accused person' and 'person accused of any offence'.

82. Subsequently, a eleven Judges Bench of this Court in State of Bombay v. Rothi Kalu Oghad , 1962 (3) SCR 10 : (AIR 1961 SC 1808) went into the question and by majority concluded that an accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more.

83. What is that 'anything more' required has been explained in the following words:

"(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in a Court or out of Court by a person accused of an offence, orally or in writing.

(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused any time after the statement has been made."

See also Nandini Satpathy v. P. L. Dani, 1978 (2) SCC 424 : (AIR 1978 SC 1025).

84. The essence of the above decisiong is that to bring a person within the meaning of 'accused of any offence', that person must assimilate the character of an 'accused person' in the sense that he must be accused of any offence.

85. We think it is not necessary to interpret the expression, "person accused of any offence" as appearing in Article 20(3) any more but suffice to note that the same expression is found in Sections 25 and 27 of the Evidence Act.

86. It is apposite to note that Clauses (1) to (3) of Article 22 which speak of a 'person arrested' use only the word 'person'. Article 22(2) states that "every person who is arrested and detained in custody ....." A similar expression is used in Section 167(l) of the Code reading. "Whenever any person is arrested and detained in custody..... " Thus while referring to a person arrested and detained neither Article 22 nor Section 167 employs the expression 'accused of any offence'.

87. Coming to the provisions of the Evidence Act, Section 24 uses the expression 'accused person' whereas in Sections 25 and 27, the identical expression 'person accused of any offence' is used. But in Section 26, neither of these two expressions is used but 'any person'. It was only while in examining the admissibility or otherwise of a statement of an 'accused person' or 'a person accused of any offence'. this Court in a series of judgments have dealt with the connotation of these two expressions but not otherwise.

88. Justice J. C. Shah who was member of the Bench in Raja Narayanlal Bansilal (AIR 1961 SC 29) (supra) speaking for the majority of a Constitution Bench in State of Uttar Pradesh v. Deoman Upadhyaya, 1961 (1) SCR 14 : (AIR 1960 SC 1125) has observed as follows (at p. 1129 of AIR 1960):

"The ban which is partial under S. 24 and complete under S. 25 applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, "accused person" in S. 24 and the expression "a person accused of any offence" have the same connotation and describe the person against whom evidence is sought to be led in a criminal proceeding."

89. The judgment in Deoman's case (AIR 1960 SC 1125) (supra) is referred to State of Bombay v. Kathi Kalu Oghad (AIR 1961 SC 1808) (supra) but that Bench has not expressed any view as to whether the expression 'accused person' and the expression 'person accused of any offence' have the same connotation. But in none of these judgments, Section 167 has come up for interpretation.

90. In Ramesh Chandra Mehta v. State of West Bengal, AIR 1970 SC 940 : 1969 (2) SCR 461 , a constitution Bench of this Court while examining the admissibility of a statement recorded under Section 171 A of the Sea Customs Act of 1878 (which Act is now repealed) corresponding to Section 108 of the Customs Act of 1962 has held that a person arrested by a Customs Officer is not a person accused of an offence within the meaning of Article 20(3) of the Constitution or within the meaning of Section 25 of the Evidence Act.

91. In Veera Ibrahim v. State of Maharashtra, 1976 (2) SCC 302 : (AIR 1976 SC 1167), a Division Bench of this Court following the dictum laid down In Ramesh Chandra Mehta (AIR 1970 SC 940) observed that in order to claim the benefit of the guarantee against testimonial compulsion embodied in Clause (3) of Article 20 It must be shown, firstly that the person who made the statement was " accused of any offence"; secondly that he made the statement under compulsion. It has been further held that when the statement of a person is recorded by the Customs Officer under Section 108, he is not a person 'accused of an offence under the Customs Act' and that an accusation which would stamp a person with the character of an accused of any offence is levelled only when the complaint is filed against that person by the Customs Officer complaining of the commission of any offence under the provisions of the Customs Act.

92. In a recent decision, this Court in Poolpandi v. Superintendent, Central Excise, 1992 (3) SCC 259 : (AIR 1992 SC 1795) has reiterated the same view and held that a person being interrogated during investigation under Customs Act or FERA is not a person accused of any offence within the meaning of Article 20(3) of the Constitution. See also Percy Rustomji Basta v. State of Maharashtra, 1971 (1) SCC 847 : (AIR 1971 SC 1087).

93. In this connection, reference may be made to a decision in Ramanlal Bhogilal Shah v. D. K. Guha, 1973 (1) SCC 696 : (AIR 1973 SC 1196), which has distinguished Ramesh Chandra Mehta (AIR 1970 SC 940) and held on the facts of that case that the person served with summons under the FERA, was an accused within the meaning of Article 20(3) of the Constitution of India. The decision in Ramanlal Bhogilal has taken a different view to that of Ramesh Chandra Mehta which view was examined in Poolpandi (AIR 1992 SC 1795) and was distinguished on the ground that a First Information Report in Ramanlal Bhogilal Shah, has been lodged earlier and consequently it was settled that the person was accused of an offence within the meaning of Article 20(3).

94. Though this Bench is bound by the decisions of all the above Constitution Benches yet these decisions are distinguishable since none of the above decisions relates to the interpretation of Section 167 of the Code explaining the meaning of the word "accused" or "accused person" limited to the purpose of Section 167; On the other hand, all those decisions are rendered only on the question of admissibility or otherwise of the statement of a person arrested under the provisions of the general Act or special Acts concerned and recorded while in the custody of the arrester.

95. A thorough and careful study of all the provisions of the Code manifestly discloses that the word 'accused' in the Code denotes different meanings according to the context in which it is deployed; in that sometimes the said word is employed to denote a person arrested, sometimes a person against whom there is an accusation, but who is yet not put on trial and sometimes to denote a person on trial and so on.

96. It is apposite, in this context, to refer to the following passage found in chapter 4 in the book titled, "The Loom of Language":

"Words are not passive agents meaning the same thing and carrying the same value at all times and in all contexts. They do not come in standard shapes and sizes like coins from the Mint, nor do they go forth with a decree to all the world that they shall mean only so much, no more and no less. Through its own particular personality, each word has a penumbra of meaning which no draftsman can entirely cut away. It refuses to be used as a mathematical symbol."

97. It may not be out of place to mention here that an officer in charge of a police station who is empowered under Section 156 to investigate on an information received under Section 154 or otherwise takes up the investigation by proceeding to the spot "for the discovery and arrest of the offender when he has reason to suspect the commission of an offence" as contemplated under Section 157 of the Code. At that stage, the investigating officer does not suddenly jump to a conclusion that the person against whom the investigation has commenced has committed an offence. But he can arrive at to such conclusion only when the investigation consummates to a finality on the collection of evidence eliminating all suspicion and establishing the commission of the offence. In case the investigating officer arrives at a conclusion that no offence is made out forwards his final report to that effect.

98. The view of majority in the impugned judgment that the person arrested under the FERA or Customs Act cannot fall within the meaning of the word 'accused' for invoking Section 167 solely based on the decisions of this Court, namely, Ramesh Chandra Mehta (AIR 1970 SC 940) as well as Illias v. Collector of Customs, Madras, AIR 1970 SC 1065 is not logically concluded for more than one reason;

Firstly, almost all the decisions of this Court holding that "a person arrested by an enforcement officer or customs officer, as the case may be, is not a 'person accused of an offence'" have been rendered only in the context of examining the question of admissibility or otherwise of the statement of a person arrested under those special Acts but not with reference to authorising the detention of an arrestee under Section 167 of the Code by a Magistrate and so the dictum laid down in those decisions is clearly distinguishable;

Secondly, in the teeth of the newly introduced explanation to Section 273 of 1973 Code it is made clear that the word 'accused' includes a person against whom any proceeding under Chapter VIII of the Code has been commenced. Thus the explanation gives a clear clue that in given situation the word "person" can be construed as 'accused' or 'accused person.'

Thirdly, in the Code different expressions are used under various provisions to denote a person involving in a criminal proceeding such as 'offender', 'person', 'accused', 'accused person', 'accused of an offence 'depending on the nature of the proceeding.

Fourthly, the very legislative change made in Section 436 of the old Code corresponding to Section 398 of the new Code substituting the words "person accused of an offence" in the place of "accused person" as originally stood makes it clear that in the procedural Code, these two expressions cannot always denote the same meaning or be construed as synonymous or interchangeable and this legislative change indicates that the Legislature in its wisdom intended to make a clear distinction between these expressions for the reasons mentioned supra.

Fifthly, if the expression 'accused person' and 'a person accused of an offence' are to be held denoting the same meaning and interchangeable at all times and situations, it will become fallacious and pernicious in the implementation of the procedural law of the Code.

Sixthly, in interpreting a statute in its true spirit, the right direction should be to give a full and literal meaning to the language aiming ever to show fidelity to the meaningful purpose of the statute and never to make it sterile and impotent by giving a strict literal interpretation putting blinkers for judicial approach; because such interpretation will run counter to the legislative intent.

99. From the foregoing discussion, it is clear that the word 'accused' or 'accused person' is used only in a generic sense in Section 167(l) and (2) denoting the "person" whose liberty is actually restrained on his arrest by a competent authority on wellfounded information or formal accusation or indictment. Therefore, the word 'accused' limited to the scope of Section 167(l) and (2) - particularly in the light of Explanation to Section 273 of the Code includes 'any person arrested'. The inevitable consequence that follows is that 'any person is arrested' occurring in the first limb of Section 167(l) of the Code takes within its ambit 'every person arrested' under Section 35 of FERA or S. 104 of the Customs Act also as the case may be and the 'person arrested' can be detained by the Magistrate in exercise of his power under Section 167(2) of the Code. In other words, the 'person arrested' under FERA or Customs Act is assimilated with the characteristics of an 'accused' within the range of Section 167(l) and as such liable to be detained under Section 167(2) by a Magistrate when produced before him.

100. In fact, Justice Yogeshwar Dayal speaking for the majority in Union of India v. O. P. Gupta, (1990) 2 DL 23 (FB) has rightly observed thus:

"The expression 'accused' used in Section 167(2) of the Code is not in the sense of accused under Article 20(3) of the Constitution and/ or Section 25 of the Indian Evidence Act with which the Supreme Court was concerned in the cases of Ramesh Chander Mehta and/or Illias. The word, "accused" in Section 167(2) of the Code is merely used in the sense of defining a person who has been arrested, detained and produced before a Magistrate and not in the sense of accused person under the Customs Act and/or Foreign Exchange Regulation Act since that person has been defined in the aforesaid two judgments as only that person against whom cognizance has been taken by the Magistrate on a complaint being filed. Therefore, the judgment of the Supreme Court in the case of Ramesh Chander Mehta or Illias referred to above do not stand in the way of applicability of Section 167(2) of the Code to the person detained and produced by competent officer before the Magistrate in pursuance of Section 104(2) of the Customs Act or Section 35(2) of the Foreign Exchange Regulation Act."

101. Further, in the later part of his judgment the learned Judge has observed;

"The word accused is to be construed in its widest connotations. It means the one who is arrested and detained."

102. After having observed as above, it has been concluded by the learned Judge thus :

"Section 167(l) of the Code is already replaced by Section 104(2) of the Customs Act and S. 35(2) of the Foreign Exchange Regulation Act. What is to be done to a person who is so produced before the Magistrate is dealt with only under Section 167(2) and not under Section 167(l) of the Code."

103. Agreeing with the majority judgment in 0. P. Gupta ((1990) 2 DL 23 (FB)) and with the view of the High Court of Kerala in C.I.U. Cochin v. P. K. Ummerkutty, 1983 Cri LJ 1860 and N. K. Ayoob v. The Superintendent, C.I.W., Cochin, 1984 Cri LJ 949 as well as of the Gujarat High Court in N. H. Dave v. Mohamed Akhtar, 1984 (15) ELT 353, Arunachalam, J. of the Madras High Court in his well-reasoned judgment in Senior Intelligence Officer v. M. K. S. Abu Bucker, 1989 LW (Cri) 325 : (1990 Cri LJ 704) has observed as follows (at Pp. 7 10 to 713 of 1990 Cri LJ):

"Obviously in relation to a person arrested under the Customs Act, Section 167(l), Cr. P. C., is covered suitably by S. 104(l) and (2) of the Customs Act. In that event, the application of S. 167(2) of the Code can pose no difficulty, except the consideration of the words 'accused person' used in that subsection.

.....

..... If we construe the words "an accused person" in S. 167(2) of the Code, it will be clear that the words would take in, the person who is arrested or detained in custody by the Customs Officer who had reason to believe that such person was guilty of an offence punishable under S. 135 of the Act..

.....

.....Looked at in this background, the word 'accused' in Section 167(2), Cr. P. C., will have to be construed in its widest connotation meaning "one who has been arrested and detained" which will include even a person suspected of having committed an offence.

.....

..... I hold that the Magistrate has the power to remand a person produced before him in accordance with S. 104 of the Customs Act by virtue of the powers of remand under S. 167(2) and (3) of the Code and could further exercise the powers under S. 437 of the Code."

104. In our considered opinion, the view taken in O. P. Gupta ((1990).2. DL 23 (FB)). and M.K.S. Abu Bucker (1990 Cri. LJ 704 (Mad)) and also of the Kerala High Court and. Gujarat High Court is the logical and correct. view and we approve the same for the reasons we have given in the preceding part of this judgment. We, indeed, see no imponderability in construing Section 35(2) of FERA and 104(2) of Customs Act that the said provisions replace Section 167(l) and serve as a substitute thereof substantially satisfying all the required basic conditions contained therein and that consequent upon such replacement of sub-section (1) of Section 167, the arrested person under those special Acts would be an accused person to be detained by the Magistrate under sub-section (2) of Section 167; In passing, it may be stated that there is no expression 'police officer' deployed in Section 167(l) nor does it appear in any part of Section 167(2). The authority for detaining a person as contemplated under Section 167(2) is in aid of investigation to be carried on by any prosecuting agency who is invested with the power of investigation.

105. We next proceed to consider the second question whether the authorised or empowered officer under FERA or Customs Act exercises all or any of the powers of a police officer outlined under Chapter XII of the Code and conducts any investigation within the meaning of Section 2(h) of the Code.

106. The word 'Investigation' is defined under Section 2(h) of the present Code (which is an exact reproduction of Section 4(l)(1) of the old Code) which is an inclusive definition as including all the proceedings under the Code for the collection of evidence conducted by a police officer or any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. The said word 'investigation' runs through the entire fabric of the Code. There is a long course of decisions of this Court as well as of the various High Courts explaining in detail, what the word 'investigation' means and is? It is not necessary for the purpose of this case to recapitulate all those decisions except the one in H. N. Rishbud v. State of Delhi, 1955 (1) SCR 1150 : (AIR 1955 SC 196). In that decision, it has been held that "under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the commission of various persons (including the accused) and the reduction of their statement into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173."

107. The steps involved in the course of investigation, as pointed out in Rishbud's case (AIR 1955 SC 196) have been reiterated in State of M. P. v. Mubarak Ali, 1959 Supp (2) SCR 201 : (AIR 1959 SC 707).

108. No doubt, it is true that there is a series of decisions holding the view that an officer of enforcement or a customs officer is not a police officer though such officers are vested with the powers of arrest and other analogous powers. Vide Ramesh Chandra v. The State of West Bengal, 1969 (2) SCR 461 : (AIR 1970 SC 940) and Illias v. Collector of Customs, Madras, 1969 (2) SCR 613 : (AIR 1970 SC 1065). In the above decisions, this Court has held that the above officers under the special Acts are not vested with the powers of a police officer qua investigation of an offence under Chapter XII of the Code including the power to forward a report under Section 173 of the Code. See also State of Punjab v. Barkat Ram, 1962,(3) SCR 338 : (AIR 1962 SC 276) and Badaku Jyoti Savant v. State of Mysore, 1966 (3) SCR 698 : (AIR 1966 SC 1746).

109. As we have pointed out in the preceding part of this judgment, Section 167(l) falls under Chapter XII relating to "Information to Police and their powers to investigate". Sub-section (1) of Section 167 speaks of the arrest by a police officer and the follow up investigation by him. Section 35(l) of FERA and Section 104(l) of the Customs Act empower the authorised officer under the relevant provisions to effect arrest of a person against whom there is reason to believe that he has been guilty of an offence under the respective concerned Acts.

110. Neither the Police Act, 1861 (Act V of 1861) nor any other statute defines the expression 'Police Officer'. Shortly stated, the main duties of the police are the prevention, detention and investigation of crimes. As the powers and duties of the State have increased and are increasing manifold, various Acts dealing with Customs, Excise, Forest, Taxes etc. have come to be passed and consequently the prevention, detention and investigation of offences as prescribed under those Acts have come to be entrusted to officers with different nomenclatures appropriate to the subject with reference to which they function. However, as stated supra, though the powers of customs officers and enforcement officer are identical to those of police officers qua the investigation under Chapter XII of the Code yet the officers under the FERA and Customs Act are vested with certain powers similar to the powers of police officers.

111. The expression 'diary' referred to in Section 167(l) of the Code is the special diary mentioned in Section 167(2) which should contain full and unabridged statements of persons examined by the police so as to give the Magistrates a perusal of the said diary, a satisfactory and complete source of information which would enable him to decide whether or not the accused person should be detained in custody but it is different from the general diary maintained under Section 44 of the Police Act.

112. Though an authorised officer of Enforcement or Customs is not undertaking an investigation as contemplated under Chapter XII of the Code, yet those officers are ..enjoying some analogous powers such as arrest, seizures, interrogation etc. Besides, a statutory duty is enjoined on them to inform the arrestee of the grounds for such arrest as contemplated under Art. 22(l) of the Constitution and Section 50 of the Code. Therefore, they have necessarily to make records of their statutory functions showing the name of the informant, as well as the name of the person who violated any other provision of the Code and who has been guilty of

an offence punishable under the Code, nature of information received by them, time of the arrest, seizure of the contraband, if any and the statements recorded during the course of the detection of the offence/ offences.

113. Apart from those two special Acts under consideration, there are various Central Acts containing provisions of prevention of offences enumerated therein and also for enforcement of the said provisions. Certain provisions of the Central Acts which we would like to give below by way of illustration in a tabular form showing the powers vested and the duties cast on the concerned officers will show that those officers enjoy certain powers during the course of any investigation or inquiry or proceeding under the special Acts concerned though not in strict sense of an investigation under Chapter XII of the Code as undertaken by police officers including the filing of a police report under Section 173(2) of the Code.

(see table on next page)

114. The above table manifestly imparts that all the powers vested on various authorities as given in the table are equipollent as being enjoyed by a police officer under the Code and exercised during investigation under Chapter XII because the investigation is nothing but an observation or inquiry into the allegations, circumstances or relationships in order to obtain factual information and make certain whether or not a violation of any law has been committed.

115. It should not be lost sight of the fact that a police officer making an investigation of an offence representing the State files a report under Section 173 of the Code and becomes the complainant whereas the prosecuting agency under the special Acts files a complaint as a complainant i.e. under Section 61(ii) in the case of FERA and under Section 137 of the Customs Act. To say differently, the police officer after consummation of the investigation files a report under Section 173 of the Code upon which the Magistrate may take cognizance of any offence disclosed in the report under Section 190(l)(b) of the Code whereas the empowered or authorised officer of the special Acts has to file only a complaint of facts constituting any offence under the provisions of the Act on the receipt of which the Magistrate may take cognizance of the said offence under Section 190(l)(a) of the Code. After taking cognizance of the offence either upon a police report or upon receiving a complaint of facts, the Magistrate has to proceed with the case as per the procedure prescribed under the Code or under the special procedure, if any, prescribed under the special Acts. Therefore, the word 'investigation' cannot be limited only to police investigation but on the other hand, the said word is with wider connotation and flexible so as to include the investigation carried on by any agency whether he be a police officer or empowered or authorised officer or a person not being a police officer under the direction of a Magistrate to make an investigation vested with the power of investigation.

Sr. No. Name of the Act Power to search premises Power to search suspected persons, entering or leaving India Power to search persons Power to stop and search conveyances Power to seize goods, documents etc. Power to arrest Power to examine persons Power to summon persons to give evidence and produce documents

1 2 3 4 5 6 7 8 9 10

1. Foreign Exchange Regulation Act, 1973. Sec.37 Sec.34 Sec.34 Sec.36 Sec.38 Sec.35 Sec.39 Sec.40

2. The Customs Act Sec.105 Sec.100 Sec.101 Sec.106 Sec.110 Sec.104 Sec.107 Sec.108

3. The Gold (Control) Act (now repealed) Sec.58 - Sec.60 Sec.61 Sec.66 Sec.68 Sec.64 Sec.63

4. The Prevention of Food Adulteration Act Sec.10(2) S.6 to be r/w S.18 of the Sea Customs Act - - Sec.10 Sec.10(B) - -

5. The Railway Property (Unlawful Possession) Act Sec.10 & Sec.11 - - - - Sec.6 - Sec.9

116. It may be recalled, in this connection, that Section 202(l) of the Code falling under Chapter XV under the caption "Complaints to Magistrates" envisages that any Magistrate on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192 of the Code can direct an investigation to be made by a police officer or 'by such other person as he thinks fit'. As regards the conferment of power on such person, sub-section (3) of Section 202 reads, "if an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant". The expression 'all the powers conferred by this Code on an officer in charge of a police station' will include the powers conferred on the police officer under the relevant provisions of Chapter XII also.

117. M. P. Thakkar, C. J. of the Gujarat High Court (as he then was) speaking for a Division Bench in N. H. Dave, Inspector of Customs v. Mohmed Akhtar, 1984 (15) ELT 353 (Guj), while examining the import of Section 104 of the Customs Act has ruled thus :

"The expression 'Investigation' has been defined in Section 2(h). It is an inclusive definitions. No doubt it will not strictly fall under the definition of 'investigation' in so far as the inclusive part is concerned. But then it being an inclusive definition the ordinary

connotation of the expression 'Investigation', cannot be overlooked. An 'investigation' means search for material and facts in order to find out whether or not an offence has been committed. It does not matter whether it made by the police officer or a customs officer who intends to lodge a complaint."

We are in total agreement with the above view of M. P. Thakkar, C. J.

118. The word 'investigation' though is not shown in any one of the sections of the Customs Act, certain powers enjoyed by the police officer during the investigation are vested on the specified officer of customs as indicated in the table given above. However, in the FERA the word 'investigation' is used in various provisions, namely, Sections 34, 36, 37, 38 and 40 reading "..... any investigation or proceeding under this Act.... ." though limited in its scope.

119. From the above discussion it cannot be said that either the Officer of Enforcement or the Customs Officer is not empowered with the power of investigation though not with the power of filing a final report as in the case of a police officer.

120. Lastly, it falls for our consideration whether Section 4(2) of the Code of Criminal Procedure can be availed of for investigating, inquiring or trying offences under any law other than the Indian Penal Code which expression includes FERA and Customs Act etc.

121. Section 4(2) of the Code corresponds to Section 5(2) of the old Code. Section 26(b) of the Code corresponds to Section 29 of the old Code except for a slight change. Under the present Section 26(b) any offence under any other law shall, when. any court is mentioned in this behalf in such, law, be tried by such Court and when no Court is mentioned in this behalf, may be tried by the High Court or other court by which such offence is shown in the First Schedule to be triable. The combined operation of Sections, 4(2) and 26(b) of the Code is that the offence complained of should be investigated or inquired into or tried according to the provisions of the Code where the enactment which creates the offence, indicates no special procedure.

122. We shall now consider the applicability of provisions of S. 167(2) of the Code in relation to Section 4(2) to a person arrested under FERA or the Customs Act and produced before a Magistrate. As we have indicated above, a reading of Section 4(2) read with Section 26(b) which governs every criminal proceeding as regards the course by which an offence is to be tried and as to the procedure to be followed, renders the provisions of the Code applicable in the field not covered by the provisions of the FERA or Customs Act.

123. We are not concerned with subsection (1) of Section 4 in this matter which provides for the procedure to be followed in every investigation, inquiry or trial in relation to offences under the Indian Penal Code stating that all offences under the Indian Penal Code "shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained".

124. In this context, Section 5 of the Code which is for all practical purposes identical with the relevant portion of the corresponding Section 1(2) of the old Code, also may be referred to which states, "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 expression 'special law' or 'local law' is defined under Sections 41 and 42 of the Indian Penal Code.

125. Desai, J. in Viswa Mitter of Vijay Bharat Cigarette Stores v. O. P. Poddar, 1983 (4) SCC 701 : (AIR 1984 SC 5), speaking for the Bench on the import of Section 4(2) has stated thus (at p. 7 of AIR 1984):

"Section 190 thus confers power on any Magistrate to take cognizance of any offence upon receiving a complaint of facts which constitute such offence. It does not speak of any particular qualification for the complainant. Generally speaking, anyone can put the criminal law in motion unless there is specific provision to the contrary. This is specifically indicated by the provision of sub-section (2) of Section 4 which provides that all offences under any other law - meaning thereby law other than the Indian Penal Code - shall be investigated, inquired into, tried and otherwise dealt with according to the provisions in the Code of Criminal Procedure but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. It would follow as a necessary corollary that unless in any statute other than the Code of Criminal Procedure which prescribes an offence and simultaneously specifies the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences, the provisions of the Code of Criminal Procedure shall apply in respect of such offences and they shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code of Criminal Procedure."

126. In A. R. Antulay v. Ramdas Sriniwas Nayak, 1984 (2) SCR 914 : (AIR 1984 SC 718), a Constitute on Bench of this Court while examining the similar question with regard to applicability of Section 4 with reference to the Prevention of Corruption Act has laid down the law thus (at p. 729 of AIR 1984):

"In the absence of a specific provision made in the statute indicating that offences will have to be investigated, inquired into, tried and otherwise dealt with according to that statute, the same will have to be investigated, inquired into, tried and otherwise dealt with. according to the Criminal P. C. In other words, Criminal P. C. is the parent statute which provides for investigation, inquiring into and trial of cases by criminal Courts of various designations."

127. To sum up Section 4 is comprehensive and that Section 5 is not in derogation of Section 4(2) and it only relates to the extent of application of the Code in the matter of territorial and other jurisdiction but does not nullify the effect of Section 4(2). In short, the provisions of this Code would be applicable to the extent in the absence of any contrary provision in the special Act or any special provision excluding the jurisdiction or applicability of the Code. In fact, the second limb of Section 4(2) itself limits the application of the provisions of the Code reading, "..... but subject to any enactment for the time being in force regulating the

manner or place of investigating, inquiring into, trying or other wise dealing with such offences".

128. It is also significant to take note of the 'Objects and Reasons' for the introduction of the present Section 104 of the Customs Act replacing the then existing Sections 173, 174 and 175 of the Sea Customs Act with some amendments one of which being, "in addition to the power to commit an arrested person to jail or order him to be kept in police custody, the Magistrate is being empowered to order the arrested person to be kept in such other custody as he deems fit" - vide S.O.R. Gaz. of India, 1962, Pt. 11, S. 2, Ext. p. 334.

129. The Select Committee expressed its view on the proposed amendment as follows:

"The Committee are of the view that an Officer of Customs arresting a person under the clause should have the power to release the arrested person on ball or otherwise similar to the power conferred on the officer in charge of a police station under the Code of Criminal Procedure, 1898 so as to obviate the necessity of detaining an arrested person till .he can be taken to a Magistrate.

The Committee feel that sub-clause (3) being merely a repetition of the provisions of the Criminal Procedure Code, 1898 should be omitted."

130. The view of the Committee expressed above can be taken as a guide in understanding the import of Section 35 of FERA.

131. The submission that as there is no investigation within the terms of the Code in the field of FERA or Customs Act, Section 4(2) of the Code can have no part to play, has to be rejected for the reasons given by us while disposing of the contention "What investigation means and is" in the preceding part of this judgment.

132. For the aforementioned reasons, we hold that the operation of Section 4(2) of the Code is straightway attracted to the area of investigation, inquiry and trial of the offences under the special laws including the FERA and Customs Act and consequently S. 167 of the Code can be made applicable during the investigation or inquiry of an offence under the special Acts also inasmuch as there is no specific provision contrary to that excluding the operation of Section 167;

133. Though much argument was advanced on the expression 'otherwise dealt with', we think it is not necessary to go deep into the matter except saying that the said expression is very wide and all comprehensive. Vide Bhim Singh v. State of U. P., AIR 1955 SC 435 and Delhi Administration v. Ram Singh, 1962 (2) SCR 694 : (AIR 1962 SC 63).

134. There is a series of decisions of various High Courts, of course with some exception, taking the view that a Magistrate before whom a person arrested by the competent authority under the FERA or Customs Act is produced, can authorise detention in exercise of his powers under Sec. 167. Otherwise the mandatory direction under the provisions of S. 35(2) of FERA or 104(2) of the Customs Act, to take every person arrested before the Magistrate without unnecessary delay when the arrestee was not released on bail under sub-section (3) of those special Acts, will become purposeless and meaningless and to say that the Courts even in the event of refusal of bail have no choice but to set the person arrested at liberty by folding their hands as a helpless spectator in the face of what is termed as 'legislative casus omissus' or legal flaw or lacuna, it will become utterly illogical and absurd.

135. We are in total agreement with the above view of the various High Courts for the discussion made already and conclusions arrived at thereto.

136. In the result, we hold that sub-sections (1) and (2) of Section 167 are squarely applicable with regard to the production and detention of a person arrested under the provisions of Section 35 of FERA and S. 104 of Customs Act and that the Magistrate has jurisdiction under Section 167(2) to authorise detention of a person arrested by any authorised officer of the Enforcement under FERA and taken to the Magistrate in compliance of Sec. 35(2) of FERA.

137. In the result, the impugned judgment of the Full Bench (five-Judges) of the High Court holding the view that the law laid down in O. P. Gupta ((1990) 2 DL 23 (FB)) "regarding the powers available to a Magistrate under Section 167(2) of the Code of Criminal Procedure to commit to custody a person taken before him by the Customs Officer is incorrect" is set aside. The law enunciated in O. P. Gupta by a three-Judges Bench is the correct law and accordingly the said decision is upheld.

138. The appeal is allowed accordingly.

Appeal allowed.

1994 Legal Eagle (SC) 444

IN THE SUPREME COURT OF INDIA

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[Before : M.N.Venkatachaliah, S.Mohan, A.S.Anand]

Joginder Kumar

versus

State of Uttar Pradesh

Case No. : 9 of 1994, Date of Decision : 25/04/1994

Arrest and Custody -- Volation of human rights because of indiscriminte arrests -- Where a young advocate cald to S.S.P. Office for inquiry in connection with some case and was detained there for 5 days and a writ petition was filed for his release in response to which S.B.P. stating that the petitioner was detained at all and such explanation insufficient, the District Judge directed to make detailed inquiry.

No arrest can be made because it is lawful for the police to do so. The existence of the power to arrest is one thing and justification for exercise of the power quite another. Arrest and detention in police lock up can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of a constitution rights of a citizen and in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaints and a reasonable belief both as to the persons' complicity and even so as to the need to effect arrest. Denying a person his liberty is a serious matter.

Constitution of India

Articles 21, 22(1) and 32 -- Violation of human rights because of indiscrimiante arrest. Where a young advocate was called to the office of SSP for inquiry in connection with some case and kept in the police custody for 5 days and when notice was issued by the Supreme Court, the SSP stating that the petitioner was not detained by him but his explanations was not sufficient -Under these circumstances the District Judge directed to make detailed inquiry.

Arrest cannot be made only because it is lawful for the police officer to do so because existence of power to arrest is one thing and justification for the exercise of such power is quite another thing, and therefore, a police, officer must be able to justify the arrest apart from his power to do so. No arrest can.be made in a routine manner on a mere allegation of commission of an offence made against a person. A person is not liable to arrest merely on the suspension of complicity in an offence and a realistic approach should be made in this direction. Then there is right to have someone informed and that right and consult a lawyer are recognised by Section 56(1) of the police and Criminal Evidence Act, 1984 in England and are inherent in Article 21 and 22(1) of the Constitution.

Criminal Procedure Code, 1973

Sections 41, 151, 157 and 172 -- Constitution of India, Articles 21,22(1) and 32 -- Violation of Human rights because of indiscriminate arrest -- A young advocate was called to the office of S.S.P. for inquiry in connection with some case but he was detained there for 5 days -- In pursuant to the writ petition filed for his release, the SSP stated that the petitioner was not detained at all -- Finding the explanation insufficient, directions given to the district judge to make a detailed inquiry and submit its report to the Supreme Court within 4 weeks.

The quality of nation civilization can be largely measured by the method it uses in the enforcement of criminal law. The Court has been receiving complaints about violation of human rights because of indiscriminate arrest. The law of arrest is one of balancing individual rights, liberties and privileges on the one hand and individual duties/ obligations and responsibilities on the other, of weighing and balancing the rights, liabilities, privileges of single individual and individuals collectively. The petitioner a young advocate of 28 years was called by the SSP Ghaziabad in his office for making inquiry in some cases and was detained there for 5 days. The brother of the petitioner sent a telegram to the Chief Minister apprehending the petitioner's false implication in some criminal case and that his death in fake encounter. Under these circumstances, the writ petition under Article 132 was filed for his release and the Supreme Court on 11.1.1994 ordered notice to the State as well as SSP who on appearing denied the detention of the concerned advocate, since the explanation given was not satisfactory, the district Judge directed to make detailed inquiry into the matter and report within 4 weeks.

Section 157 -- Constitution of India, Articles 21, 22(1) and 32 -Inhuman treatment by the police., detaining the advocate of 28 year in the police custody for 5 days, while on questioning, SSP stating that the petitioner was not detained at all -- The law of arrest being one of balancing individual rights liberties and privileges, the District and Sessions Judge directed to make detailed inquiry.

The existence of power to arrest is one thing and justification for exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. No arrest can be made in a routine manner on mere allegation of commission of an offence, made against a person. The petitioner a young advocate of 28 years was called by the SSP Ghaziabad in his office for making inquiry in some case. It was alleged that on 7.1.1994 at about 10 o'clock, he personally alongwith his brother appeared before SSP. At about 12.55 p.m. the brother of the petitioner sent a telegram to Chief Minister of U.P. apprehending the petitioners false implication in some criminal case. In the evening it came to be known that the petitioner was detained in the alleged custody of SHO who instead of producing petitioner before a Magistrate asked the relatives to approach SSP. Under these circumstances writ petition was filed for release of petitioner and notice was sent to State of UP and SSP, who stated that the petitioner was not detained at all. In these circumstances, the explanation of SSP being insufficient, District Judge directed to make detailed inquiry and submit the report within four weeks.

Advocates Appeared :

Singh L.R., Pundir A.S., Malik Mohd Yunus

Statutes Referred :

1. Code of Criminal Procedure -- S.157 2. Code of Criminal Procedure -- S.172 3. Code of Criminal Procedure -- S.41 4. Code of Criminal Procedure -- S.151 5. Constitution of India -- Art.32 6. Constitution of India -- Art.21 7. Constitution of India -- Art.22(1)

JUDGMENT/ORDER:
ORDER :-

This is a petition under Art. 32 of the Constitution of India. The petitioner is a young man of 28 years of age who has completed his LL. B. and has enrolled himself as an advocate. The Senior Superientendent of Police, Ghaziabad, respondent No.4 called the petitioner in his office for making enquiries in some case. The petitioner on 7-1-1994 at about 10 O'clock appeared personally along with his brothers Sri Mangeram Choudhary, Nahar Singh Yadav, Harinder Singh Tewatia, Amar Singh and others before the respondent No. 4. Respondent No. 4 kept the petitioner in his custody. When the brother of the petitioner made enquiries about .the petitioner, he was told that the petitioner will be set free in the evening after making some enquiries in connection with a case.

2. On 7-1-1994 at about 12-55 p.m., the brother of the petitioner being apprehensive of the intentions of respondent No. 4, sent a telegram to the Chief Minister of U. P. apprehending his brother's implication in some criminal case and also further apprehending the petitioner being shot dead in fake encounter.

3. In spite of the frequent enquiries, the whereabouts of the petitioner could not be located. On the evening of 7-1-1994, it came to be known that petitioner is detained in illegal custody of 5th respondent, S.H.O, P. S. Mussorie.

4. On 8-1-1994, it was informed that the 5th respondent was keeping the petitioner in detention to make further enquiries in some case. So far as petitioner has not been produced before the concerned Magistrate. Instead the 5th respondent directed the relative of the petitioner to approach the 4th respondent S.S.P. Ghaziabad for release of the petitioner.

5. On 9-1-1994, in the evening when the brother of petitioner along with relatives went to P.S. Mussorie to enquire about the wellbeing of his brother, it was found that the petitioner had been taken to some undisclosed destination. Under these circumstances, the present petition has been preferred for the release of Joginder Kumar, the petitioner herein.

6. This Court on 11-1-1994 ordered notice to State of U.P. as well as S.S.P. Ghaziabad.

7. The said Senior Superintendent of Police along with petitioner appeared before this Court on 14-1-1994. According to him, the petitioner has been released. The question as to why the petitioner was detained for a period of five days, he would submit that the petitioner was not in detention at all. His help was taken for detecting some cases relating to abduction and the petitioner was helpful in co-operating with the police. Therefore, there is no question of detaining him. Though, as on today the relief in habeas corpus petition cannot be granted yet this Court cannot put an end to the writ petition on this score. Where was the need to detain the petitioner for five days; if really the petitioner was not in detention, why was not this Court informed are some questions which remain unanswered. If really, there was detention for five days, for what reason was he detained? These matters require to be enquiried into. Therefore, we direct the learned District Judge, Ghaziabad to make a detailed enquiry and submit his report within four weeks from the date of receipt of this order.

8. The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violation of human rights because of indiscriminate arrests. How are we to strike a balance between the two?

9. A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first - the criminal or society, the law violator or the law abider; of meeting the challenge which Mr. Justice Cardozo so forthrightly met when he wrestled with a similar task of balancing individual rights against society's rights and wisely held that the exclusion rule was bad law, that society came first, and that the criminal should not go free because the constable blundered. In People v. Defore, (1926) 242 NY 13, 24:150 NE 585, 589, justice Cardozo

observed:

"The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the Adams case (People v. Adams, (1903) 176 NY 351 : 68 NE 636) strikes a balance between opposing interests. We must hold it to be the law until those organs of government by which a change of public policy is normally effected shall give notice to the courts that change has come to pass."

10. To the same effect is the statement by Judge learned Hand, In Re Fried, 161 F 2d 453, 465 (2d Cir. 1947):

"The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten. Perfection is impossible; like other human institutions criminal proceedings must be a compromise."

11. The quality of a nation's civilisation can be largely measured by the methods it uses in the enforcement of criminal law.

12. This Court in Smt. Nandinia Satpathy v. P. L. Dani AIR 1978 SC 1025 at page 1032 quoting Lewis Mayers stated:

The paradox has been put sharply by Lewis Mayers:

"To strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swung to the right."

Again in para 21 at page 1033 it was observed:

"We have earlier spoken of the conflicing claims requiring reconciliation. Speaking pragmatically, there exists a rivalry between societal interest in effecting crime detection and constitutional rights which accused individuals possess. Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in America. Since Miranda ((1966) 334 US 436) there has been retreat from stress on protection of the accused and gravitation towards society's interest in convicting law-brakers. Currently, the trend in the American jurisdiction according to legal journals, is that 'respect for (constitutional) principles is eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of its laws ..... (Couch v. United States (1972) 409 US 322, 336). Our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect the application of principles in producing humane justice."

13. The National Police Commission in its Third Report referring to the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails. The said Commission in its Third Report at page 31 observed thus:

"It is obvious that a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as quite necessary from the point of view of crime prevention. Continued detention in jail of the persons so arrested has also meant avoidable expenditure on their maintenance. In the above period it was estimated that 43.2 per cent of the expenditure in the connected jails was over such prisoners only who in the ultimate analysis need not have been arrested at all."

14. As on today, arrest with or without warrant depending upon the circumstances of a particular case is governed by the Code of Criminal Procedure.

15. Whenever a public servant is arrested that matter should be intimated to the superior officers, if possible, before the arrest and in any case, immediately after the arrest. In cases of members of Armed Forces, Army, Navy or Air Force, intimation should be sent to the Officer commanding the unit to which the member belongs. It should be done immediately after the arrest is effected.

16. Under Rule 229 of the Procedure and Conduct of Business in Lok Sabha, when a Member is arrested on a criminal charge or is detained under an executive order of the Magistrate, the executive authority must inform without delay such fact to the Speaker. As soon as any arrest, detention, conviction or release is effected intimation should invariably be sent to the Government concerned concurrently with the intimation sent to the Speaker/Chairman of the Legislative Assembly/Council/Lok Sabha/Rajya Sabha. This should be sent through telegrams and also by post and the intimation should not be on the ground of holiday.

17. With regard to the apprehension of juvenile offenders S. 58 of the Code of Criminal Procedure lays down as under:

"Officers in charge of police stations shall report to the District Magistrate or, if he so directs, to the Sub-Divisional Magistrate, the cases of all persons arrested without warrant, within the limit of their respective stations whether such persons have been admitted to bail or otherwise."

18. Section 19(a) of the Children Act makes the following provision:

"the parent or guardian of the child, if he can be found, of such arrest and direct him to be present at the children's court before which the child will appear."

19. In England, the police powers of Arrest, Detention and lnterrogation have been streamlined by the Police and Criminal Evidence Act, 1984 based on the report of Sir Cyril Philips Committee (Report of a Royal Commission on Criminal Procedure, Command-papers 8092 19811).

20. It is worth quoting the following passage from Police Powers and Accountability by John L. Lambert, page 93:

"More recently, the Royal Commission on Criminal Procedure recognised that "there is a critically important relationship between the police and the public in the detection and investigation of crime" and suggested that public confidence in police powers required that these conform to three principal standards : fairness, openness and workability."

(Emphasis supplied)

21. The Royal Commission suggested restrictions on the power of arrest on the basis of the 'necessity of principle'. The two main objectives of this principle are that police can exercise powers only in those cases in which it was genuinely necessary to enable them to execute their duty to prevent the Commission of offences, to investigate crime. The Royal Commission was of the view that such restrictions would diminish the use of arrest and produce more uniform use of powers. The Royal Commission Report on Criminal Procedure - Sir Cyril Philips at page 45 said:

".....We recommend that detention upon arrest for an offence should continue only on one or more of the following crtiteria;

(a) the person's unwillingness to indentify himself so that a summons may be served upon him;

(b) the need to prevent the continuation or repetition of that offence;

(c) the need to protect the arrested person himself or other persons or property;

(d) the need to secure or preserve evidence of or relating to that offence or to obtain such specified guidelines evidence from the suspect by questioning him; and

(e) the likelihood of the person failing to appear at court to answer any charge made against him."

22. The Royal Commission in the abovesaid Report at page 46 also suggested:

"To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be fingerprinted or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case ....."

23. In India, Third Report of the National Police Commission at page 32 also suggested:

"....An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances :-

(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines....."

24. The above guidelines are merely the incidents of personal liberty guaranteed under the Constitution of India. No arrest canbe made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and selfesteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave Station without permission would do.

25. Then, there is the right to have someone informed. That right of the arrested person, upon request, to have someone informed and to consult privately with a lawyer was recognised by Section 56(1) of the Police and Criminal Evidence Act, 1984 in England (Civil Actions Against the Police -Richard Clayton and Hugh Tomlinson; page 313). That Section provides:

"where a person has been arrested and is being held in custody in a police station or other premises, he shall be entitled, if he so requests, to have one friend or relative or other person who is known to him or who is likely to take an interest in his welfare told, as soon as is practicable except to the extent that delay is permitted by this section, that he has been arrested and is being detained there."

26. These rights are inherent in Articles 21 and 22(1) of the Constitution and require to be recognised and scrupulously protected. For effective enforcement of these fundamental rights, we issue the following requirements:

1. An arrested person being held in custody is entitled, if he so requests to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where is being detained.

2. The Police Officer shall inform the arrested person when he is brought to the police station of this right.

3. An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Articles 21 and 22(1) and enforced strictly.

27. It shall be the duty of the Magistrate, before whom the arrested person is produced, to statisfy himself that these requirements have been complied with.

28. The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various Police Manuals.

29. These requirements are not exhaustive. The Directors General of Police of all the States in India shall issue necessary instructions requiring due observance of these requirements. In addition, departmental instruction shall also be issued that a police officer making an arrest should also record in the case diary, the reasons for making the arrest.

Order accordingly.

1996 Legal Eagle (SC) 2122

IN THE SUPREME COURT OF INDIA

Equivalent Citations : 1997 Bom.C.R.(Cri.) 459 : 1997 (2) Bom.C.R. 666 : 1996 (4) Crimes 233 : 1997 CrLJ 743 : 1997 (1) JT 1 : 1996 (9) Scale 298 : 1997 (1) SCC 416 : 1997 SCC(Cri) 92 : 1996 (8) Supreme 581 : 1997 AIR(SC) 610 : 1997 AIR(SCW) 233

[Before : Kuldip Singh, A.S.Anand]

D.K.Basu: Ashok K.Johari

versus

State of West Bengal and others.

Case No. : Writ Petn. (Crl) No. 539 of 1986, with Writ Petn. (Cri) No. 592 of 1987., Date of Decision : 18/12/1996

Constitution of India, 1950

Articles 21, 22 and 32 -- Custodial violence, torture and rape and ultimate death in the Police locker -- The torture itself is a naked violation of human dignity and destructive of human personality -- The interrogation by investigating agency though essential must be on scientific principles and third degrees methods are totally impermissible -- Mandatory directions in the shape of 'requirement' issued by the Supreme Court for compliance by the Police personnels while arresting or detaining any person.

The Supreme Court issued the following requirements to be followed in all cases of arrest or detention till provisions in that behalf as preventive measures: (i) The police personnel carrying out the arrest and handling the interrogation of the arrested should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such personnel who handle interrogation of the arrestee must be recorded in a register.

(ii) That the Police Officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest, (iii) A person who has been arrested or detained and is being held in custody in a Police Station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee. (iv) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the District or town through the Legal Aid Organisation in the District and the Police Station of the area concerned telegraphically with a period of 8 to 12 hours after the arrest.

(v) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(vi) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the Police officials in whose custody the arrestee is.

(vii) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body must be recorded at that time. The 'Inspection Memo' must be signed both by the arrestee and the Police Officer effecting the arrest and its copy provided to the arrestee.

(viii) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(ix) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

(x) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(xi) A Police control room should be provided at all District and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the Police control room it should be displayed on a conspicious notice Board.

Indian Penal Code, 1860

Section 330 -- Constitution of India, Articles 32 and 226 -- Torture of the person arrested amounting to infringement of fundamental right -- For such torture, the person concerned will be entitled to compensation from the State and quantum of compensation would depend on the peculiar facts of the case.

Section 330 directly makes torture during interrogation and investigation, punishable under IPCode -- It was however, inadequate to repair the wrong done to the citizen. The prosecution of the offender was a obligation of the State to prosecute every offender but the victim of crime needs to he compensated and the Court where the infringement of fundamental rights is establishment, it must proceed further and gave compensatory relief not by way of damages as a civil action but by way of compensation under the public law jurisdiction for the wrong done due to breach of public duty. It is not well accepted proposition that in most of the jurisdiction that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes, the only suitable remedy for redressal of the establishment of infringement of the fundamental right. In the assessment of the compensation, the emphasis has to be on the compensatory and not on punitive element.

Advocates Appeared :

V. R. Reddy, Solicitor General, Dr. N. M. Ghatate, Tapas Ray, Ms. K. Amareswari, Sr. Advocates, Dr. A. M. Singhvi, (A.C.), Sushil Kr. Jain, Sudhanshu Atreya, P. K. Bansal, P. Parmeswaran R. P. Srivastava, S. K. Nandy, (I. S. Goyal) Advocates, for Ms. Indu Malhotra, Naresh K. Sharma, Ashok Mathur, Sakesh Kumar, Uma Nath Singh, A. S. Bhasme, D. N. Mukherjee, Ms. Hemantika Wahi, Kailash Vasdev, Ms. Alpana Kirpal, Ram Kumar Mehta, R. S. Suri, G. K. Bansal A. S. Pundir, Dilip Singh, Krishnamurthi Swami, P. K. Manohar, G. Prabhakar, M. Veerappa, Ms. S. Janani, G. Prakash, M. T. George, K. V. Venkataraman, K. V. Viswanathan, B. K. Prasad, T. V. S. N. Chari, B. B. Singh, Anip Sachthey, M. Raghuraman, K. R. Nambiar, Indra Makwana, R. Mohan, Gopal Singh, Ms. Kamini Jaiswal, D. N. Goburdhan, C. V. S. Rao, R. Sasiprabhu, S. K. Agnihotri, R. B. Misra, Advocates, with them, for the appearing parties.

Statutes Referred :

1. Indian Penal Code -- S.220 2. Indian Penal Code -- S.330 3. Indian Penal Code -- S.330 4. Indian Penal Code -- S.220 5. Constitution of India -- Art.226 6. Constitution of India -- Art.226 7. Constitution of India -- Art.22 8. Constitution of India -- Art.22 9. Constitution of India -- Art.32 10. Constitution of India -- Art.21 11. Constitution of India -- Art.32 12. Constitution of India -- Art.21

Cases Referred :

1995 AIR SCW 2793 : 1995 (3) Scale 343 24, 28

1995 Supp (4) SCC 450 : 1994 SCC (Cri) 1464 31

1994 AIR SCW 1886 : (1994) 4 SCC 260 : 1994 Cri LJ 1981 : AIR 1994 SC 1349 20, 21

1994 NZLR 667, Simpson v. Attorney General (Baigenti Case)

1993 AIR SCW 2366 : (1993) 2 SCC 746 : 1993 Cri LJ 2899 : AIR 1993 SC 1960 23, 42A, 43, 46, 53

AIR 1990 SC513 : (1990) 1 SCC 422 42A

AIR 1986 SC 494 : (1985) 4 SCC 677 : 1986 Cri LJ 192 : 1986 All LJ 653 42A

AIR 1984 SC956 : (1984) 3 SCC 339 42A

AIR 1984 SC1026 : (1984) 3 SCC 82 : 1984 Cri LJ 830 42A

1984 (Supp) SCC 504 : 1984 Cri LR (SC) 439 42A

AIR 1983 SC1086 : (1983) 4 SCC 141 : 1983 Cri LJ 1644 42A, 43

(1978) 2 All ER 670 : (1978) 2 WLR 902 : (1979) AC 385 (PC), Maharaj v. Attorney-General of Trinidad and Tobago 50

(1972) IR 241, Byrne v. Ireland 49

(1966) 384 US 436 : 16 Law Ed 2d 694, Miranda v. Arizona 33

AIR 1965 SC1039 : (1965) 1 SCR 375 : 1965 (2) Cri LJ 144 43

(1965) IR 70, The State (At the Prosecution of Quinn v. Ryan) 48

(1940) 309 US 227: 84 Law Ed. 716, Chambers v. Fiorida 33

JUDGMENT/ORDER:
Dr. Anand, J.:—

The Executive Chairman, Legal Aid Services, West Bengal, a non-political organisation registered under the Societies Registration Act, on 26th August, 1986 addressed a letter to the Chief Justice of India drawing his attention to certain news items published in the Telegraph dated 20, 21 and 22 of July, 1986 and in the Statesman and Indian Express dated 17th August, 1986 regarding deaths in police lock-ups and custody. The Executive Chairman after reproducing the news items submitted that it was imperative to examine the issue in depth and to develop "custody jurisprudence" and formulate modalities for awarding compensation to the victim and/or family members of the victim for atrocities and death caused in police custody and to provide for accountability of the officers concerned. It was also stated in the letter that efforts are often made to hush up the matter of lock-up deaths and thus the crime goes unpunished and "flourishes". It was requested that the letter along with the news items be treated as a writ petition under "public interest litigation" category.

2. Considering the importance of the issue raised in the letter and being concerned by frequent complaints regarding custodial violence and deaths in police lock up, the letter was treated as a writ petition and notice was issued on 9-2-1987 to the respondents.

3. In response to the notice, the State of West Bengal filed a counter. It was maintained that the police was not hushing up any matter of lock-up death and that wherever police personnel were found to be responsible for such death, action was being initiated against them. The respondents characterised the writ petition as misconceived, misleading and untenable in law.

4. While the writ petition was under consideration a letter addressed by Shri Ashok Kumar Johri on 29-7-1987 to the Hon'ble Chief Justice of India drawing the attention of this Court to the death of one Mahesh Bihari of Pilkhana, Aligarh in police custody was received. That letter was also treated as a writ petition and was directed to be listed along with the writ petition filed by Shri D. K. Basu. On 14-8-1987 this Court made the following order:

"In almost every States there are allegations and these allegations are now increasing in frequency of deaths in custody described generally by newspapers as lock-up deaths. At present there does not appear to be any machinery to effectively deal with such allegations Since this is an all India question concerning all States, it is desirable to issue notices to all the State Governments to find out whether they are desire to say anything in the matter. Let notice issue to all the State Government. Let notice also issue to the Law Commission of India with a request that suitable suggestions may be made in the matter. Notice be made returnable in two months from today."

5. In response to the notice, affidavits have been filed on behalf of the States of West Bengal, Orissa, Assam, Himachal Pradesh, Madhya Pradesh, Haryana, Tamil Nadu, Meghalaya, Maharashtra and Manipur. Affidavits have also been filed on behalf of Union Territory of Chandigarh and the Law Commission of India.

6. During the course of hearing of the writ petition , the Court felt necessity of having assistance from the Bar and Dr. A. M. Singhvi, senior Advocate was requested to assist the Court as amicus curiae.

7. Learned counsel appearing for different States and Dr. Singhvi, as a friend of the Court, presented the case ably and though the effort on the part of the states initially was to show that "everything was well" within their respective States, learned counsel for the parties, as was expected of them in view of the importance of the issue involved, rose above their respective briefs and rendered useful assistance to this Court in examining various facets of the issue and made certain suggestions for formulation of guidelines by this Court to minimise, if not prevent, custodial violence and for award of compensation to the victims of custodial violence and the kith and kin of those who die in custody on account of torture.

8. The Law Commission of India also in response to the notice issued by this Court forwarded a copy of the 113th Report regarding "Injuries in police custody and suggested incorporation of Section 114-B in the Indian Evidence Act."

9. The importance of affirmed rights of every human being need no emphasis and, therefore, to deter breaches thereof becomes a sacred duty of the Court, as the custodian and protector of the fundamental and the basic human rights of the citizens. Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law enforcing officers is a matter of deep concern in a free society. These petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22 of the Constitution of India. The issues are fundamental.

10. "Torture" has not been defined in the Constitution or in other penal laws. 'Torture' of a human being by another human being is essentially an instrument to impose the will of the 'strong' over the 'weak' by suffering. The word torture today has become synonymous with the darker side of human civilisation.

"Torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also so intangible that there is no way to heal it.

Torture is anguish squeezing in your chest, cold as ice and heavy as a stone paralyzing as sleep and dark as the abyss. Torture is despair and fear and rage and hate. It is a desire to kill and destroy including yourself."

Adriana P. Bartow

11. No violation of any one of the human rights has been the subject of so many Conventions and Declarations as 'torture' - all

aiming at total banning of it in all forms, but in spite of the commitments made to eliminate torture, the fact remains that torture is more widespread now than ever before. "Custodial torture" is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality. It is a calculated assault on human dignity and whenever human dignity is wounded, civilisation takes a step backward - flag of humanity must on each such occasion fly half-mast.

12. In all custodial crimes what is of real concern is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Whether it is physical assault or rape in police custody, the extent of trauma, a person experiences is beyond the purview of law.

13. "Custodial violence" and abuse of police power is not only peculiar to this country, but it is widespread. It has been concern of international community because the problem is universal and the challenge is almost global. The Universal Declaration of Human Rights in 1948, which marked the emergence of a worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Despite the pious declaration, the crime continues unabated, though every civilised nation shows its concern and takes steps for its eradication.

14. In England, torture was once regarded as a normal practice to get information regarding the crime, the accomplices and the case property or to extract confessions, but with the development of common law and more radical ideas imbibing human thought and approach, such inhuman practices were initially discouraged and eventually almost done away with, certain aberrations here and there notwithstanding. The police powers of arrest, detention and interrogation in England were examined in depth by Sir Cyril Philips Committee - 'Report of a Royal Commission on Criminal Procedure' (Command - Papers 8092 of 1981). The report of the Royal Commission is, instructive. In regard to the power of arrest, the Report recommended that the power to arrest without a warrant must be related to and limited by the object to be served by the arrest, namely, to prevent the suspect from destroying evidence or interfering with witnesses or warning accomplices who have not yet been arrested or where there is a good reason to suspect the repetition of the offence and not to every case irrespective of the object sought to be achieved.

15. The Royal Commission suggested certain restrictions on the power of arrest on the basis of the 'necessary principle'. The Royal Commission said :

"..... We recommend that detention upon arrest for an offence should continue only on one or more to the following criteria :

(a) the person's unwillingness to identify himself so that a summons may be served upon him;

(b) the need to prevent to continuation or repetition of that offence;

(c) the need to protect the arrested person himself or other persons or property;

(d) the need to secure or preserve evidence of or relating to that offence or to obtain such evidence from the suspect by questioning him; and

(e) the likelihood of the person failing to appear at Court to answer any charge made against him."

The Royal Commission also suggested :

"To help to reduce the use of arrest we would also propose the introduction here of a scheme that is used in Ontario enabling a police officer to issue what is called an appearance notice. That procedure can be used to obtain attendance at the police station without resorting to arrest provided a power to arrest exists, for example to be finger printed or to participate in an identification parade. It could also be extended to attendance for interview at a time convenient both to the suspect and to the police officer investigating the case....."

16. The power of arrest, interrogation and detention has now been streamlined in England on the basis of the suggestions made by the Royal Commission and incorporated in Police and Criminal Evidence Act, 1984 and the incidents of custodial violence has been minimised there to a very great extent.

17. fundamental rights occupy a place of pride in the Indian Constitution. Article 21 provides "no person shall be deprived of his life or personal liberty except according to procedure established by law". Personal liberty, thus, is a sacred and cherished right under the Constitution. The expression "life or personal liberty" has been held to include the right to live with human dignity and thus it would also include within itself a guarantee against torture and assault by the State or its functionaries. Article 22 guarantees protection against arrest and detention in certain cases and declares that no person who is arrested shall be detained in custody without being informed of the grounds of such arrest and he shall not be denied the right to consult and defend himself by a legal practitioner of his choice. Clause (2) of Article 22 directs that the person arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate. Article 20(3) of the Constitution lays down that a person accused of an offence shall not be compelled to be a witness against himself. These are some of the constitutional safeguards provided to a person with a view to protect his personal liberty against any unjustified assault by the State. In tune with the constitutional guarantee a number of statutory provisions also seek to protect personal liberty, dignity and basic human rights of the citizens. Chapter V of Criminal Procedure Code, 1973 deals with the powers of arrest of a person and the safeguards which are required to be followed by the police to protect the interest of the arrested person. Section 41, Cr. P. C. confers powers on any police officer to arrest a person under the circumstances specified therein without any order or a warrant of arrest from a Magistrate. Section 46 provides the method and manner of arrest. Under this Section no formality is necessary while arresting a person. Under Section 49, the police is not

permitted to use more restraint than is necessary to prevent the escape of the person. Section 50 enjoins every police officer arresting any person without warrant to communicate to him the full particulars of the offence for which he is arrested and the grounds for such arrest. The police officer is further enjoined to inform the person arrested that he is entitled to be released on bail and he may arrange for sureties in the event of his arrest for a non-bailable offence. Section 56 contains a mandatory provision requiring the police officer making an arrest without warrant to produce the arrested person before a Magistrate without necessary delay and Section 57 echoes Clause (2) of Article 22 of the Constitution of India. There are some other provisions also like Sections 53, 54 and 167 which are aimed at affording procedural safeguards to a person arrested by the police. Whenever a person dies in custody of the police, Section 176 requires the Magistrate to hold an enquiry into the cause of death.

18. However, in spite of the constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen, growing incidents of torture and deaths in police custody has been a disturbing factor. Experience shows that worst violations of human rights take place during the course of investigation, when the police with a view to secure evidence or confession often resorts to third degree methods including torture and adopts techniques of screening arrest by either not recording the arrest or describing the deprivation of liberty merely as a prolonged interrogation. A reading of the morning newspaper almost everyday carrying reports of dehumanising torture, assault, rape and death in custody of police or other governmental agencies is indeed depressing. The increasing incidence of torture and death in custody has assumed such alarming proportions that it is affecting the credibility of the Rule of Law and the administration of criminal justice system. The community rightly feels perturbed. Society's cry for justice becomes louder.

19. The Third Report of the National Police Commission in India expressed its deep concern with custodial violence and lock-up deaths. It appreciated the demoralising effect which custodial torture was creating on the society as a whole. It made some very useful suggestions. It suggested :

".....An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances :-

(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.

(ii) The accused is likely to abscond and evade the processes of law.

(iii) The accused is given to violent behaviour and is likely to commit further offences unless his movement are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again. It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines....."

The recommendations of the Police Commission (supra) reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. These recommendation, however, have not acquired any statutory status so far.

20. This Court in Joginder Kumar v. State, (1994) 4 SCC 260 : (1994 AIR SCW 1886) (to which one of us, namely, Anand, J. was a party) considered the dynamics of misuse of police power of arrest and opined (at pp. 1892 and 1893 of AIR SCW) :

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power of arrest it one thing. The justification for the exercise of it is quite another..... No arrest should be made without a reasonable satisfaction reached after some investigation about the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person his liberty is a serious matter."

21. Joginder Kumar's case (supra) involved arrest of a practising lawyer who had been called to the police station in connection with a case under inquiry on 7-1-94. On not receiving any satisfactory account of his whereabouts, the family members of the detained lawyer preferred a petition in the nature of habeas corpus before this Court on 11-1-94 and in compliance with the notice, the lawyer was produced on 14-1-94 before this Court. The police version was that during 7-1-1994 and 14-1-1994 the lawyer was not in detention at all but was only assisting the police to detect some cases. The detenu asserted otherwise. This Court was not satisfied with the police version. It was noticed that though as on that day the relief in habeas corpus petition could not be granted but the questions whether there had been any need to detain the lawyer for 5 days and if at all he was not in detention then why was this Court not informed, were important questions which required an answer. Besides, if there was detention for 5 days, for what reason was he detained. The Court, therefore, directed the District Judge, Ghaziabad to make a detailed enquiry and submit his report within 4 weeks. The Court voiced its concern regarding complaints of violations of human rights during and after arrest. It said :

"The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violations of human rights because of indiscriminate arrests. How are we to strike a balance between the two ?

....

A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the

weight and the emphasis; of deciding which comes first - the criminal or society, the law violator or the abider ....."

This Court then set down certain procedural "requirements" in cases of arrest.

22. Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22 (1) of the Constitution require to be jealously and scrupulously protected. We cannot whisk away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchanism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic "No". the precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by laws.

23. In Neelabati Bahera v. State of Orissa, (1993) 2 SCC 746 : (1993 AIR SCW 2366), (to which Anand, J. was a party, this Court pointed out that prisoners and detenus are not denuded of their fundamental rights under Article 21 and it is only such restrictions as are permitted by law, which can be imposed on the enjoyment of the fundamental rights of the arrestees and detenus. It was observed (at p. 2382 of AIR SCW) :

"It is axiomatice that convicts, prisoners or undertrials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons. It is an obligation of State to ensure that there is no infringement of the indefeasible rights of a citizen to life, except in accordance with law, while the citizen is in its custody. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials or other prisoners in custody, except according to procedure established by law. There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His liberty is in the very nature of things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The duty of care on the part of the State is strict and admits of no exceptions. The wrongdoer is accountable and the State is responsible if the person in custody of the police is deprived of his life except according to the procedure established by law.

24. Instances have come to our notice where the police has arrested a person without warrant in connection with the investigation of an offence, without recording the arrest, and the arrested person has been subjected to torture to extract information from him for the purpose of further investigation or for recovery of case property or for extracting confession etc. The torture and injury caused on the body of the arrestee has sometimes resulted into his death. Death in custody is not generally shown in the records of the lock-up and every effort is made out a case that the arrested person died after he was released from custody. Any complaint against such torture or death is generally not given any attention by the police officers because of ties of brotherhood. No first information report at the instance of the victim or his kith and kin is generally entertained and even the higher police officers turn a blind eye to such complaints. Even where a formal prosecution is launched by the victim or his kith and kin, no direct evidence is available to substantiate the charge of torture or causing hurt resulting into death, as the police lock-up where generally torture or injury is caused is away from the public gaze and the witnesses are either police men or coprisoners who are highly reluctant to appear as prosecution witnesses due to fear of retaliation by the superior officers of the police. It is often seen that when a complaint is made against torture, death or injury, in police custody, it is difficult to secure evidence against the policemen responsible for resorting to third degree methods since they are in charge of police station records which they do not find difficult to manipulate. Consequently, prosecution against the delinquent officers generally results in acquittal. State of Madhya Pradesh v. Shyamsunder Trivedi, 1995 (3) Scale 343 : (1995 AIR SCW 2793) is an apt case illustrative of the observations made by us above. In that case, Nathu Banjara was tortured at police station, Rampura during the interrogation. As a result of extensive injuries caused to him he died in police custody at the police station. The defence set up by the respondent police officials at the trial was that Nathu had been released from police custody at about 10.30 p.m. after interrogation on 13-10-1986 itself vide entry Ex. P/22A in the Roznamcha and that at about 7.00 a.m. on 14-10-1981, a death report Ex. P/9 was recorded at the police station, Rampura, at the instance of Ramesh respondent No. 6, to the effect that he had found "one unknown person" near a tree by the side of the tank riggling with pain in his chest and that as soon as respondent No. 6 reached near him, the said person died. The further case set up by SI Trivedi, respondent No. 1, in charge of the police station was that after making a Roznamcha entry at 7.00 a.m. about his departure from the police station he (respondent No. 1- Shyamsunder Trivedi) and Constable Rajaram respondent proceeded to the spot where the death body was stated to be lying for conducting investigation under Section 174, Cr. P. C. He summoned Ramesh Chandra and Goverdhan respondents to the spot and in their presence prepared a panchanama Ex. P/27 of the dead body recording the opinion therein to the effect that no definite cause of death was known.

25. The First Additional Sessions Judge acquitted all the respondents of all the charges holding that there was no direct evidence to connect the respondents with the crime. The State of Madhya Pradesh went up in appeal against the order of acquittal and the High Court maintained the acquittal of respondents 2 to 7 but set aside the acquittal of respondent No. 1, Shyamsunder Trivedi for offences under Sections 218, 201 and 342, I. P. C. His acquittal for the offences under Sections 302/149 and 147, I. P. C. was, however, maintained. The State filed an appeal in this Court by special leave. The Court found that the following circumstances had been established by the prosecution beyond every reasonable doubt and coupled with the direct evidence of PWs. 1, 3, 4, 8 and 18 those circumstances were consistent only with the hypothesis of the guilt of the respondents and were inconsistent with their innocence :

(a) that the deceased had been brought alive to the police station and was last seen alive there on 13-10-1981;

(b) that the dead body of the deceased was taken out of the police station on 14-10-1981 at about 2 p.m. for being removed to the hospital;

(c) that S. I. Trivedi respondent No. 1, Ram Naresh Shukla, respondent No. 3, Raja Ram, respondent No. 4 and Ganiuddin respondent No. 5 were present at the police station and had all joined hands to dispose of the dead body of Nathu - Banjara;

(d) that SI Trivedi, respondent No. 1 created false evidence and fabricated false clues in the shape of documentary evidence with a view to screen the offence and for that matter, the offender;

(e) SI Trivedi respondent in connivance with some of his subordinates, respondents herein had taken steps to cremate the dead body in hot haste describing the deceased as a 'lavaris' though the identity of the deceased, when they had interrogated for a sufficient long time was well known to them

and opined that:

"The observations of the High Court that the presence and participation of these respondents in the crime is doubtful are not borne out from the evidence on the record and appear to be an unrealistic over simplification of the tell tale circumstances established by the prosecution."

26. One of us (namely, Anand, J.) speaking for the Court went on to observe (1995) AIR SCW 2793 at pp. 2800 and 2801) :

"The trial Court and the High Court, if we may say so with respect, exhibited a total lack of sensitivity and a 'could not careless' attitude in appreciating the evidence on the record and thereby condoning the barbarous third degree methods which are still being used, at some police stations, despite being illegal. The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situations and the peculiar circumstances of a given case, as in the present case, often results in miscarriage of justice and makes the justice delivery system a suspect. In the ultimate analysis the society suffers and a criminal gets encouraged. Tortures in police custody, which of late are on the increase, receive encouragement by this type of an unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them, if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The Courts, must not lose sight of the fact that death in police custody is perhaps one of the worst kind of crime in a civilised society, governed by the rule of law and poses a serious threat to an orderly civilised society."

This Court then suggested (at p. 2801 of AIR SCW) :

"The Courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial crimes and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crime so that as far as possible within their powers, the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the Majesty of Law has prevailed."

27. The State appeal was allowed and the acquittal of respondents 1, 3, 4 and 5 was set aside. The respondents were convicted for various offences including the offence under Section 304, Part II/34, IPC. and sentenced to various terms of imprisonment and fine ranging from Rs. 20,000/- to Rs. 50,000/-. The fine was directed to be paid to the heirs of Nathu Banjara by way of compensation. It was further directed (at p. 2802 of AIR SCW) :

"The Trial Court shall ensure, in case the fine is deposited by the accused respondents, that the payment of the same is made to the heirs of deceased Nathu Banjara, and the Court shall take all such precautions as are necessary to see that the money is not allowed to fall into wrong hands and is utilised for the benefit of the members of the family of the deceased nathu Banjar, and if found practical by deposit in Nationalised Bank or post office on such terms as the trial Court may in consultation with the heirs for the deceased consider fit and proper."

28. It needs no emphasis to say that when the crime goes unpunished, the criminals are encouraged and the society suffers. The victim of crime or his kith and kin become frustrated and contempt for law develops. It was considering these aspects that the Law Commission in its 113th Report recommended the insertion of Section 114B in the Indian Evidence Act. The Law Commission recommended in its 113th Report that in prosecution of a police officer for an alleged offence of having caused bodily injury to a person, if there was evidence that the injury was caused during the period when the person was in the custody of the police, the Court may presume that the injury was caused by the police officer having the custody of that person during that period. The Commission further recommended that the Court, while considering the question of presumption, should have regard to all relevant circumstances including the period of custody, statement made by the victim, medical evidence and the evidence which the Magistrate may have recorded. Change of burden of proof was, thus, advocated. In Shyam Sunder Trivedi's case (1995 AIR SCW 2793)(supra) this Court also expressed the hope that the Government and the legislature would give serious thought to the recommendation of the Law Commission. Unfortunately, the suggested amendment, has not been incorporated in the statute so far. The need of amendment requires no emphasis - sharp rise in custodial violence, torture and death in custody, justifies the urgency for the amendment and we invite Parliament's attention to it.

29. Police is, no doubt, under a legal duty and has legitimate right to arrest a criminal and to interrogate him during the investigation of an offence but it must be remembered that the law does not permit use of third degree methods or torture of accused in custody during interrogation and investigation with a view to solve the crime. End cannot justify the means. The interrogation and investigation into a crime should be in true sense purposeful to make the investigation effective. By torturing a person and using third degree methods, the police would be accomplishing behind the closed doors what the demands of our legal order forbid. No society can permit it.

30. How do we check the abuse of police power? Transparency of action and accountability perhaps are two possible safeguards which this Court must insist upon. Attention is also required to be paid to properly develop work culture, training and orientation of the police force consistent with basic human values. Training methodology of the police needs restructuring. The force needs to be infused with basic human values and made sensitive to the constitutional ethos. Efforts must be made to change the attitude and approach of the police personnel handling investigations so that they do not sacrifice basic human values during interrogation and do not resort to questionable forms of interrogation. With a view to bring in transparency, the presence of the counsel of the arrestee at some point of time during the interrogation may deter the police from using third degrees methods during interrogation.

31. Apart from the police, there are several other governmental authorities also like Directions of Revenue Intelligence, Directorate of Enforcement, Coastal Guard, Central Reserve Police Force (CRPF), Border Security Force (BSF), the Central Industrial Security Force (CISF), the State Armed Police, Intelligence Agencies like the Intelligence Bureau, R.A.W., Central Bureau of Investigation (CBI), CID, Traffic Police, Mounted Police and ITBP, which have the power to detain a person and to interrogate him in connection with the investigation of economic offences, offences under the Essential Commodities Act, Excise and Customs Act, Foreign Exchange Regulation Act etc. There are instances of torture and death in custody of these authorities as well. In Re Death of Sawinder Singh Grover, 1995 Supp (4) SCC 450, (to which Kuldip Singh, J. was a party) this Court took suo motu notice of the death of Sawinder Singh Grover during his custody with the Directorate of Enforcement. After getting an enquiry conducted by the Additional District Judge, which disclosed a prima facie case for investigation and prosecution, this Court directed the CBI to lodge a FIR and initiate criminal proceedings against all persons named in the report of the Additional Judge and proceed against them. The Union of India/Directorate of Enforcement was also directed to pay a sum of Rs. 2 lacs to the widow of the deceased by way of ex gratia payment at the interim stage. Amendment of the relevant provisions of law to protect the interest of arrested persons in such cases too is a genuine need.

32. There is one other aspect also which needs our consideration. We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hard core criminals like extremists, the terrorists, drug peddlers, smugglers who have organised, gangs, have taken strong roots in the society. It is being said in certain quarters that with more liberalisation and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogation. It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the result, the crime would go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with the criminals in an efficient and effective manner and bring to book those who are involved in the crime. The cure cannot, however, be worst than the disease itself.

33. The response of the American Supreme Court to such an issue in Miranda v. Arizona, (1966) 384 US 436 is instructive. The Court said :

"A recurrent argument, made in these cases is that society's need for interrogation out-weighs the privilege. This argument is not unfamiliar to this Court. See. e.g., Chambers v. Florida, (1940) 309 US 227, 240-41, 84 Law Ed 716, 724, 60 SCt 472. The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individuals when confronted with the power of Government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged."

(Emphasis ours)

34. There can be no gain saying that freedom of an individual must yield to be security of the State. The right of preventive detention of individuals in the interest of security of the State in various situations prescribed under different statutes has been upheld by the Courts. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The latin maxim salus populi est suprema lex (the safety of the people is the supreme law) and salus republicae est suprema lex (safety of the State is the Supreme law) co-exist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be "right, just and fair". Using any form of torture for extracting any kind of information would neither be 'right nor just nor fair' and, therefore, would be impermissible, being offensive to Article 21; Such a crime-suspect must be interrogated - indeed subjected to sustained and scientific interrogation - determined in accordance with the provision of law. He cannot, however, be tortured or subjected to third degree methods or eliminated with a view to elicit information, extract confession or drive knowledge about his accomplices, weapons etc.His Constitutional right cannot be abridged except in the manner permitted by law, though in the very nature of things there would be qualitative difference in the method of interrogation of such a person as compared to an ordinary criminal. Challenge of terrorism must be met with innovative ideas and approach. State terrorism is no answer to combat terrorism. State terrorism would only provide legitimacy to 'terrorism'. That would be bad for the State, the community and above all for the Rule of Law. The State must, therefore, ensure that various agencies deployed by it for combating terrorism act within the bounds of law and not become law unto themselves. That the terrorist has violated human rights of innocent citizens may render him liable for punishment but it cannot justify the violation of his human rights except in the manner permitted by law. Need, therefore, is to develop scientific methods of investigation and train the investigators properly to interrogate to meet the challenge.

35. In addition to the statutory and constitutional requirements to which we have made a reference, we are of the view that it would be useful and effective to structure appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention to bring in transparency and accountability. It is desirable that the officer arresting a person should prepare a memo of his arrest at the time of arrest in the presence of at least one witness who may be a member of the family of the arrestee or a respectable

person of the locality from where the arrest is made. The date and time of arrest shall be recorded in the memo which must also be counter signed by the arrestee.

36. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures :

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or and through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the (sic) Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous police board.

37. Failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of Court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

38. The requirements, referred to above flow from Articles 21 and 22 (1) of the Constitution and need to be strictly followed. These would apply with equal force to the other governmental agencies also to which a reference has been made earlier.

39. These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the Courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.

40. The requirements mentioned above shall be forwarded to the Director General of Police and the Home Secretary of every State/Union Territory and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on the All India Radio besides being shown on the National Network of Doordarshan and by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. Creating awareness about the rights of the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability. It is hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes.

PUNITIVE MEASURES :

41. UBIJUS IBI REMEDIUM - There is no wrong without a remedy. The law wills that in every case where a man is wronged and endamaged he must have a remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up, does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. Mush more

needs to be done.

42. Some punitive provisions are contained in the Indian Penal Code which seek to punish violation of right to life. Section 220 provides for punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive. Sections 330 and 331, provide for punishment of those who inflict injury or grievous hurt on a person to extort confession or information in regard to commission of an offence. Illustrations (a) and (b) to Section 330 make a police officer guilty of torturing a person in order to induce him to confess the commission of a crime or to induce him to point out places where stolen property is deposited. Section 330, therefore, directly makes torture during interrogation and investigation punishable under the Indian Penal Code. These statutory provisions are, however, inadequate to repair the wrong done to the citizen. Prosecution of the offender is an obligation of the State in case of every crime but the victim of crime needs to be compensated monetarily also. The Court, where the infringement of the fundamental right is established, therefore, cannot stop by giving a mere declaration. It must proceed further and give compensatory relief, not by way of damages as in a civil action but by way of compensation under the public law jurisdiction for the wrong done, due to breach of public duty by the State of not protecting the fundamental right to life of the citizen. To repair the wrong done and give judicial redress for legal injury is a compulsion of judicial conscience.

42A. Article 9(5) of the International Covenant on Civil and Political Rights, 1966 (ICCPR) provides that "anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation". Of course, the Government of India at the time of its ratification (of ICCOR) in 1979 had made a specific reservation to the effect that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention and thus did not become a party to Covenant. That reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen. (See with advantage Rudal Shah v. State of Bihar, (1983) 4 SCC 141 : (AIR 1983 SC 1086 ; Sebastian M. Hongrey v. Union of India; Rajendra Singh v. Smt. Usha Rani, (1984) 3 SCC 339 : (AIR 1984 SC 956), (1984) 3 SCC 82 : (AIR 1984 SC 1026); Bhim Singh v. state of Jammu and Kashmir 1984 (Supp) SCC 504 and (1985) 4 SCC 677 : (AIR1986 SC 494), Saheli v. Commissioner of Police, Delhi, (1990) 1 SCC 422 : (AIR 1990 SC 513). There is indeed no express provision in the Constitution of India for grant of compensation for violation of a fundamental right to life, nonetheless, this Court has judicially evolved a right to compensation in cases of established unconstitutional deprivation of personal liberty or life. (See : Neelabati Behera v. State (1993 AIR SCW 2366) (supra)).

43. Till about two decades ago the liability of the Government for tortious act of its public servants was generally limited and the person affected could enforce his right in tort by filing a civil suit and there again the defence of sovereign immunity was allowed to have its play. For the violation of the fundamental right to life or the basic human rights, however, this Court has taken the view that the defence of sovereign immunity is not available to the State for the tortious acts of the public servants and for the established violation of the rights guaranteed by Article 21 of the Constitution of the India. In Nilabati Beehera v. State (1993 AIR SCW 2366) (supra) the decision of this Court in Kasturi Lal Ralia Ram Jain v. State of U.P. (1965) 1 SCR 375 : (AIR 1965 SC 1039), wherein the plea of sovereign immunity had been upheld in a case of vicarious liability of the State for the tort committed by its employees was explained thus (at p. 2376 of AIR SCW):

"In this context, it is sufficient to say that the decision of this Court in Kasturilal upholding the State's plea of sovereign immunity for tortious acts of its servants is confined to the sphere of liability in tort, which is distinct from the State's liability for contravention of fundamental rights to which the doctrine of sovereign immunity has no application in the constitutional scheme, and is no defence to the constitutional remedy under Article 32 and 226 of the Constitution which enables award of compensation for contravention of fundamental rights, when the only practicable mode of enforcement of the fundamental rights can be the award of compensation. The decisions of this Court in Rudul Sah (AIR 1983 SC 1086) and others in that line relate to award of compensation for contravention of fundamental rights, in the constitutional remedy under Articles 32 and 226 of the Constitution. On the other hand, Kasturilal related to the value of goods seized and not returned to the owner due to the fault of Government Servants, the claim being of damages for the tort of conversion under the ordinary process, and not a claim for compensation for violation of fundamental rights. Kasturilal is, therefore, inapplicable in this context and distinguishable."

44. The claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to he claim available in private law for damages for tortious acts of the public servants. Public law proceedings serve a different purpose than the private law proceedings. Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. Grant of compensation in proceedings under Article 32 or 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the Courts under the public law jurisdiction for penalising the wrong doer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen.

45. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the Courts too much, as the protector and custodian of the indefeasible rights of the citizen. The Courts have the obligation to satisfy the social aspirations of the citizen because the Courts and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim - civil action for damages is a long drawn and cumbersome judicial process. Monetary compensation for redressal by the Court finding the infringement of the indefeasible right to life of the citizen is, therefore, a useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the bread winner of the family.

46. In Nilabati Behera's case (1993 AIR SCW 2366) (supra), it was held (at pp. 2382 and 2383 of AIR SCW) :

"Adverting to the grant of relief to the heirs of a victim of custodial death for the infraction or invasion of his rights guaranteed under Article 21 of the Constitution of India, it is not always enough to relegate him to the ordinary remedy of a civil suit to claim damages for the tortious act of the State as that remedy in private law indeed is available to the aggrieved party. The citizen complaining of the infringement of the indefeasible right under Article 21 of the Constitution cannot be told that for the established violation of the fundamental right to life, he cannot get any relief under the public law by the Courts exercising writ jurisdiction. The primary source of the public law proceedings stems from the prerogative writs and the Courts have, therefore, to evolve 'new' tools' to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the title "Freedom under the Law" Lord Denning in has own style warned :

"No one can suppose that the executive will never be guilty of are sins that the common to all of us. You may be sure that they will sometimes do things which they ought not to do : and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy ? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to date machinery, by declarations, injunctions and actions for negligence... This is not the task of Parliament...the Courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare State; but abused they lead to a totalitarian State. None such must ever be allowed in this country".

47. A similar approach of redressing the wrong by award of monetary compensation against the State for its failure to protect the fundamental rights of the citizen has been adopted by the Courts of Ireland, which has a written constitution, guaranteeing fundamental rights, but which also like the Indian Constitution contains no provision of remedy for the infringement of those rights. That has, however, not prevented the Courts in Ireland from developing remedies, including the award of damages, not only against individuals guilty of infringement, but against the State itself.

48. The informative and educative observations of O' Dalaigh CJ in the State (At the Prosecution of Quinn v. Ryan (1965) IR 70 (122)) deserve special notice. The Learned Chief Justice said :

"It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of those rights. As a necessary corollary, it follows that no one can with impunity set these rights at nought or circumvent them, and that the Court's powers in this regard are as ample as the defence of the Constitution requires."

(Emphasis supplied)

49. In Byrne v. Ireland, (1972) IR 241, Walsh J. opined at p. 264:

"In several parts in the Constitution duties to make certain provisions for the benefit of the citizens are imposed on the State in terms which bestow rights upon the citizen and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights. It follows that, where the right is one guaranteed by the State, it is against the State that the remedy must be sought if there has been a failure to discharge the constitution obligation imposed".

(Emphasis supplied)

50. In Maharaj v. Attorney General of Trinidad and Tobago (1978) 2 All ER 670, the Privy Council while interpreting Section 6 of the Constitution of Trinidad and Tobago held that though not expressly provided therein, it permitted an order for monetary compensation, by way of 'redress' for contravention of the basic human rights and fundamental freedoms. Lord Diplock speaking for the majority said :

"It was argued on behalf of the Attorney General that Section 6 (2) does not permit of an order for monetary compensation despite the fact that this kind of redress was ordered in Jaundoo v. Attorney General of Guyana. Reliance was placed on the reference in the sub-section to 'enforcing, or securing the enforcement of, any of the provisions of the sais foregoing section' as the purpose for which orders etc. could be made. An order for payment of compensation, it was submitted, did not amount to the enforcement of the rights that had been contravened. In their Lordships' view an order for payment of compensation when a right protected under Section 1 'has been' contravened is clearly a form of 'redress' which a person is entitled to claim under Section 6(1) and may well be the only practicable form of redress, as by now it is in the instant case. The jurisdiction to make such an order is conferred on the High Court by para (a) of Section 6(2), viz. jurisdiction 'to hear and determine any application made by any person in pursuance of sub-section (1) of this section'. The very wide powers to make orders, issue writs and give directions are ancillary to this".

51. Lord Diplock then went on the observe (at page 680):

"Finally, their Lordships would say something about the measure of monetary compensation recoverable under Section 6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone."

52. In Simpson v. Attorney General (Baigent's case) 1994 NZLR 667, the Court of Appeal in New Zealand, dealt with the issue in a very elaborate manner by reference to a catena of authorities from different jurisdictions. It considered the applicability of the doctrine of vicarious liability for torts, like unlawful search, committed by the police officials which violate the New Zealand Bill of Rights Act, 1990. While dealing with the enforcement of rights and freedoms as guaranteed by the Bill of Rights for which no

specific remedy was provided. Hardie Boys, J. observed.

"The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the Government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been imfringed. I see no reason to think that this should depend on the terms of a written constitution. Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised State. They are inherent in and essential to the structure of society. They do not depend on the legal or constitutional form in which they are declared. The reasoning that has led the Privy Council and the Courts of Ireland and India to the conclusions reached in the cases to which I have referred (and they are but a sample) is in my opinion equally valid to the New Zealand Bill of Rights Act if it is to have life and meaning".

(Emphasis supplied)

53. The Court of Appeal relied upon the judgments of the Irish Courts, the Privy Council and referred to the law a laid down in Nilabati Behera v. State (1993 AIR SCW 2366) (supra) thus :

"Another valuable authority comes from India, where the constitution empowers the Supreme Court to enforce rights guaranteed under it. In Nilabati Bahera v. State of Orissa, 1993 Cri LJ 2899, the Supreme Court awarded damages against the State to the mother of a young man beaten to death in police custody. The Court held that its power of enforcement imposed a duty to "forgenew tools", of which compensation was an appropriate one where that was the only mode of redress available. This was not a remedy in tort, but one in public law based on strict liability for the contravention of fundamental rights to which the principle of sovereign immunity does not apply. These observations of Anand, J. at p. 2912 may be noted.

The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the Courts too much as protector and guarantor of the indefeasible rights of the citizens. The Courts have the obligation to satisfy the social aspirations of the citizens because the Courts and the law are for the people and expected to respond to their aspirations. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights".

54. Each of the five members of the Court of Appeal in Simpson's case (1994 NZLR 667) (supra) delivered a separate judgment but there was unanimity of opinion regarding the grant of pecuniary compensation to the victim, for the contravention of his rights guaranteed under the Bill of Rights Act, notwithstanding the absence of an express provision in that behalf in the Bill of Rights Act.

55. Thus, to sum up, it is now a well accepted proposition in most of the jurisdiction, that monetary or pecuniary compensation is an appropriate and indeed an effective and sometimes perhaps the only suitable remedy for redressal of the established infringement of the fundamental right to life of a citizen by the public servants and the State is vicariously liable for their acts. The claim of the citizen is based on the principle of strict liability to which the defence of sovereign immunity is not available and the citizen must receive the amount of compensation from the State, which shall have the right to be indemnified by the wrong doer. In the assessment of compensation, the emphasis has to be on the compensatory and not on pvnitive element. The objective is to apply balm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence (irrespective of compensation) must be left to the Criminal Courts in which the offender is prosecuted, which the State, in law, is duly bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.

56. Before parting with this judgment we wish to place on record our appreciation for the learned counsel appearing for the States in general and Dr. A. M. Singhvi, learned senior counsel who assisted the Court amicus curiae in particular for the valuable assistance

Order accordingly.

1999 Legal Eagle (SC) 391

IN THE SUPREME COURT OF INDIA

Equivalent Citations : 1999 AIR(SC) 1403 : 1999 AIR(SCW) 1083 : 1999 (2) Crimes 329 : 1999 CrLJ 2095 : 1999 (2) JT 520 : 1999 (2) Scale 409 : 1999 (3) SCC 715 : 1999 SCC(Cri) 478 : 1999 (3) Supreme 401 : 1999 (2) SCR 402

[Before : M.B.Shah, K.T.Thomas]

Manoj

versus

State of Madhya Pradesh

Case No. : Criminal Appeal No. 371 of 1999 (@ Spl. Leave Petn. (Cri.) No. 39 of 1997)., Date of Decision : 05/04/1999

Bail -- Refusal to grant bail -- Entitlement of bail under Section 167 Cr.P.C. for the offence under N.D.P.S. Act -- The accused was involved in the offence under N.D.P.S. Act in two different States -- He was arrested in one offence and obtained bail from the High Court but he was again arrested in subsequent offence -- He could not be produced before the Magistrate after such arrest within 24 hours and, therefore, his arrest was absolutely otiose -- In such circumstances directions issued to release the accused on bail.

When the State of Madhya Pradesh, whose police made the arrest of the appellant in connection with the MP case on 7.8.1998, admitted that after arrest he was not produced before the nearest magistrate within 24 hours, its inevitable corollary is that detention made as a sequel to the arrest would become unlawful beyond the said period of 24 hours. The excuses were advanced by the respondent -- State for their inability to produce the accused before the nearest magistrate within the required period. But no such excuse has been recognised by law. Hence respondent cannot validly press for further detention of the accused beyond 24 hours. That arrest has now become otiose.

Criminal Procedure Code, 1973

Sections 57 and 167 -- Refusal to grant bail -- Offence under NDPS Act in two States the accused was arrested in one State and was granted bail by the High Court but bail bond not executed because lateron he was arrested in another State, however, he was not produced before the Magistrate within 24 hours -- Therefore his arrest in other State at become illegal and therefore directions issued to realised him on execution of bonds as per terms of grant on bail.

If the police officer is forbidden from keeping an arrested person beyond twenty four hours without order of a magistrate, what should happen to the arrested person after the said period. It is a constitutional mandate that no person shall be deprived of his liberty except in accordance with the procedure established in law. Close to its heels the Constitution directs that the person arrested and detained in custody shall be produced before the nearest magistrate within 24 hours of such arrest. The only time peirnittcd by Article 22 of the Constitution to be excluded from the said period of 24 hours is I:the time necessary forgoing from the place of arrest to the Court of the Magistrate". Only under two contingencies can the said direction be obviated. One is when the person arrested is an "enemy alien". Second is when the arrest is under any law for preventive detention. In all other cases the Constitution has prohibited peremptorily that "no such person shall be detained in custody beyond the said period without the authority of a magistrate".

Refusal to Bail -- Section 167 -- Refusal to bail under NDPS Act -- The accused was arrested in one state under NDPS Act -- He was earlier also, arrested in other state and was granted bail by the High Court of that State, but bail bond not furnished on account of his subsequent arresrt -- The accused on such subsequent arrest not produced Magistrate within 24 hours as required under Section 167 -- Therefore, direction issued to release the accused on bail, within the meaning of Section 167 of the Code.

When the State of Madhya Pradesh, whosie police made the arrest of the appellant in connection with the M.P. case on 7.8.1998, admitted that after arrest he was not produced before the nearest Magistrate within 24 hours, ills inevitable corollary is that detention made as a sequel to the arrest would become unlawful beyond the said period of 24 hours. Of course the stand of the State of Madhya Pradesh is that appellant continues to be under detention pursuant to his arrest in the Rajasthan's case. Excuses were advanced by the respondent State for their inability to produce the accused before the nearest magistrate within the required period. But no such excuse has been recognised by law. Hence respondent cannot validly press for further detention of the accused beyond 24 hours. That arrest has now become otiose.

Advocates Appeared :

Mr. U. R. Lalit, Sr. Advocate and Mr. Shakil Ahmed Syed, Advocate with him for Appellant

Mr. R. Anoop G. Chaudhary, Sr. Advocate Mr. Uma Nath Singh, Ms. Madhur Dadlani and Mr. Naveen Kumar Singh, Advocates with him for Respondent.

Statutes Referred :

1. Code of Criminal Procedure -- S.439 2. Code of Criminal Procedure -- S.57 3. Code of Criminal Procedure -- S.167(1) 4. Code of Criminal Procedure -- S.57 5. Code of Criminal Procedure -- S.439 6. Code of Criminal Procedure -- S.437 7. Code of Criminal Procedure -- S.437 8. Code of Criminal Procedure -- S.167(2) 9. Code of Criminal Procedure -- S.167(2) 10. Code of Criminal Procedure -- S.167(1) 11. Narcotics Drugs And Psychotropic Substances Act -- S.37 12. Narcotics Drugs And Psychotropic Substances Act -- S.37 13. Constitution of India -- Art.22(2) 14. Constitution of India -- Art.21 15. Constitution of India -- Art.22(2) 16. Constitution of India -- Art.21

Cases Referred :

1995 AIR SCW 2543 : (1995) 4 SCC 190 7

JUDGMENT/ORDER:
Thomas, J.:—

Leave granted.

2. Appellant is caught between Scylla and Charybdis. Such a peculiar situation arises but rarely for an accused and he remains in jail for long, without conviction in any case, despite obtaining an order of bail as the High Court of Madhya Pradesh expressed helplessness in considering his plea for release, though he has a legal point in his favour.

3. The aforesaid situation was reached on the following facts. On 22-6-1998 appellant was arrested in connection with a case involving Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (For short the 'NDPS Act) registered by the police of Kota in Rajasthan (it can be referred to as "the Rajasthan case", for convenience) and is remaining in custody. In the meanwhile, another case under NDPS Act started snowballing at Rampura district in Madhya Pradesh which initially was against one Govind Singh and eventually it involved the appellant also (for convenience the latter case can be referred to as "the MP case"). It is said that appellant was recorded as arrested in connection with the MP case on 7-8-1998.

4. Appellant moved for bail in Rajasthan case and after initial setbacks he succeeded in getting an order in his favour which was passed on 16-10-1998 by the High Court of Rajasthan (Jaipur Bench) directing him to be released on bail on executing a personal bond for Rupees fifty thousand together with two solvent sureties in a sum of Rupees twenty five thousand each to the satisfaction of the Special Judge (dealing with NDPS cases) Kota. We are told that appellant did not execute the bond since his arrest in the MP case became a stonewall for his release from custody.

5. So he moved the High Court of Madhya Pradesh for bail under Section 439 of the Code of Criminal Procedure ('the Code', for short) after his first move before the Sessions Court at Mandsaur in Madhya Pradesh was rejected. The High Court of Madhya Pradesh also rejected his petition. After the expiry of ninety days of arrest in the Madhya Pradesh case he moved an application before the Special Judge, Kota contending that he is entitled to bail under the proviso to Section 167 (2) of the Code as no charge-sheet was laid in the MP case till then. But the special Court rejected the application on the ground that "he was never produced before the Court after the formal arrest (and no order as regards first remand was ever passed); therefore, in this case, question of completion of investigation within a period of ninety days does not arise."

6. He again moved the High Court of Madhya Pradesh upon which the impugned order was passed. Learned single Judge of the High Court of Madhya Pradesh who passed the impugned order, was not inclined to give the appellant benefit of the proviso to Section 167 (2) of the Code on the premise that he was not produced before any Court pursuant to the arrest dated 7-8-1998 and hence he cannot be treated to be in judicial custody in the MP case. This is what the learned judge has said :

"On perusal of the impugned order of the trial Court, it emerged that the accused/applicant is not produced before the Court as yet in compliance to the production warrant issued by the Court. The trial Court considered that he is not in a judicial custody in the instant case. Without commenting anything on the applicability of Section 167 (2) to this case at this stage I do not consider it proper to enlarge the accused on bail."

7. It is now well-neigh settled that benefit of the proviso to Section 167 (2) of the Code would endue to an accused involved in the offences under NDPS Act as well, (vide Union of India v. Thamisharasi, (1995) 4 SCC 190 : (1995 AIR SCW 2543). Paragraph 14 of the said decision reads thus :

"In our opinion, in order to exclude the application of the proviso to sub-section (2) of Section 167 Cr. P.C. in such cases an express provision indicating the contrary intention was required or at least some provision from which such a conclusion emerged by necessary implication. As shown by us, there is no such provision in the NDPS Act and the scheme of the Act indicates that the total period of custody of the accused permissible during investigation is to be found in Section 167 Cr. P.C. which is expressly applied. The absence of any provision inconsistent therewith in this Act is significant."

8. But here the position is slightly different because appellant is not continuing in custody pursuant to any order passed under Section 167 (2) of the Code. Sub-section (2) would apply only to an accused who was forwarded to a magistrate as per sub-section (1) because further detention of the accused can be made only if it is so authorised by such magistrate. Proviso to sub-section (2) contains the interdict that "no magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years". The proviso further mandates that "on the expiry of the said period of ninety days..... the accused person shall be released on bail if he is prepared to and does furnish bail." It is further provided that "every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter".

9. Here the prayer for bail is opposed on the ground that detention is without such authorisation. Can the benefit of bail be denied on such a ground? Section 167 (1) of the Code is relevant in this context as it enjoins on the police officer concerned a legal obligation to forward the arrested accused to the nearest magistrate. That sub-section reads thus :

"Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate."

10. The police officer who conducts investigation cannot obviate the legal obligation to perform two requisites if he knows that investigation cannot be completed within 24 hours after arrest of the accused. One requisite is, to transmit a copy of the case diary to the nearest judicial magistrate.

The other is, to forward the accused to such magistrate simultaneously. The only exceptional ground on which the police officer can avoid producing the arrested person before such magistrate is when the officer concerned is satisfied that there are no grounds for believing that the information or accusation was well-founded. In such a case, the accused must be released from custody to which he was interned pursuant to the arrest.

11. In this context Section 57 of the Code is also relevant and hence it is extracted below :

"57. Person arrested not to be detained more than twenty-four hours.- No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court."

12. If the police officer is forbidden from keeping an arrested person beyond twenty four hours without order of a magistrate, what should happen to the arrested person after the said period. It is a constitutional mandate that no person shall be deprived of his liberty except in accordance with the procedure established in law. Close to its heels the Constitution directs that the person arrested and detained in custody shall be produced before the nearest magistrate within 24 hours of such arrest. The only time permitted by Article 22 of the Constitution to be excluded from the said period of 24 hours is "the time necessary for going from the place of arrest to the Court of the magistrate". Only under two contingencies can the said direction be obviated. One is when the person arrested is an "enemy alien". Second is when the arrest is under any law for preventive detention. In all other cases the Constitution has prohibited peremptorily that "no such person shall be detained in custody beyond the said period without the authority of a magistrate".

13. When the State of Madhya Pradesh, whose police made the arrest of the appellant in connection with the MP case on 7-8-1998, admitted that after arrest he was not produced before the nearest magistrate within 24 hours, its inevitable corollary is that detention made as a sequel to the arrest would become unlawful beyond the said period of 24 hours.

14. Of course the stand of the State of Madhya Pradesh is that appellant continues to be under detention pursuant to his arrest in the Rajasthan's case. Excuses were advanced by the respondent-State for their inability to produce the accused before the nearest magistrate within the required period. But no such excuse has been recognized by law. Hence respondent cannot validly press for further detention of the accused beyond 24 hours. That arrest has now become otiose.

15. We therefore make it clear that as soon as the appellant executes the bond to the satisfaction of the Special Magistrate, Kota, in pursuance of the order of the High Court of Rajasthan dated 16-10-1998 (cited supra) he shall be released forthwith unless his detention is lawfully required in any other case. We make it clear that nothing stated in this judgment shall prejudice the powers of the police to arrest the appellant in accordance with law, in connection with any case.

Order accordingly.

2001 Legal Eagle (SC) 809

IN THE SUPREME COURT OF INDIA

Equivalent Citations : 2001 AIR(SC) 2369 : 2001 AIR(SCW) 2210 : 2001 (2) Crimes 303 : 2001 CrLJ 2941 : 2001 (Supp.1) JT 248 : 2001 (3) Scale 671 : 2001 (5) SCC 34 : 2001 SCC(Cri) 819 : 2001 (4) Supreme 8 : 2001 (2) UJ 1321 : 2001 (3) SCR 508

[Before : M.B.Shah, S.N.Variava]

Rajeev Chaudhary

versus

State (N.C.T.) of Delhi

Case No. : Criminal Appeal No. 606 of 2001., Date of Decision : 04/05/2001

Criminal Procedure Code,1973, Section 167(2)(i), Proviso (a) -- Indian Penal Code 1860, Section 386 -- Detention of accused in custody -- Maximum period -- Expression offence punishable with imprisonment for a term of not less than 10 years in Cl. (i) of Proviso (a) to S. 167(2) -- Is offence for which imprisonment is for clear period of 10 years or more -- Under S. 386 of I.P.C. punishment prescribed can extend to ten years i.e. it could be less than 10 years -- Hence, accused cannot be released on bail on grounds of non-submission of chargesheet within period of 60 days -- Accused can be detained up to period of ninety days. (Para 6)

Advocates Appeared :

Dr. Krishnan Singh Chaudhan Adv. (A.C.), for the Appellant

Kailash Vasdev, Senior Advocate (K. C. Kaushik) Advocate, for the D. S. Mehra Advocate with him, for the Respondent.

Statutes Referred :

1. Indian Penal Code -- S.386 2. Code of Criminal Procedure -- S.167(2)

JUDGMENT/ORDER:
Shah, J.:—

Leave granted.

2. Short question involved in this appeal is with regard to the interpretation and construction of the expression "offence punishable with imprisonment for a term of not less than ten years" occurring in Proviso (a) to Section 167(2) of the Criminal Procedure Code in context of the expression "imprisonment which may extend to ten years" occurring in Section 386 of the I.P.C.

3. Appellant was arrested in connection with an offence punishable under Sections 386, 506 and 120-B of the I.P.C. He was produced before the Metropolitan Magistrate, Delhi on 31-10-1998 and was released on bail by Order dated 2-1-1999 by the Metropolitan Magistrate on the grounds that charge-sheet was not submitted within 60 days as provided under Section 167(2) of the Criminal Procedure Code, 1973. That order was challenged before the Sessions Judge. New Delhi by filing Criminal Revision No. 22 of 1999. By judgment and Order dated 18-8-1999, the Additional Sessions Judge, New Delhi allowed the said revision application. The learned Additional Sessions Judge held that for an offence under Section 386, I.P.C. period of sentence could be up to 10 years RI. Hence, Clause (i) of the Proviso (a) to Section 167(2) would be applicable. He, therefore, set aside the order passed by the Metropolitan Magistrate releasing the accused on bail. That order was challenged before the High Court by the accused. The High Court referred to its earlier decisions and held that expression "an offence punishable with imprisonment for a term of not less than 10 years" in Clause (i) of the proviso to Section 167 would mean an offence punishable with imprisonment for a specified period which period would not be less than 10 years or in other words would be at least ten years. The words 'not less than' qualify the period. These words put emphasis on the period of ten years and mean period must be clear ten years. It was further held that on a plain reading of Clause (i) of Proviso (a) to sub-section (2) of Section 167, Cr. P.C. there seemed to be no doubt that offences punishable with death, imprisonment for life or imprisonment for a term of ten years or more would fall under Clause (i) and offences which are punishable with imprisonment for less than ten years would fall under Clause (ii). Hence, the High Court set aside the order passed by the Additional Sessions Judge. That order is challenged in this appeal.

4. Section 167 is a provision which authorises the Magistrate permitting detention of an accused in custody and prescribing the maximum period for which such detention could be ordered pending investigation. We are concerned with the interpretation of Proviso (a) of Section 167(2) which reads thus:-

"167. Procedure when investigation cannot be completed in twenty four hours.- (2)....

Provident that-

(a) the Magistrate may authorise the detention of the accused person otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years,"

(ii) . . . . . ."

5. Further, Section 386 of I.P.C. provides as under:

"386. Extortion by putting a person in fear of death or grievous hurt- Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

(Emphasis added)

6. From the relevant part of the aforesaid sections, it is apparent that pending investigation relating to an offence punishable with imprisonment for a term "not less than 10 years", the Magistrate is empowered to authorise the detention of the accused in custody for not more than 90 days. For rest of the offences, period prescribed is 60 days. Hence in case, where offence is punishable with imprisonment for 10 years or more, accused could be detained up to a period of 90 days. In this context, the expression "not less than" would mean imprisonment should be 10 years or more and would cover only those offences for which punishment could be imprisonment for a clear period of 10 years or more. Under Section 386 punishment provided is imprisonment of either description for a term which may extend to 10 years and also fine. That means, imprisonment can be for a clear period of 10 years or less. Hence, it could not be said that minimum sentence would be 10 years or more. Further, in context also if we consider Clause (i) of Proviso (a) to Section 167(2) it would be applicable in case where investigation relates to an offence punishable (1) with death; (2) imprisonment for life; and (3) imprisonment for a term of not less than ten years. It would not cover the offence for which punishment could be imprisonment for less than 10 years. Under Section 386 of the I.P.C. imprisonment can vary from minimum to maximum of 10 years and it cannot be said that imprisonment prescribed is not less than 10 years.

7. In the result, the appeal is dismissed.

Appeal dismissed.

2003 Legal Eagle (SC) 854

IN THE SUPREME COURT OF INDIA

Equivalent Citations : 2004 AIR(SC) 7 : 2004 (2) Bom.C.R.(Cri.) 147 : 2003 (4) Crimes 367 : 2004 CrLJ 14 : 2003 (8) JT 84 : 2003 (8) Scale 621 : 2003 (8) SCC 546 : 2004 SCC(Cri) 27 : 2003 (7) Supreme 487 : 2004 (1) Bom.L.R. 324

[Before : N.Santosh Hegde & B.P.Singh]

State of Maharashtra

versus

Christian Community Welfare Council of India

Case No. : Criminal Appeal Nos. 508 with 509 of 1996, Date of Decision : 15/10/2003

(A) Criminal Procedure Code, 1973 -- Sections 41 and 46 -- Arrest and Detention of Female Persons -- Preventive Measures and Compensation -- High Court prevented police for arresting a female person without presence of a lady constable -- also prevented arrest of a lady before sunrise and after sunset -- Directions modified -- Practical difficulties in strict compliance of these directions -- While arresting a female person all efforts should be made to keep a lady constable present -- But in circumstances where the arresting officers is reasonably satisfied that such presence of a lady constable is not available or possible and/ or the delay in arresting caused by securing the presence of a lady constable would impede the course of investigation such arresting officer for reasons to be recorded either before the arrest or immediately after the arrest be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable -- Constitution of India, 1950, Article 226;

(B) Custodial Death -- Compensation -- recovery of compensation from police official -- whether can be recovered or not -- observations of high court that compensation paid to widow of deceased may be recovered from Police Officials -- Held, Justified -- Indian Penal Code, 1860, Sections 302, 330, 342, 354, 355 & 34 -- Cr.P.C., Section 357;

Advocates Appeared :

For the Appellant : Ravindra Keshavrao Adsure, M. R. Daga and Dr. Kailash Chand, Advocates.

For the Respondents : R. S. Lambat, Advocate.

Statutes Referred :

1. Indian Penal Code -- S.330 2. Indian Penal Code -- S.34 3. Indian Penal Code -- S.334 4. Indian Penal Code -- S.354 5. Indian Penal Code -- S.302 6. Indian Penal Code -- S.342 7. Code of Criminal Procedure -- S.46 8. Code of Criminal Procedure -- S.357 9. Code of Criminal Procedure -- S.41 10. Constitution of India -- Art.21 11. Constitution of India -- Art.136 12. Constitution of India -- Art.226

Cases Referred :

1. D.K. Basu v. State of W.B., AIR 1997 SC 610 : 1997 AIR SCW 233: 1997 Cri LJ 743 : (1997) 1 SCC 416 [Paras 6 & 7]

2. Nilabati Behera v. State of Ori, AIR 1993 SC1960 : 1993 AIR SCW 2366 : 1993 Cri LJ 2899 (Foll.) [Para 10]

JUDGMENT/ORDER:
Santosh Hegde, J.:--

These two appeals arise from a judgment of the Nagpur Bench of the High Court of Judicature at Bombay made in Writ Petition (Criminal) No. 204 of 1993. Even though the points for our consideration in these appeals have narrowed down considerably because of the previous orders of this Court in these appeals as also some previous judgments of this Court, we think it necessary to very succinctly refer to the facts to the extent that is necessary.

2. Some of the policemen on duty in the Crime Branch Office of Nagpur City took into custody one Junious Adam Illamatti, a resident of Ajni Railway Colony on 23-6-1993. While he was in police custody, it is stated he was found dead. It is also alleged that when his wife Jarina Adam went to the Police Station to enquire about her husband, she was also locked up by the said Police and molested. On 26-6-1993 a criminal case being Crime No. 438 of 1993 was registered for offences under Ss. 302, 342, 330, 354 read with S. 34 against 10 Police Officers. The investigation in this regard was conducted by a Deputy Superintendent of Police, State CID (Crimes) Mr. Godbole. After investigation said Police Officers were charge-sheeted for the offences mentioned hereinabove and in the trial in S.C. No. 416 of 1993 before the Additional Sessions Judge, Nagpur, said 10 Police Officers were acquitted of the charge under S. 302, I.P.C. but were convicted for offences punishable under S. 333 read with Ss. 34, 342 read with Ss. 34, 355 read with S. 34, and a punishment of 3 years' R.I. with fine for the principal offence was awarded by said Sessions Judge to the abovementioned 10 Police Officers.

3. A criminal appeal against the said judgment and conviction is pending before the High Court.

4. On 29-9-1993 Criminal Writ Petition No. 204 of 1993 was filed initially by the respondent in Criminal Appeal No. 508 of 1996 before us i.e. Christian Community Welfare Council of India. Subsequently above-mentioned Jarina Adam wife of deceased was also impleaded as petitioner No. 2. In the said writ petition inter alia a direction was sought to the respondent-State to conduct a proper inquiry into the custodial death. There was a prayer to direct the respondent-State to pay compensation of Rs. 10 lacs to the second petitioner. The High Court by the impugned order issued various directions in regard to the laying down of guidelines to prevent and check custodial violence and procedures to be followed by Police while arresting any person as also procedures to be followed by the Police after arresting such person, procedures to be followed in arresting a female person, manner in which such female person is to be detained etc. The High Court also directed the State Government to pay a compensation of Rs. 1,50,000 to the second petitioner, the widow of the deceased. During the course of judgment the High Court directed the State Government to enquire into the conduct of the I.O. Mr. Godbole to find out whether there was any lapse on his part in arrest/his investigation. The Court also observed in the body of its judgment that the amount of Rs. 1,50,000 directed to be paid as compensation to the 2nd petitioner may ultimately be recovered from the concerned Police Officers pro rata depending upon their involvement in the death of the deceased. Against the said judgment apart from the 2 appeals mentioned hereinabove the I.O. Mr. Godbole also filed a S.L.P. which later on came to be withdrawn by him with liberty to approach the High Court.

5. At this stage it is necessary to note that this Court while granting leave has confined the same to consider whether the directions issued by the High Court in sub-paras (iv), (v) and (vii) of the operative part of the judgment in paragraph 29 need to be retained, modified or deleted. There is no dispute in regard to this limited scope of the appeal. Sub-paras (iv) and (v) of the operative portion of the judgment reads thus:

"(iv) The State Government is directed to issue immediately necessary instructions to all concerned police officials of the State that in every case after arrest and before detainee is taken to the Magistrate, he should be medically examined and the details of his medical report should be noted in the Station House Diary of Police Station and should be forwarded to the Magistrate at the time of production of detainee;

(v) The State Government should also issue instructions to all concerned police officials in the State that even after the police remand is ordered by the concerned Magistrate for any period, every third day, the detainee should be medically examined and such medical reports should be entered in the Station House Diary."

6. We are informed by learned counsel appearing for the State that so far as the direction issued in these sub-paras of the judgment are concerned, the law is settled by the judgment of this Court in D.K. Basu v. State of W.B. 1997 (1) SCC 416) wherein this Court has held in sub-paras (7) and (8) of para 35 of the said judgment as follows:

"(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State of Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well."

7. We are in agreement with the submission made by learned counsel for the State that in view of the said requirement laid down by this Court in the said judgment the directions issued by the High Court in Cl. (iv) and (v) of its operative part will have to stand modified and will be substituted by the requirement laid down by this Court in sub-paras (7) and (8) of para 35 of the judgment in Basu's case.

8. In sub-para (vii) the High Court has directed the State Government to issue instructions in the following terms:

"(vii) The State Government should issue instructions immediately in unequivocal and unambiguous terms to all concerned that no female persons shall be detained or arrested without the presence of lady constable and in no case, after sunset and before sunrise."

9. Herein we notice the mandate issued by the High Court prevents the Police from arresting a lady without the presence of a lady constable. Said direction also prohibits the arrest of a lady after sunset and before sunrise under any circumstances. While we do agree with the object behind the direction issued by the High Court in Cl. (vii) of operative part of its judgment, we think a strict compliance of the said direction, in a given circumstance, would cause practical difficulties to the investigating agency and might even give room for evading the process of law by unscrupulous accused. While it is necessary to protect the female sought to be arrested by the Police from Police misdeeds, it may not be always possible and practical to have the presence of a lady constable when the necessity for such arrest arises, therefore, we think this direction issued requires some modification without disturbing the object behind the same. We think the object will be served if a direction is issued to the Arresting Authority that while arresting a female person, all efforts should be made to keep a lady constable present but in circumstances where the Arresting Officers is reasonably satisfied that such presence of a lady constable is not available or possible and/or the delay in arresting caused by securing the presence of a lady constable would impede the course of investigation such Arresting Officer for reasons to be recorded either before the arrest or immediately after the arrest be permitted to arrest a female person for lawful reasons at any time of the day or night depending on the circumstances of the case even without the presence of a lady constable. We also direct that with the above modification in regard to the direction issued by the High Court in Cl. (vii) of this appeal, this appeal is disposed of.

Criminal Appeal No. 509 of 1996:

10. As noted above, this appeal is filed against an observation made by the High Court that the compensation of Rs. 1,50,000 paid to the widow of the deceased may be recovered from the erring Police officials. The challenge to this observation is based on the

ground that the same is made without hearing the appellants who were not the parties to the said writ petition. So far as the liability to pay compensation to the aggrieved party who has suffered because of the Police excesses there can be no doubt in view of the judgment of this Court in Smt. Nilabati Behera alias Lalita Behera v. State of Orissa and others (AIR 1993 SC 1960). The question whether such compensation paid by the State can be recovered from the Officers concerned will depend on the fact whether the alleged misdeeds by the Officer concerned is committed in the course of the discharge of his lawful duties, beyond or in excess of the same which will have to be determined in a proper enquiry. The High Court by the impugned judgment has not conclusively held that the amount should in any circumstance be recovered from the Officers, therefore, at this stage it is too premature for us to go into this question whether the appellants in this case are liable to reimburse the State the amount paid by it to the widow of the deceased as directed by the High Court. This will have to be as stated above adjudicated in an inquiry wherein it will have to be decided whether the acts of the concerned Police Officers were in the performance of State duty a (sovereign function) or outside the same. If it is found that the appellant-Officers did cause the death of the deceased and the same is not in the performance of their official duty or in excess of the same then they cannot escape the liability. However, as stated above this question would arise only as and when an inquiry specifically in this regard is conducted. Therefore, for the present there need for any direction in this regard does not arise.

11. With the said observations this appeal is also disposed of.

Order accordingly.

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2007 Legal Eagle (SC) 501

IN THE SUPREME COURT OF INDIA

Equivalent Citations : 2007 AIOL 459 : 2007 AIR(SC) 1801 : 2007 AIR(SCW) 3006 : 2007 CrLJ 2757 : 2007 (6) JT 309 : 2007 (6) Scale 80 : 2007 (5) SCC 773 : 2007 (3) SCC(Cri) 19 : 2007 (5) SCR 561 : 2007 (4) Supreme 136

[Before : Tarun Chatterjee, A.K.Mathur]

State of West Bengal

versus

Dinesh Dalmia

Case No. : Criminal Appeal No.623 of 2007, Date of Decision : 25/04/2007

Code of Criminal Procedure,1973 -- Section 167(2) -- Detention period -- Computation of -- Two cases pending in the Calcutta court against the accused -- Accused was arrested and detained in CBI cases pending before Chief Metropolitan Magistrate, Chennai -- Accused was in custody of CBI till 24.2.2006 in connection with CBI cases -- On 27.2.2006 accused surrendered before Magistrate Chennai in connection with two cases of Calcutta -- Accused was produced before Calcutta court on 13.3.2006 -- Detention period should be counted from 13.3.2006 when the police took the accused in custody -- Deemed surrender in another criminal case cannot be taken as starting point for counting 15 days police remand or 90 days/60 days as the case may be -- Accused cannot be deemed to be in police custody on 27.2.2006 as no physical custody of the accused given to police before 13.3.2006 -- National surrender cannot be treated as police custody.

Advocates Appeared :

Umapathi Ganeshan, Tirthan Kar Ghosh, Tara Chandra Sharma, Shekhar Basu, Rajendra Singhvi, Rajeev Sharma, Neelam Sharma, Mukul Rohatgi, Madhurima Tatia, Madhur Dadlani, K.Parasaran, Ashok Kumar Singh, Anuj Singh, Anirudh Sharma, Altaf Ahmed

Statutes Referred :

1. Code of Criminal Procedure -- S.167(2)

JUDGMENT/ORDER:
JUDGMENT

A.K. MATHUR, J.

Leave granted.

2. This appeal is directed against the order dated 27.9.2006 passed in A.S.T. No.570 of 2006 by the Calcutta High Court whereby the learned single Judge of the High Court has set aside the order dated 16.6.2006 passed by the learned Chief Metropolitan Magistrate, Calcutta and directed the 5th Court of Metropolitan Magistrate, Calcutta to consider the matter afresh and pass necessary order in the light of observation made by the Court.

3. Aggrieved against this order dated 27.9.2006 passed by learned Single Judge, the present S.L.P. was preferred by the State of West Bengal.

4. Brief facts giving rise to this appeal are that the Respondent, Dinesh Dalmia filed a petition under Section 397/482 of the Code of Criminal Procedure, 1973 in the High Court of Calcutta for setting aside the order of 27th May, 2006 and 16th June, 2006 passed by the learned Chief Metropolitan Magistrate, Calcutta and the learned 5th Court of Metropolitan Magistrate, Calcutta respectively in connection with GDD 476 dated 24.9.2002 corresponding to G.R.No. 2001 of 2002 being investigated by Detective Department (Special Cell) Lalbazar pending before the 5th Court of Metropolitan Magistrate, Calcutta.

5. The Secretary of the Calcutta Stock Exchange Association Limited lodged a written complaint with the Hare Street Police Station on 9th September, 2002 alleging a commission of offences under Sections 120B/4 20/409/467/468/471/477A of the Indian Penal Code against Harish Chandra Biyani and others. The complaint was treated as First Information Report and was registered at Park Street P.S. case No. 476 dated 24.9.2002 under the aforesaid Sections of the I.P.C.. Thereafter, the investigation of the case was taken up by the Detective Department. During the course of the investigation, Investigating Officer prayed for issuance of warrant of arrest against the respondent on 12th February, 2006. Prior to that the respondent was arrested in New Delhi by the Central Bureau of Investigation, Bank Securities and Fraud Cell, New Delhi in connection with CBI Case No. RC 4(E)/200 3-BS &F C CBI. He was produced before the learned Additional Chief Judicial Magistrate, Tis Hazari. On transit remand, the respondent was produced before the learned Court of Additional Chief Judicial Magistrate, Egmore, Chennai on 14th February, 2006. In the mean time, the Investigation Officer of the present case also prayed for issuance of production warrant against the respondent before the Court of learned Chief Metropolitan Magistrate Calcutta, as the respondent was arrested and detained in the aforesaid CBI case pending before the Chief Metropolitan Magistrate, Egmore, Chennai. The Chief Metropolitan Magistrate, Calcutta by order dated 13th February, 2006 allowed such prayer of the Investigating Officer and directed that the accused-respondent be produced before the the Learned Chief Metropolitan Magistrate, Calcutta on or before 22nd February, 2006. A copy of the said order was sent to the

Court of Additional Chief Metropolitan Magistrate, Egmore, Chennai. On 14th February, 2006, the order dated 13th February, 2006 passed by the Chief Metropolitan Magistrate, Calcutta was brought to the notice of the Additional Chief Metropolitan Magistrate, Egmore, Chennai by the CBI in their further remand application. The Addl. Chief Metropolitan Magistrate, Egmore, Chennai observed that the matter of Calcutta Police would be considered after the period of CBI custody was over. On 17th February, 2006 the Investigating Officer of the present case filed an application before the learned Court of Chief Metropolitan Magistrate, Calcutta intimating that the accused-respondent was in the custody of CBI till 24th February, 2006 in connection with the aforesaid CBI cases and sought direction for production of the accused-respondent in Calcutta on or by 8th March, 2006. The Court at Calcutta by order dated 17th February, 2006 observed that looking to the gravity of the offences complained against the accused-respondent in the cases pending in Calcutta, he should not be released in the CBI cases at Chennai. On 23rd February, 2006, the Investigating Officer in the present case filed an application before the Magistrate at Egmore, Chennai regarding production of the accused-respondent being in the present case before the Court of Chief Metropolitan Magistrate at Calcutta. By that time, the accused-respondent came to know that he was wanted in two more cases pending against him in Calcutta. When the accused-respondent was in custody on 27thFebruary, 2006 in connection with the CBI case pending before the Addl. Chief Metropolitan Magistrate, Egmore, Chennai, he voluntarily surrendered before the learned Magistrate, Chennai as he was wanted in connection with the two cases of Calcutta Police. i.e. Case No. 300/2002 and 476/2002. The accused respondent surrendered on 27th February, 2006 and that was accepted by the Addl. Chief Metropolitan Magistrate, Egmore, Chennai on the same date. But the Learned Additional Chief Metropolitan Magistrate Egmore, Chennai remanded the accused respondent to the judicial custody till 13th March, 2006. The learned Additional Chief Metropolitan Magistrate, Chennai further directed production of the accused before the Court at Calcutta. An intimation in this regard was also forwarded to the Chief Metropolitan Magistrate, Calcutta along with surrender papers of both the cases. An intimation dated 28th February, 2006 was also forwarded to the Hare Street Police Station and Park Street Police Station where those two cases were pending. The Investigation Officer requested the learned Addl. Chief Metropolitan Magistrate, Egmore, Chennai for counter signature on the production warrant issued by the learned Chief Metropolitan Magistrate, Calcutta. The Addl. Chief Metropolitan magistrate, Chennai counter signed the production warrant and served upon the Jail Superintendent, Egmore, Chennai. On 3rd March, 2006 in response to the prayer made by the CBI, the learned Magistrate at Chennai directed for conducting of Polygraph, Brain Mapping and Nacro Analysis tests on the accused-respondent. The learned Magistrate directed the Superintendent, Central Jail, Chennai to hand over the accused for the aforesaid test to Inspector, CBI and produce him before the Court on 9.3.2006. Thereafter on 11.3.2006 on the request of Calcutta Police accused was handed over to Calcutta Police to be escorted to Calcutta for production before the Magistrate at Calcutta. Therefore, on the request made by the CBI , the accused respondent was handed over to the CBI team for the above tests. On 13th March, 2006 pursuant to the order of the learned Magistrate at Calcutta the accused respondent was produced in the Court of Chief Metropolitan Magistrate, Calcutta. The Investigating Officer of the instant case requested the Court of Chief Metropolitan Magistrate, Calcutta to hand over the accused for 15 days for police remand for investigation. An application was moved by the defence praying for bail on behalf of the accused-respondent before the Court of Addl. Chief Metropolitan Magistrate, Calcutta. It was contended that the accused-respondent had surrendered on 27th February, 2006 before the Magistrate at Chennai and the period of 15 days was over and Police had not filed the challan, therefore accused be enlarged on bail. As against this, it was submitted that he was arrested by CBI and the accused was produced before the Calcutta Court in this case on 13th March, 2006 so the period of 15 days was not over. The case was fixed for 16th March, 2006 for further hearing and on that date the bail application was rejected and the accused was remanded to police custody up to 24.3.2006 and the Court directed to produce the accused on the fixed date.

6. The learned Chief Metropolitan Magistrate, Calcutta after considering the submission took the view that the custody of the petitioner cannot be considered unless and until he is physically produced before the Court and since in the present case it was done on March 13, 2006 on the strength of the production warrant issued by the learned Chief Metropolitan Magistrate, Calcutta, the period of police custody was to be considered from the date of his physical production. The accused-respondent was remanded to the police custody till 28th March, 2006. Hence aggrieved against this order the respondent approached the Calcutta High Court in revision. The learned Single Judge has taken the view that the Chief Metropolitan Magistrate has not correctly approached the matter and has wrongly taken the view that the accused did not surrender before the Metropolitan Magistrate, Egmore, Chennai on 24.2.2006. However, the accused was given liberty to file application before the said Court afresh and the Magistrate was directed to consider the same in the light of the aforesaid judgment. It was also mentioned that still 8 more days from 19.5.2005 to 27.5.2006 were left to the Police to file final report. The Police still did not file the final report.

7. Then again accused moved the bail application before the Chief Metropolitan Magistrate, Calcutta. The Chief Metropolitan Magistrate, Calcutta rejected the bail application holding that statutory period of 90 days has not expired by his order dated 27.5.2006.

8. The final report under Section 173(2) of the Code of Criminal Procedure was submitted before the Chief Metropolitan Magistrate, Calcutta and the case was transferred to Vth Court of Metropolitan Magistrate, Calcutta. Then again on 12.6.2006 a bail application was filed before the Vth Metropolitan Magistrate, Calcutta. Learned Metropolitan Magistrate rejected the bail application holding that this bail application amounted to review of the order and he has no power of review, therefore, the same was rejected by order dated 16.6.2006.

9. Aggrieved against that order the present revision petition was filed before the High Court.

10. The Calcutta High Court took the view that the detention of the accused should be counted w.e.f. 27th February, 2006 when the accused alleged to have surrendered himself in the case of 476/2002 before the Additional Chief Metropolitan Magistrate, Egmore, Chennai and accordingly held that more than 90 days period has expired. Therefore, the matter should be considered by the Metropolitan Magistrate again in the light of observation made by the Court, by order dated 27.9.2006. The revision petition of the accused was allowed.

11. Aggrieved against the order of the Calcutta High Court, dated 27.9.2006 the present appeal was filed.

12. We heard learned counsel for both the parties and perused the record. The crucial question before us is whether the detention period should be counted from 13th March, 2006 when the police took the accused in custody or the period should be counted from 27th February, 2006 when the accused surrendered in the case of 476/2002 before the Metropolitan Magistrate, Egmore, Chennai. Learned counsel for the State submitted that under Sub-Section 2 of Section 167 of Criminal Procedure Code the period should only be counted when he is arrested/ taken in custody by the police not before the date when he surrendered before the Magistrate on 27th February, 2006. Learned counsel submitted that in fact the accused was taken in custody by the police on 13th March, 2006 and was produced before the Magistrate on 13th March, 2006 and on that date the police sought the custody of accused for completion of the investigation. Therefore, the period commences from 13th March, 2006. In respect thereof, learned counsel invited our attention to a case of Uday Mohanlal Acharya v. State of Maharashtra reported in (2001) 5 SCC 453 as against this Learned counsel for the respondent submitted that the period should be counted from the date when the accused-respondent surrendered in case No. 476/2002 before the Metropolitan Magistrate, Egmore, Chennai. The challan has not been filed within the period of 90 days. Therefore, the accused-respondent is entitled to bail as per sub-section (2) of Section 167 of the Cr.P.C. In respect thereof, learned counsel invited our attention to cases of Niranjan Singh & Another v. Prabhakar Rajaram Kharote & Ors. reported in (1980) 2 SCC 559 , Central Bureau of Investigation, Special Investigation Cell, New Delhi v. Anupam J. Kulkarni reported in (1992) 3 SCC 141 and learned counsel also invited our attention to the case Directorate of Enforcement v. Deepak Mahajan and Another reported in (1994)3 SCC 440 (para 44).

13. We have considered the rival submissions of the parties and perused the record.

14. The admitted position is that there were two cases pending in the Calcutta Court against the accused and the accused-respondent was arrested at Delhi in CBI case and he was produced before the Additional Chief Metropolitan Magistrate Egmore, Chennai under the investigation of CBI. The accused was remanded for the investigation before the CBI after that the accused was sent for judicial custody in the CBI case. The Calcutta Court directed the production of the accused-respondent and a request was made before the Additional Chief Metropolitan Magistrate, Egmore, Chennai for the custody of the accused in the cases pending before the Calcutta. In fact the accused was detained in CBI case pending in Egmore, Chennai. The CBI sought the police remand of accused for some scientific test and the accused was sent for the test and after that the accused was sent back by the CBI to the Egmore, Court. Then an order dated 11th March, 2006 was passed for handing over of the accused to the Calcutta Police for being produced before the Magistrate on 13th March, 2006 and on 11th March, 2006 Police took physical custody of the accused under the order of the Metropolitan Magistrate, Egmore, Chennai and on the basis of the transit warrant, the accused was taken over on 11th March, 2006 and was produced before the Calcutta court on 13th March, 2006 and from there the accused was sent to the custody of the police for investigation. Therefore, in the sequence of event, physical custody of the accused was taken over for investigation by the Calcutta Police on 13.3.2006. The accused was very well aware that there were two cases registered against him in Calcutta for which he was required by the Police, so he voluntarily surrendered before the Magistrate on 27th February, 2006 when he was already in custody in relation to the CBI case. Therefore, this voluntary surrender cannot be conceived to be detention under a case registered at Calcutta i.e.476/2002. Though knowing well that a requisition was sent by the Metropolitan Magistrate, Calcutta but in fact the physical custody of the accused was given by the Calcutta Police for investigation by the order of the Metropolitan Magistrate on 13th March, 2006. Therefore, so called notional surrender of the accused in the case No. 476/02 of Calcutta cannot be deemed to be a custody of the police for investigation for a case registered against the accused at Calcutta.. In fact the accused continued to be under the judicial custody in relation to the CBI case. It may be relevant to mention here that the CBI again took the accused in custody for scientific test and he was surrendered back on 10th of March, 2006 and on 11th March, the Calcutta police was given a custody of the accused by the Egmore Court, Chennai to be produced before the Magistrate in Calcutta on 13th March, 2006 and he was produced before the Calcutta Court on 13th March, 2006 and the Court directed the custody of the accused to the police on 13th March, 2006 for investigation in the criminal case registered against him in Calcutta. Therefore, the police custody will be treated from 13th March, 2006 and not from 27th February, 2006. In this back-ground, the view taken by the learned single Judge that since he voluntarily surrendered on 27th February, 2006, therefore, he shall be deemed to be under the police custody w.e.f. 27th February, 2006 is far from correct and 90 days shall be counted from that date only i.e. 13.3.2006.

15. Section 167 of the CR.P.C. clearly lays down that where investigation cannot be completed within twenty four hours and accused is under arrest with Police, he has to be produced before Magistrate for further detention if necessary. This is a salutary provision to safeguard the citizen's liberty so that Police cannot illegally detain any citizen. Sub-sections (1) & (2) of Section 167 which are relevant for our purposes read as under:

"167 Procedure when investigation cannot be completed in twenty-four hours.

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

{(a) the Magistrate may authorize the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorize the detention of the accused person in custody under this paragraph for a total period exceeding-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail, if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be released under the provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorize detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorize detention in the custody of the police."

16. Sub-section (1) says that when a person is arrested and detained in custody and it appears that investigation cannot be completed within 24 hours fixed under Section 57 and there are grounds of believing that accusation or information is well-founded, the officer in charge of the Police Station or the Police Officer making the investigation not below the rank of sub-inspector shall produce the accused before the nearest judicial magistrate. The mandate of sub-section (1) of Section 167, Cr.P.C. is that when it is not possible to complete investigation within 24 hours then it is the duty of the Police to produce the accused before the Magistrate. Police cannot detain any person in their custody beyond that period. Therefore, Sub-Section (1) pre-supposes that the police should have custody of an accused in relation to certain accusation for which the cognizance has been taken and the matter is under investigation. This check is on police for detention of any citizen . Sub-Section (2) says that if the accused is produced before the Magistrate and if the Magistrate is satisfied looking to accusation then he can give a remand to the police for investigation not exceeding 15 days in the whole. But the proviso further gives a discretion to the Magistrate that he can authorize detention of the accused otherwise then the police custody beyond the period of 15 days but no Magistrate shall authorize detention of the accused in police custody for a total period of 90 days for the offences punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and no magistrate shall authorize the detention of the accused person in custody for a total period of 60 days when the investigation relates to any other offence and on expiry of the period of 90 days or 60 days as the case may be. He shall be released if he is willing to furnish bail. Therefore, the reading of sub-Sections (1) & (2) with proviso clearly transpires that the incumbent should be in fact under the detention of police for investigation. In the present case, the accused was not arrested by the police nor was he in the police custody before 13.3.2006. He voluntarily surrendered before a Magistrate and no physical custody of the accused was given to the police for investigation. The whole purpose is that the accused should not be detained more than 24 hours and subject to 15 days police remand and it can further be extended up to 90/60 as the case may be. But the custody of police for investigation purpose cannot be treated judicial custody/ detention in another case. The police custody here means the Police custody in a particular case for investigation and not judicial custody in another case. This notional surrender cannot be treated as Police custody so as to count 90 days from that notional surrender. A notorious criminal may have number of cases pending in various police station in city or outside city, a notional surrender in pending case for another FIR outside city or of another police-station in same city, if the notional surrender is counted then the police will not get the opportunity to get custodial investigation. The period of detention before a Magistrate can be treated as device to avoid physical custody of the police and claim the benefit of proviso to Sub-Section 1 and can be released on bail. This kind of device cannot be permitted under Section 167 of the Cr.P.C. The condition is that the accused must be in the custody of the police and so called deemed surrender in another criminal case cannot be taken as starting point for counting 15 days police remand or 90 days or 60 days as the case may be. Therefore, this kind of surrender by the accused cannot be deemed to be in the Police custody in the case of 476/02 in Calcutta. The Magistrate at Egmore, Chennai could not have released the accused on bail as there was already cases pending against him in Calcutta for which a production warrant had already been issued by the Calcutta Court. In this connection in the case of State of Maharashtra Vs. Bharati Chandmal Varma (Mrs.) reported in (2002)2 SCC 121 their Lordships has very clearly mentioned that:

"For the application of the proviso to Section 167(2) of the Code, there is no necessity to consider when the investigation could legally have commenced. That proviso is intended only for keeping an arrested person under detention for the purpose of investigation and the legislature has provided a maximum period for such detention.. On the expiry of the said period the further custody becomes unauthorized and hence it is mandated that the arrested person shall be released on bail if he is prepared to and does furnish bail. It may be a different position if the same accused was found to have been involved in some other offence disconnected from the offence for which he is arrested. In such an eventuality the officer investigating such second offence can exercise the power of arresting him in connection with the second case. But if the investigation into the offence for which he was arrested initially had revealed other ramifications associated therewith, any further investigation would continue to relate to the same arrest and hence the period envisaged in the proviso to Section 167(2) would remain unextendable."

17. Therefore, it is very clearly mentioned that the accused must be in custody of the police for the investigation. But if the investigation into the offence for which he is arrested initially revealed other ramifications associated therewith, any further investigation would continue to relate to the same arrest and hence the period envisaged in the proviso to Section 167(2) would remain unextendable. Meaning thereby that during the course of the investigation any further ramification comes to the notice of the Police then the period will not be extendable. But it clearly lays down that the accused must be in custody of police. In the case of Directoate of Enforcement v. Deepak Mahajan and Another reported in (1994)3 SCC 440 their Lordships observed that Section 167 is one of the provisions falling under Chapter XII of the Code commencing from Section 154 and ending with Section 176 under the caption "Information to the police and other powers to investigate". Their Lordships also observed that main object of Section 167 is the production of an arrestee before a Magistrate within twenty four hours as fixed by Section 57 when investigation cannot be completed within that period so that the Magistrate can take further course of action as contemplated under sub-Section (2) of section 167. In para 54 their Lordships have also observed with regard to the pre-requisite condition which reads as under:

"54. The above deliberation leads to a derivation that to invoke Section 167(1), it is not an indispensable pre-requisite condition

that in all circumstances, the arrest should have been effected only by a police officer and none else and that there must necessarily be records of entries of a case diary. Therefore, it necessarily follows that a mere production of an arrestee before a competent Magistrate by an authorized officer or an officer empowered to arrest (notwithstanding the fact that he is not a police officer in its stricto sensu)on a reasonable belief that the arrestee " has been guilty of an offence punishable" under the provisions of the Special Act is sufficient for the Magistrate to take that person into his custody on his being satisfied of the three preliminary conditions, namely (1) the arresting officer is legally competent to make the arrest; (2) that the particulars of the offence or the accusation for which the person is arrested or other grounds for such arrest do exist and are well-founded; and (3) that the provisions of the special Act in regard to the arrest of the persons and the productions of the arrestee serve the purpose of Section 167(1) of the Code."

18. As against this learned counsel for the accused respondent has invited our attention to the case of Niranjan Singh & Anr. v. Prabhakar Rajaram Kharote & Ors. [(1980) 2 SCC 359]. This case only relates to 'custody' under section 439 Cr.P.C. Therefore, this case does not provide us any assistance whatsoever. In another case, Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni [(1992) 3 SCC 141] their Lordships observed in paragraph 11 as follows :

"In one occurrence it might so happen that the accused might have committed several offences and the police may arrest him in connection with one or two offences on the basis of the available information and obtain police custody. If during the investigation his complicity in more serious offences during the same occurrence is disclosed that does not authorize the police to ask for police custody for a further period after the expiry of the first fifteen days. If that is permitted then the police can go on adding some offence or the other of a serious nature at various stages and seek further detention in police custody repeatedly, this would defeat the very object underlying Section 167; But their Lordships put an occasion and added that limitation shall not apply to a different occurrence in which complicity of the arrested accused is disclosed. That would be a different transaction and if an accused is in judicial custody in connection with one case and to enable the police to complete their investigation of the other case they can require his detention in police custody for the purpose of associating him with the investigation in other case. In such a situation he must be formally arrested in connection with other case and then obtain the order of the Magistrate for detention in police custody."

Their Lordships have clarified that if one case is registered against the accused in which during the course of investigation it is found that he has committed more than one offence then it will be treated to be one investigation and for each offence a separate police remand cannot be sought. But in case it is a different offence which has been committed by him then it will be a separate case registered and separate investigation will be taken up and for that the detention by the accused in the previous case cannot be counted towards a new case or different case registered against the accused. In fact, the observation in this case answers the question raised in this petition. Therefore, their Lordships observed; "the occurrence constituting to different transactions give rise to two different cases and the exercise of power under Sections 167(1) and (2) should be in consonance with the object underlying the said provision in respect of each of those occurrences which constitute two difference cases……. Arrest and detention in custody in the context of Section 167(1) &(2) of the Code has to be truly viewed with regard to the investigation of that specific case in which the accused person has been taken into custody.

18. Therefore, for the separate offence the accused has to be tried separately and for that the proceedings will be initiated separately and independent remand can be sought by the accused.

19. In view of the above discussion, we are of the opinion that the view taken by the learned Single Judge of the Calcutta High Court is not correct and we accordingly set side the order of the Calcutta High Court dated 27.9.2006 and allow the appeal filed by the State of West Bengal and direct the Metropolitan Magistrate to proceed in the matter in accordance with law.

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IN THE SUPREME COURT OF INDIA

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[Before : Dalveer Bhandari, K.S.Panicker Radhakrishnan]

Siddharam Satlingappa Mhetre

versus

State of Maharashtra & Ors.

Case No. : Criminal Appeal No. 2271 of 2010 (Arising out of SLP (Crl.) No. 7615 of 2009), Date of Decision : 02/12/2010

(A) Code of Criminal procedure, 1973 -- Chapter XXXIII, Sections 436 to 450 -- Criminal Procedure -- Bail -- Grant or Refusal -- Society has very vital interest in grant or refusal of bail, as every criminal offence is the offence against the State -- Order granting or refusing bail must reflect perfect balance between conflicting interests, namely sanctity of individual liberty and the interest of the society -- Just as the liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order -- Both are equally important. [Paras 3 & 93]

(B) Constitution of India, 1950 -- Article 21 -- Legal Concepts -- Life and Liberty -- Meaning and connotation -- All human beings are born with some inalienable rights like life, liberty and pursuit of happiness -- Importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right of life and liberty -- Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and life itself would not be worth living -- That is why 'liberty' is called the very quintessence of a civilized existence -- Very difficult to define 'Liberty' -- It has many facets and meanings -- It may be defined as 'affirmation by individual or group of his or its own essence -- It needs the presence of three factors, firstly, harmonious balance of personality; secondly, the absence of restraint upon the exercise of that affirmation and thirdly; organization of opportunities for the exercise of a continuous initiative -- It may be defined as a power of acting according to the determinations of the will -- In nutshell, when liberty is recognized by absence of 'restraint', it nevertheless, recognize the 'restraint', that is to say, 'liberty' means doing anything one desires but subject to the desires of others' -- On the same line, our constitution has recognised the concept of 'life and personal liberty' by specifically incorporating 'Right to life and Right to personal liberty' as fundamental right under Article 21 -- In scores of decisions, Supreme Court and High Courts have also defined and expanded the contours of those rights -- In the process, Article 21 has been given a very liberal interpretation. [Paras 41, 42, 45 to 47, 59 to 61, 70, 71, 126 & 127]

(C) Code of Criminal Procedure, 1973 -- Section 438 -- Criminal Procedure -- Anticipatory Bail -- Bail to person apprehending arrest -- Concept, object and reasons -- Police custody is an inevitable concomitant of arrest for non-bailable offences -- Concept of anticipatory bail is that a person apprehending arrest in a non-bailable case can apply for grant of bail to Court of Sessions or to High Court before the arrest -- Old Code did not contain any provision corresponding to Section 438 -- There were Sections 437 & 439, under which bail could be granted -- Purpose and reasons for introducing provision of Section 438 was to recognize importance of personal liberty and freedom in a free and democratic country -- For this age-old principle that, 'an individual is presumed to be innocent till he is found guilty by the court' was pressed in service -- Law on this point had been elaborately discussed and finally settled by an authoritative pronouncement of Constitution Bench decision of Supreme Court in Gurbaksh Singh Sibbia and Others v. State of Punjab, (1980) 2 SCC 565 -- Even then, Section 438 has not been allowed its full play, causing a large number of under trials to languish in jail for a long time even for allegedly committing very minor offences -- Code of Criminal Procedure, 1898. [Paras 11, 14 to 17, 27 & 93]

(D) Code of Criminal procedure, 1973 -- Section 438 vis-a-vis Sections 437 & 439 -- Criminal Procedure -- Anticipatory Bail -- Scope and ambit of Section 438 -- Relevant Consideration for grant or refusal of bail -- Barring some exceptions, arrest should be the last option and anticipatory bail must continue till the end of trial -- Complaints has to be thoroughly examined including the aspect whether complainant has filed false or frivolous complaint on previous occasion, whether there is any family dispute between accused and the complainant -- Complainant must also be warned, in case complaint turns to be false or frivolous, strict action shall be taken against him according to law -- If IO connives with complainant, action should also be taken against his -- At the same time, gravity of charge and exact role of accused must be properly comprehended -- Before arrest, Arresting Officer must record valid reasons which have led to the arrest, in the case Diary -- In exceptional cases, reasons could be recorded immediately after the arrest, so that, they can be properly weighed at the time of hearing bail application -- Facts of the case must be evaluated carefully and with meticulous precision -- In case, where court is of considered view that accused has joined investigation and is fully cooperating with Investigating Agency and is not likely to abscond, custodial interrogation should be avoided -- Arrest attaches a great ignominy, humiliation and disgrace -- It leads serious consequences not only for the accused but for the entire family and at times for the entire community -- As held in Sibbia's case (supra), there is no justification for reading into section 438 and the limitations

mentioned in Section 437 -- Grant of anticipatory bail for a limited duration and thereafter directing the accused to surrender and apply for regular bail, held contrary to legislative intent and spirit of the law laid down in Sibbia's case supra -- Court granting bail can also cancel it -- Several judgments referred, need review -- Once Anticipatory bail is granted, protection should ordinarily available till the end of trial , unless, the same is curtailed by cancellation of such bail on fresh materials or circumstances or in case of abuse -- There is great deal of misunderstanding about scope and ambit of Section 438 could have been avoided, if Sibbia's decision was correctly understood, appreciated and applied -- Court also appended certain suggestions for State to minimize curtailment of personal liberty of an accuse. [Paras 94 to 98, 101 to 103, 105, 108 to 111, 116 to 118, 121 to 126, 128, 137 & 138]

(E) Constitution of India, 1950 -- Article 141 -- Law of precedent -- Doctrine of per incuriam Sibbia' case (supra) -- Binding force and ignorance by Benches of lower strength -- In cited English decision, House of Lords observed that 'incuria' literally means 'carelessness' -- In practice per incuriam appears to mean 'per ignoratium' -- 'Quotable in law' is avoided and ignored if it is rendered , 'in ignoratium' of a statute or other binding authority -- Same has been accepted, approved and adopted by Supreme Court while interpreting Article 141 which embodies the doctrine of precedents as a matter of law -- Irresistible conclusion on the basis of English and Indian law, emerges that, 'not only the judgment of a larger strength is binding on a judgment of smaller strength but a judgment of a co-equal strength is also binding on a Bench of co-equal strength -- In this case, judgments mentioned in paragraphs 135 and 136 are by two or three judges of Supreme Court -- These judgments have clearly ignored a Constitution Bench judgment in Sibbia's case (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 Cr. P. C. -- Thus those judgments are per incuriam -- In case of doubt regarding correctness of Sibbia's decision, only option left with those lower strength benches was to seek reference of matter to a larger Bench. [Paras 149 to 151]

(F) Code of Criminal procedure, 1973 -- Section 438 -- Criminal Procedure -- Anticipatory Bail -- Political rivalry between National Congress and BJP workers -- Process claimed one life and assault on others -- High Court refused anticipatory bail to appellant, by distinguishing decision in Sibbia's case(supra) and relying on decisions of the Benches of lower strength -- Order held unsustainable, set-aside -- Bail granted -- Appellant directed to join investigation and fully cooperate with the investigating Agency -- In case of arrest, he be released on bail subject to PB for Rs.50,000/- and two sureties of equal amount to the satisfaction of Arresting Officer -- Appeal allowed. [Paras 4 to 7, 18, 152 & 153]

Advocates Appeared :

Shanti Bhushan, Kamlendra Mishra, Rajeev K. Dubey, Shankar Chillarge, Sanjay Kharde, Arun R. Pednekar, Rajiv Shankar Dvivedi, Priyal Sardha, Pranav Badheka, Pravin Satale, A. Raghunath, Sudhir Halli, Naveen Chomal, Mahesh Jethmalani, Asha Gopalan Nair

Statutes Referred :

1. Code of Criminal procedure -- S.449 2. Code of Criminal procedure -- S.450 3. Code of Criminal procedure -- S.443 4. Code of Criminal procedure -- S.439 5. Code of Criminal procedure -- S.444 6. Code of Criminal procedure -- S.445 7. Code of Criminal procedure -- S.436 8. Code of Criminal procedure -- S.440 9. Code of Criminal procedure -- S.438 10. Code of Criminal procedure -- S.448 11. Code of Criminal procedure -- S.446 12. Code of Criminal procedure -- S.447 13. Code of Criminal procedure -- Ch.33 14. Code of Criminal procedure -- S.441 15. Code of Criminal procedure -- S.437 16. Code of Criminal procedure -- S.442 17. Constitution of India -- Art.21 18. Constitution of India -- Art.141

JUDGMENT/ORDER:
Cases Referred :

1. A. K. Gopalan v. State of Madras, AIR 1950 SC 27 [Para 62]

2. Adri Dharan Das v. State of West Bengal, (2005) 4 SCC 303 [Para 32]

3. Bharat Petroleum Corporation Ltd. v. Mumbai Shramik Sangra and Ors., (2001) 4 SCC 448 [Para 145]

4. Bugdaycay v. Secretary of State for the Home Department, (1987) 1 All ER 940 [Para 78]

5. Central Board of Dawoodi Bohra Community v. State of Maharashtra, (2005) 2 SCC 673 [Para 146]

6. Central Inland Water Transport Corporation Ltd. and Anr. v. Brojo Nath Ganguly and Anr., (1986) 3 SCC 156 [Para 72]

7. Constitution Bench in State of Karnataka and Ors. v. Umadevi (3) and Ors., (2006) 4 SCC 1 [Para 147]

8. E.V. Chinnaiah v. State of A.P., (2005) 1 SCC 394 [Para 148]

9. Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors., (1981) 1 SCC 608 [Para 69]

10. Government of A.P. and Anr. v. B. Satyanarayana Rao (dead) by LRs. and Ors., (2000) 4 SCC 262 [Para 141]

11. Gujarat Steel Tubes Ltd. v. Mazdoor Sabha, (1980) 2 SCC 593 [Para 144]

12. Gurbaksh Singh Sibbia and Others v. State of Punjab, (1980) 2 SCC 565 [Para 27]

13. Huddersfield Police Authority v. Watson, 1947 KB 842 : (1947) 2 All ER 193 [Paras 139 & 140]

14. Joginder Kumar v. State of U.P. and Ors., (1994) 4 SCC 260 [Para 120]

15. K. L. Verma v. State and Anr., (1998) 9 SCC 348 [Para 32]

16. Kartar Singh v. State of Punjab and Ors., (1994) 3 SCC 569 [Para 67]

17. Kharak Singh v. State of U.P. and Ors., AIR 1963 SC 1295 [Para 64]

18. Khedat Mazdoor Chetana Sangath v. State of M.P. and Ors., (1994) 6 SCC 260

19. Maneka Gandhi v. Union of India and Anr., (1978) 1 SCC 248 [Para 65]

20. Marri Chandra Shekhar Rao v. Seth G.S. Medical College, (1990) 3 SCC 139 [Para 148]

21. Mst. Karmi v. Amru, (1972) 4 SCC 86 [Para 143]

22. N. Meera Rani v. Government of Tamil Nadu and Anr., (1989) 4 SCC 418 [Para 33]

23. Naresh Kumar Yadav v. Ravindra Kumar (2008) 1 SCC 632 [Para 136]

24. Official Liquidator v. Dayanand and Others (2008) 10 SCC 1 [Paras147 & 148]

25. P. Rathinam/Nagbhusan Patnaik v. Union of India and Anr., (1994) 3 SCC 394 [Para 70]

26. P.H. Kalyani v. Air France, (1964) 2 SCR 104 [Para 144]

27. Palani kumar and Anr. v. State, 2007 (4) CTC 1 [Para 39]

28. Pokar Ram v. State of Rajasthan and Others (1985) 2 SCC 597 [Para 31]

29. Prem Shankar Shukla v. Delhi Administration, (1980) 3 SCC 526 [Para 16]

30. R on the application of Pretty v. Director of Public Prosecutions (2002) 1 All ER 1 [Para 78]

31. R. Thiruvirkolam v. Presiding Officer and Anr., (1997) 1 SCC 9 [Para 144]

32. R. v. Curr, (1972) S.C.R. 889 [Para 84]

33. S. Pushpa v. Sivachanmugavelu, (2005) 3 SCC 1 [Para 148]

34. Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667 [Para 32]

35. State of A.P. v. Challa Ramakrishna Reddy and Ors., (2000) 5 SCC 712 [Para 66]

36. State of Karnataka and Ors. v. Umadevi (3) and Ors., (2006) 4 SCC 1 [Para 147]

37. State of U.P. v. Ram Chandra Trivedi, (1976) 4 SCC 52 [Para 35]

38. Subhash Chandra and Anr. v. Delhi Subordinate Services Selection Board and Ors., (2009) 15 SCC 458 [Para 148]

39. Sunita Devi v. State of Bihar and Another (2005) 1 SCC 608 [Para 32]

40. Thota Sesharathamma and Anr. v. Thota Manikyamma (Dead) by LRs. and Ors., (1991) 4 SCC 312 [Para 143]

41. Union of India and Ors. v. K. S. Subramanian, (1976) 3 SCC 677 [Para 35]

42. Union of India v. Raghubir Singh, (1989) 2 SCC 754 [Para 142]

43. Vijayalaxmi Cashew Company and Ors. v. Dy. Commercial Tax Officer and Anr., (1996) 1 SCC 468 [Para 34]

44. Young v. Bristol Aeroplane Co. Ltd., 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300 [Para 139]

Advocates : Shanti Bhushan, Mahesh Jethmalani, Senior Advocate, Naveen Chomal, Sudhir Halli, A. Raghunath, Pravin Satale, Pranav Badheka, Priyal Sardha, Rajiv Shankar Dvivedi, Arun R. Pednekar, Sanjay Kharde, Shankar Chillarge, Ms. Asha Gopalan Nair, Rajeev K. Dubey, Kamlendra Mishra, Advocates with them for the appearing parties.

JUDGMENT

Dalveer Bhandari, J.:--

1. Leave granted.

2. This appeal involves issues of great public importance pertaining to the importance of individual's personal liberty and the society's interest.

3. The society has a vital interest in grant or refusal of bail because every criminal offence is the offence against the State. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of the society. The law of 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.

4. Brief facts which are necessary to dispose of this appeal are recapitulated as under:

The appellant, who belongs to the Indian National Congress party (for short 'Congress party') is the alleged accused in this case. The case of the prosecution, as disclosed in the First Information Report (for short 'FIR'), is that Sidramappa Patil was contesting election of the State assembly on behalf of the Bhartiya Janata Party (for short 'BJP'). In the FIR, it is incorporated that Baburao Patil, Prakash Patil, Mahadev Patil, Mallikarjun Patil, Apparao Patil, Yeshwant Patil were supporters of the Congress and so also the supporters of the appellant Siddharam Mhetre and opposed to the BJP candidate.

5. On 26.9.2009, around 6.00 p.m. in the evening, Sidramappa Patil of BJP came to the village to meet his party workers. At that juncture, Shrimant Ishwarappa Kore, Bhimashankar Ishwarappa Kore, Kallapa Gaddi, Sangappa Gaddi, Gafur Patil, Layappa Gaddi, Mahadev Kore, Suresh Gaddi, Suresh Zhalaki, Ankalgi, Sarpanch of village Shivmurti Vijapure met Sidramappa Patil and thereafter went to worship and pray at Layavva Devi's temple. After worshipping the Goddess when they came out to the assembly hall of the temple, these aforementioned political opponents namely, Baburao Patil, Prakash Patil, Gurunath Patil, Shrishail Patil, Mahadev Patil, Mallikarjun Patil, Annarao @ Pintu Patil, Hanumant Patil, Tammarao Bassappa Patil, Apparao Patil, Mallaya Swami, Sidhappa Patil, Shankar Mhetre, Usman Sheikh, Jagdev Patil, Omsiddha Pujari, Panchappa Patil, Mahesh Hattargi, Siddhappa Birajdar, Santosh Arwat, Sangayya Swami, Anandappa Birajdar, Sharanappa Birajdar, Shailesh Chougule, Ravi Patil, Amrutling Koshti, Ramesh Patil and Chandrakant Hattargi suddenly came rushing in their direction and loudly shouted, “why have you come to our village? Have you come here to oppose our Mhetre Saheb? They asked them to go away and shouted Mhetre Saheb Ki Jai.”

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

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

8. The law relating to bail is contained in sections 436 to 450 of chapter XXXIII of the Code of Criminal Procedure, 1973. Section 436 deals with situation, in what kind of cases bail should be granted. Section 436 deals with the situation when bail may be granted in case of a bailable offence. Section 439 deals with the special powers of the High Court or the Court of Sessions regarding grant of bail. Under sections 437 and 439 bail is granted when the accused or the detenu is in jail or under detention.

9. The provision of anticipatory bail was introduced for the first time in the Code of Criminal Procedure in 1973.

10. Section 438 of the Code of Criminal Procedure, 1973 reads as under:

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

(i) the nature and gravity of the accusation;

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

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

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

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

(1-A) 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.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub- section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may thinks fit, including --

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

(ii) a condition that the person 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) a condition that the person shall not leave India without the previous permission of the Court;

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

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail, and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).”

Why was the provision of anticipatory bail introduced? - Historical perspective

11. The Code of Criminal Procedure, 1898 did not contain any specific provision of anticipatory bail. Under the old Code, there was a sharp difference of opinion amongst the various High Courts on the question as to whether the courts had an inherent power to pass an order of bail in anticipation of arrest, the preponderance of view being that it did not have such power.

12. The Law Commission of India, in its 41st Report dated September 24, 1969 pointed out the necessity of introducing a provision in the Code of Criminal Procedure enabling the High Court and the Court of Sessions to grant “anticipatory bail”. It observed in para 39.9 of its report (Volume I) and the same is set out as under:

“The suggestion for directing the release of a person on bail prior to his arrest (commonly known as “anticipatory bail”) was carefully considered by us. Though there is a conflict of judicial opinion about the power of a court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, 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.”

The Law commission recommended acceptance of the suggestion.

13. The Law Commission in para 31 of its 48th Report (July, 1972) made the following comments on the aforesaid clause:

“The Bill introduces a provision for the grant of anticipatory bail. This is substantially in accordance with the recommendation made by the previous Commission. We agree that this would be a useful addition, though we must add that it is in very exceptional cases that such a power should be exercised.

We are further of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after notice to the Public Prosecutor. The initial order should only be an interim one. Further, the relevant section should make it clear that the direction can be issued only for reasons to be recorded, and if the court is satisfied that such a direction is necessary in the interests of justice.

It will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the Superintendent of Police forthwith.”

14. Police custody is an inevitable concomitant of arrest for non-bailable offences. The concept of anticipatory bail is that a person who apprehends his arrest in a non-bailable case can apply for grant of bail to the Court of Sessions or to the High Court before the arrest.

Scope and ambit of Section 438 Cr.P.C.

15. It is apparent from the Statement of Objects and Reasons for introducing section 438 in the Code of Criminal Procedure, 1973 that it was felt imperative to evolve a device by which an alleged accused is not compelled to face ignominy and disgrace at the instance of influential people who try to implicate their rivals in false cases.

16. The Code of Criminal Procedure, 1898 did not contain any specific provision corresponding to the present section 438 Cr.P.C. The only two clear provisions of law by which bail could be granted were sections 437 and 439 of the Code. Section 438 was incorporated in the Code of Criminal Procedure, 1973 for the first time.

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

18. The High Court in the impugned judgment has declined to grant anticipatory bail to the appellant and aggrieved by the said order, the appellant has approached this Court by filing this appeal.

19. Mr. Shanti Bhushan, learned senior counsel appearing for the appellant submitted that the High Court has gravely erred in declining the anticipatory bail to the appellant. He submitted that section 438 Cr.P.C. was incorporated because sometime influential people try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. He pointed out that in recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase.

20. Mr. Bhushan submitted that the appellant has been implicated in a false case and apart from that he has already joined the investigation and he is not likely to abscond, or otherwise misuse the liberty while on bail, therefore, there was no justification to decline anticipatory bail to the appellant.

21. Mr. Bhushan also submitted that the FIR in this case refers to an incident which had taken place on the instigation of the appellant about eight days ago. According to him, proper analysis of the averments in the FIR leads to irresistible conclusion that the entire prosecution story seems to be a cock and bull story and no reliance can be placed on such a concocted version.

22. Mr. Bhushan contended that the personal liberty is the most important fundamental right guaranteed by the Constitution. He also submitted that it is the fundamental principle of criminal jurisprudence that every individual is presumed to be innocent till he or she is found guilty. He further submitted that on proper analysis of section 438 Cr.P.C. the legislative wisdom becomes quite evident that the legislature wanted to preserve and protect personal liberty and give impetus to the age-old principle that every person is presumed to be innocent till he is found guilty by the court.

23. Mr. Bhushan also submitted that an order of anticipatory bail does not in any way, directly or indirectly, take away from the police their power and right to fully investigate into charges made against the appellant. He further submitted that when the case is under investigation, the usual anxiety of the investigating agency is to ensure that the alleged accused should fully cooperate with them and should be available as and when they require him. In the instant case, when the appellant has already joined the investigation and is fully cooperating with the investigating agency then it is difficult to comprehend why the respondent is insistent for custodial interrogation of the appellant? According to the appellant, in the instant case, the investigating agency should not have a slightest doubt that the appellant would not be available to the investigating agency for further investigation particularly when he has already joined investigation and is fully cooperating with the investigating agency.

24. Mr. Bhushan also submitted that according to the General Clauses Act, 1897 the court which grants the bail also has the power to cancel it. The grant of bail is an interim order. The court can always review its decision according to the subsequent facts, circumstances and new material. Mr. Bhushan also submitted that the exercise of grant, refusal and cancellation of bail can be undertaken by the court either at the instance of the accused or a public prosecutor or a complainant on finding fresh material and new circumstances at any point of time. Even the appellant's reluctance in not fully cooperating with the investigation could be a ground for cancellation of bail.

25. Mr. Bhushan submitted that a plain reading of the section 438 Cr.P.C. clearly reveals that the legislature has not placed any fetters on the court. In other words, the legislature has not circumscribed court's discretion in any manner while granting anticipatory bail, therefore, the court should not limit the order only for a specified period till the charge-sheet is filed and thereafter compel the accused to surrender and ask for regular bail under section 439 Cr.P.C., meaning thereby the legislature has not envisaged that the life of the anticipatory bail would only last till the charge-sheet is filed. Mr. Bhushan submitted that when no embargo has been placed by the legislature then this court in some of its orders was not justified in placing this embargo.

26. Mr. Bhushan submitted that the discretion which has been granted by the legislature cannot and should not be curtailed by interpreting the provisions contrary to the legislative intention. The courts' discretion in grant or refusal of the anticipatory bail cannot be diluted by interpreting the provisions against the legislative intention. He submitted that the life is never static and every situation has to be assessed and evaluated in the context of emerging concerns as and when it arises. It is difficult to visualize or anticipate all kinds of problems and situations which may arise in future.

Law has been settled by an authoritative pronouncement of the Supreme Court

27. The Constitution Bench of this Court in Gurbaksh Singh Sibbia and Ors. v. State of Punjab, (1980) 2 SCC 565 had an

occasion to comprehensively deal with the scope and ambit of the concept of anticipatory bail. Section 438 Cr.P.C. is an extraordinary provision where the accused who apprehends his/her arrest on accusation of having committed a non-bailable offence can be granted bail in anticipation of arrest. The Constitution Bench's relevant observations are set out as under:

".....A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hall mark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail".

28. Mr. Bhushan referred to a Constitution Bench judgment in Sibbia's case (supra) to strengthen his argument that no such embargo has been placed by the said judgment of the Constitution Bench. He placed heavy reliance on para 15 of Sibbia's case (supra), which reads as under:

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

29. Mr. Bhushan submitted that the Constitution Bench in Sibbia's case (supra) also mentioned that "we see no valid reason for rewriting Section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal".

30. Mr. Bhushan submitted that the court's orders in some cases that anticipatory bail is granted till the charge-sheet is filed and thereafter the accused has to surrender and seek bail application under section 439 Cr.P.C. is neither envisaged by the provisions of the Act nor is in consonance with the law declared by a Constitution Bench in Sibbia's case (supra) nor it is in conformity with the fundamental principles of criminal jurisprudence that accused is considered to be innocent till he is found guilty nor in consonance with the provisions of the Constitution where individual's liberty in a democratic society is considered sacrosanct.

31. Mr. Mahesh Jethmalani, learned senior counsel appearing for respondent No. 2, submitted that looking to the facts and circumstances of this case, the High Court was justified in declining the anticipatory bail to the appellant. He submitted that the anticipatory bail ought to be granted in rarest of rare cases where the nature of offence is not very serious. He placed reliance on the case of Pokar Ram v. State of Rajasthan and Ors, (1985) 2 SCC 597 and submitted that in murder cases custodial interrogation is of paramount importance particularly when no eye witness account is available.

32. Mr. Jethmalani fairly submitted that the practice of passing orders of anticipatory bail operative for a few days and directing the accused to surrender before the Magistrate and apply for regular bail are contrary to the law laid down in Sibbia's case (supra). The decisions of this Court in Salauddin Abdulsamad Shaikh v. State of Maharashtra (1996) 1 SCC 667 , K. L. Verma v. State and Anr., (1998) 9 SCC 348 , Adri Dharan Das v. State of West Bengal (2005) 4 SCC 303 and Sunita Devi v. State of Bihar and Anr , (2005) 1 SCC 608 are in conflict with the above decision of the Constitution Bench in Sibbia's case (supra). He submitted that all these orders which are contrary to the clear legislative intention of law laid down in Sibbia's case (supra) are per incuriam. He also submitted that in case the conflict between the two views is irreconcilable, the court is bound to follow the judgment of the Constitution Bench over the subsequent decisions of Benches of lesser strength.

33. He placed reliance on N. Meera Rani v. Government of Tamil Nadu and Anr (1989) 4 SCC 418 wherein it was perceived that there was a clear conflict between the judgment of the Constitution Bench and subsequent decisions of Benches of lesser strength. The Court ruled that the dictum in the judgment of the Constitution Bench has to be preferred over the subsequent decisions of the Bench of lesser strength. The Court observed thus:

".....All subsequent decisions which are cited have to be read in the light of the Constitution Bench decision since they are decisions by Benches comprising of lesser number of judges. It is obvious that none of these subsequent decisions could have intended taking a view contrary to that of the Constitution bench in Rameshwar Shaw's case (1964) 4 SCR 921"

34. He placed reliance on another judgment of this Court in Vijayalaxmi Cashew Company and Ors. v. Dy. Commercial Tax Officer and Anr., (1996) 1 SCC 468 . This Court held as under:

".....It is not possible to uphold the contention that perception of the Supreme Court, as will appear from the later judgments, has changed in this regard. A judgment of a Five Judge Bench, which has not been doubted by any later judgment of the Supreme Court cannot be treated as overruled by implication."

35. He also placed reliance on Union of India and Ors v. K. S. Subramanian (1976) 3 SCC 677 and State of U.P. v. Ram Chandra Trivedi, (1976) 4 SCC 52 and submitted that in case of conflict, the High Court has to prefer the decision of a larger Bench to that of a smaller Bench.

36. Mr. Jethmalani submitted that not only the decision in Sibbia's case (supra) must be followed on account of the larger strength of the Bench that delivered it but the subsequent decisions must be held to be per incuriam and hence not binding since they have not taken into account the ratio of the judgment of the Constitution Bench.

37. He further submitted that as per the doctrine of 'per incuriam', any judgment which has been passed in ignorance of or without considering a statutory provision or a binding precedent is not good law and the same ought to be ignored. A perusal of the judgments in Salauddin Abdulsamad Shaikh v. State of Maharashtra, K. L. Verma v. State and Anr.,, Adri Dharan Das v. State of West Bengal and Sunita Devi v. State of Bihar and Anr (supra) indicates that none of these judgments have considered para 42 of Sibbia's case (supra) in proper perspective. According to Mr. Jethmalani, all subsequent decisions which have been cited above have to be read in the light of the Constitution Bench's decision in Sibbia's case (supra) since they are decisions of Benches comprised of lesser number of judges. According to him, none of these subsequent decisions could be intended taking a view contrary to that of the Constitution Bench in Sibbia's case (supra).

38. Thus, the law laid down in para 42 by the Constitution Bench that the normal rule is not to limit operation of the order of anticipatory bail, was not taken into account by the courts passing the subsequent judgments. The observations made by the courts in the subsequent judgments have been made in ignorance of and without considering the law laid down in para 42 which was binding on them. In these circumstances, the observations made in the subsequent judgments to the effect that anticipatory bail should be for a limited period of time, must be construed to be per incuriam and the decision of the Constitution Bench preferred.

39. He further submitted that the said issue came up for consideration before the Madras High Court reported in Palanikumar and Anr. v. State 2007 (4) CTC 1 wherein after discussing all the judgments of this court on the issue, the court held that the subsequent judgments were in conflict with the decision of the Constitution Bench in Sibbia's case (supra) and in accordance with the law of precedents, the judgment of the Constitution Bench is biding on all courts and the ratio of that judgment has to be applicable for all judgments decided by the Benches of same or smaller combinations. In the said judgment of Sibbia's case (supra) it was directed that the anticipatory bail should not be limited in period of time.

40. We have heard the learned counsel for the parties at great length and perused the written submissions filed by the learned counsel for the parties.

Relevance and importance of personal liberty

41. All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty.

42. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why “liberty” is called the very quintessence of a civilized existence.

43. Origin of “liberty”' can be traced in the ancient Greek civilization. The Greeks distinguished between the liberty of the group and the liberty of the individual. In 431 B.C., an Athenian statesman described that the concept of liberty was the outcome of two notions, firstly, protection of group from attack and secondly, the ambition of the group to realize itself as fully as possible through the self-realization of the individual by way of human reason. Greeks assigned the duty of protecting their liberties to the State. According to Aristotle, as the state was a means to fulfil certain fundamental needs of human nature and was a means for development of individuals' personality in association of fellow citizens so it was natural and necessary to man. Plato found his “republic” as the best source for the achievement of the self-realization of the people.

44. Chambers' Twentieth Century Dictionary defines “liberty” as “Freedom to do as one pleases, the unrestrained employment of natural rights, power of free chance, privileges, exemption, relaxation of restraint, the bounds within which certain privileges are enjoyed, freedom of speech and action beyond ordinary civility”.

45. It is very difficult to define the “liberty”. It has many facets and meanings. The philosophers and moralists have praised freedom and liberty but this term is difficult to define because it does not resist any interpretation. The term “liberty” may be defined as the affirmation by an individual or group of his or its own essence. It needs the presence of three factors, firstly, harmonious balance of personality, secondly, the absence of restraint upon the exercise of that affirmation and thirdly, organization of opportunities for the exercise of a continuous initiative.

46. “Liberty” may be defined as a power of acting according to the determinations of the will. According to Harold Laski, liberty was essentially an absence of restraints and John Stuard Mill viewed that “all restraint”, qua restraint is an evil”. In the words of Jonathon Edwards, the meaning of “liberty” and freedom is:

“Power, opportunity or advantage that any one has to do as he pleases, or, in other words, his being free from hindrance or impediment in the way of doing, or conducting in any respect, as he wills.”

47. It can be found that “liberty” generally means the prevention of restraints and providing such opportunities, the denial of which would result in frustration and ultimately disorder. Restraints on man's liberty are laid down by power used through absolute

discretion, which when used in this manner brings an end to “liberty” and freedom is lost. At the same time “liberty” without restraints would mean liberty won by one and lost by another. So “liberty” means doing of anything one desires but subject to the desire of others.

48. As John E.E.D. in his monograph Action on “Essays on Freedom and Power” wrote that Liberty is one of the most essential requirements of the modern man. It is said to be the delicate fruit of a mature civilization.

49. A distinguished former Attorney General for India, M.C. Setalvad in his treatise “War and Civil Liberties” observed that the French Convention stipulates common happiness as the end of the society, whereas Bentham postulates the greatest happiness of the greatest number as the end of law. Article 19 of the Indian Constitution averts to freedom and it enumerates certain rights regarding individual freedom. These rights are vital and most important freedoms which lie at the very root of liberty.

50. He further observed that the concept of civil liberty is essentially rooted in the philosophy of individualism. According to this doctrine, the highest development of the individual and the enrichment of his personality are the true function and end of the state. It is only when the individual has reached the highest state of perfection and evolved what is best in him that society and the state can reach their goal of perfection. In brief, according to this doctrine, the state exists mainly, if not solely, for the purpose of affording the individual freedom and assistance for the attainment of his growth and perfection. The state exists for the benefit of the individual.

51. Mr. Setalvad in the same treatise further observed that it is also true that the individual cannot attain the highest in him unless he is in possession of certain essential liberties which leave him free as it were to breathe and expand. According to Justice Holmes, these liberties are the indispensable conditions of a free society. The justification of the existence of such a state can only be the advancement of the interests of the individuals who compose it and who are its members. Therefore, in a properly constituted democratic state, there cannot be a conflict between the interests of the citizens and those of the state. The harmony, if not the identity, of the interests of the state and the individual, is the fundamental basis of the modern Democratic National State. And, yet the existence of the state and all government and even all law must mean in a measure the curtailment of the liberty of the individual. But such a surrender and curtailment of his liberty is essential in the interests of the citizens of the State. The individuals composing the state must, in their own interests and in order that they may be assured the existence of conditions in which they can, with a reasonable amount of freedom, carry on their other activities, endow those in authority over them to make laws and regulations and adopt measures which impose certain restrictions on the activities of the individuals.

52. Harold J. Laski in his monumental work in “Liberty in the Modern State” observed that liberty always demands a limitation on political authority. Power as such when uncontrolled is always the natural enemy of freedom.

53. Roscoe Pound, an eminent and one of the greatest American Law Professors aptly observed in his book “The Development of Constitutional Guarantee of Liberty” that whatever, 'liberty' may mean today, the liberty is guaranteed by our bills of rights, “is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust that society to individuals.”

54. Blackstone in “Commentaries on the Laws of England”, Vol. I, p.134 aptly observed that “Personal liberty consists in the power of locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due process of law”.

55. According to Dicey, a distinguished English author of the Constitutional Law in his treatise on Constitutional Law observed that, “Personal liberty, as understood in England, means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification.” [Dicey on Constitutional Law, 9th Edn., pp.207-08]. According to him, it is the negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty and not mere freedom to move to any part of the Indian territory. In ordinary language personal liberty means liberty relating to or concerning the person or body of the individual, and personal liberty in this sense is the antithesis of physical restraint or coercion.

56. Eminent English Judge Lord Alfred Denning observed:

“By personal freedom I mean freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasion without hindrance from any person.... It must be matched, of course, with social security by which I mean the peace and good order of the community in which we live.”

57. Eminent former Judge of this Court, Justice H.R. Khanna in a speech as published in 2 IJIL, Vol.18 (1978), p.133 observed that “liberty postulates the creation of a climate wherein there is no suppression of the human spirits, wherein, there is no denial of the opportunity for the full growth of human personality, wherein head is held high and there is no servility of the human mind or enslavement of the human body”.

Right to life and personal liberty under the Constitution

58. We deem it appropriate to deal with the concept of personal liberty under the Indian and other Constitutions.

59. The Fundamental Rights represent the basic values enriched by the people of this country. The aim behind having elementary right of the individual such as the Right to Life and Liberty is not fulfilled as desired by the framers of the Constitution. It is to preserve and protect certain basic human rights against interference by the state. The inclusion of a Chapter in Constitution is in

accordance with the trends of modern democratic thought. The object is to ensure the inviolability of certain essential rights against political vicissitudes.

60. The framers of the Indian Constitution followed the American model in adopting and incorporating the Fundamental Rights for the people of India. American Constitution provides that no person shall be deprived of his life, liberty, or property without due process of law. The due process clause not only protects the property but also life and liberty, similarly Article 21 of the Indian Constitution asserts the importance of Article 21;

The said Article reads as under:--

“no person shall be deprived for his life or personal liberty except according to procedure established by law”

the right secured by Article 21 is available to every citizen or non-citizen, according to this article, two rights are secured.

1. Right to life

2. Right to personal liberty.

61. Life and personal liberty are the most prized possessions of an individual. The inner urge for freedom is a natural phenomenon of every human being. Respect for life, liberty and property is not merely a norm or a policy of the State but an essential requirement of any civilized society.

62. This court defined the term “personal liberty” immediately after the Constitution came in force in India in the case of A. K. Gopalan v. State of Madras, AIR 1950 SC 27 . The expression 'personal liberty' has wider as well narrow meaning. In the wider sense it includes not only immunity from arrest and detention but also freedom of speech, association etc. In the narrow sense, it means immunity from arrest and detention. The juristic conception of 'personal liberty', when used the latter sense, is that it consists freedom of movement and locomotion.

63. Mukherjea, J. in the said judgment observed that 'Personal Liberty' means liberty relating to or concerning the person or body of the individual and it is, in this sense, antithesis of physical restraint or coercion. 'Personal Liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification. This negative right constitutes the essence of personal liberty. Patanjali Shastri, J. however, said that whatever may be the generally accepted connotation of the expression 'personal liberty', it was used in Article 21 in a sense which excludes the freedom dealt with in Article 19. Thus, the Court gave a narrow interpretation to 'personal liberty'. This court excluded certain varieties of rights, as separately mentioned in Article 19, from the purview of 'personal liberty' guaranteed by Art. 21.

64. In Kharak Singh v. State of U.P. and Ors., AIR 1963 SC 1295 , Subba Rao, J. defined 'personal

liberty, as a right of an individual to be free from restrictions or encroachment on his person whether these are directly imposed or indirectly brought about by calculated measure. The court held that 'personal liberty' in Article 21 includes all varieties of freedoms except those included in Article 19.

65. In Maneka Gandhi v. Union of India and Anr., (1978) 1 SCC 248 , this court expanded the scope of the expression 'personal liberty' as used in Article 21 of the Constitution of India. The court rejected the argument that the expression 'personal liberty' must be so interpreted as to avoid overlapping between Article 21 and Article 19(1). It was observed: “The expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19.” So, the phrase personal liberty' is very wide and includes all possible rights which go to constitute personal liberty, including those which are mentioned in Article 19.

66. Right to life is one of the basic human right and not even the State has the authority to violate that right. [State of A.P. v. Challa Ramakrishna Reddy and Ors., (2000) 5 SCC 712].

67. Article 21 is a declaration of deep faith and belief in human rights. In this pattern of guarantee woven in Chapter III of this Constitution, personal liberty of man is at root of Article 21 and each expression used in this Article enhances human dignity and values. It lays foundation for a society where rule of law has primary and not arbitrary or capricious exercise of power. [Kartar Singh v. State of Punjab and Ors., (1994) 3 SCC 569].

68. While examining the ambit, scope and content of the expression “personal liberty” in the said case, it was held that the term is used in this Article as a compendious term to include within itself all varieties of rights which goes to make up the “personal liberties” or man other than those dealt within several clauses of Article 19(1). While Article 19(1) deals with particular species or attributes of that freedom, “personal liberty” in Article 21 takes on and comprises the residue.

69. The early approach to Article 21 which guarantees right to life and personal liberty was circumscribed by literal interpretation in A.K. Gopalan (supra). But in course of time, the scope of this application of the Article against arbitrary encroachment by the executives has been expanded by liberal interpretation of the components of the Article in tune with the relevant international understanding. Thus protection against arbitrary privation of “life” no longer means mere protection of death, or physical injury, but also an invasion of the right to “live” with human dignity and would include all these aspects of life which would go to make a man's life meaningful and worth living, such as his tradition, culture and heritage. [Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors., (1981) 1 SCC 608]

70. Article 21 has received very liberal interpretation by this court. It was held: "The right to live with human dignity and same does not connote continued drudging. It takes within its fold some process of civilization which makes life worth living and expanded concept of life would mean the tradition, culture, and heritage of the person concerned." [P. Rathinam/Nagbhusan Patnaik v. Union of India and Anr., (1994) 3 SCC 394 .]

71. The object of Article 21 is to prevent encroachment upon personal liberty in any manner. Article 21 is repository of all human rights essentially for a person or a citizen. A fruitful and meaningful life presupposes full of dignity, honour, health and welfare. In the modern "Welfare Philosophy", it is for the State to ensure these essentials of life to all its citizens, and if possible to non-citizens. While invoking the provisions of Article 21, and by referring to the oft-quoted statement of Joseph Addision, "Better to die ten thousand deaths than wound my honour", the Apex court in Khedat Mazdoor Chetana Sangath v. State of M.P. and Ors., (1994) 6 SCC 260 posed to itself a question "If dignity or honour vanishes what remains of life"? This is the significance of the Right to Life and Personal Liberty guaranteed under the Constitution of India in its third part.

72. This court in Central Inland Water Transport Corporation Ltd. and Anr. v. Brojo Nath Ganguly and Anr., (1986) 3 SCC 156 observed that the law must respond and be responsive to the felt and discernible compulsions of circumstances that would be equitable, fair and justice, and unless there is anything to the contrary in the statute, Court must take cognizance of that fact and act accordingly.

73. This court remarked that an undertrial prisoner should not be put in fetters while he is being taken from prison to Court or back to prison from Court. Steps other than putting him in fetters will have to be taken to prevent his escape.

74. In Prem Shankar Shukla v. Delhi Administration (1980) 3 SCC 526 , this court has made following observations:

"..... The Punjab Police Manual, in so far as it puts the ordinary Indian beneath the better class breed (para 26.21A and 26.22 of Chapter XXVI) is untenable and arbitrary. Indian humans shall not be dichotomised and the common run discriminated against regarding handcuffs. The provisions in para 26.22 that every under-trial who is accused of a non-bailable offence punishable with more than 3 years prison term shall be routinely handcuffed is violative of Articles 14, 19 and 21. The nature of the accusation is not the criterion. The clear and present danger of escape breaking out of the police control is the determinant. And for this there must be clear material, not glib assumption, record of reasons and judicial oversight and summary hearing and direction by the court where the victim is produced. ... Handcuffs are not summary punishment vicariously imposed at police level, at once obnoxious and irreversible. Armed escorts, worth the salt, can overpower any unarmed under- trial and extra guards can make up exceptional needs. In very special situations, the application of irons is not ruled out. The same reasoning applies to (e) and (f). Why torture the prisoner because others will demonstrate or attempt his rescue? The plain law of under-trial custody is thus contrary to the unedifying escort practice. (Para 31)

Even in cases where, in extreme circumstances, handcuffs have to be put on the prisoner, the escorting authority must record contemporaneously the reason for doing so. Otherwise, under Article 21 the procedure will be unfair and bad in law. The minions of the police establishment must make good their security recipes by getting judicial approval. And, once the court directs that handcuffs shall be off, no escorting authority can overrule judicial direction. This is implicit in Article 21 which insists upon fairness, reasonableness and justice in the very procedure which authorities stringent deprivation of life and liberty. (Para 30)

It is implicit in Articles 14 and 19 that when there is no compulsive need to fetter a person's limbs, it is sadistic, capricious, despotic and demoralizing to humble a man by manacling him. Such arbitrary conduct surely slaps Article 14 on the face. The minimal freedom of movement which even a detainee is entitled to under Article 19 cannot be cut down cruelly by application of handcuffs or other hoops. It will be unreasonable so to do unless the State is able to make out that no other practical way of forbidding escape is available, the prisoner being so dangerous and desperate and the circumstances so hostile to safekeeping. (Para 23)

Whether handcuffs or other restraint should be imposed on a prisoner is a matter for the decision of the authority responsible for his custody. But there is room for imposing supervisory regime over the exercise of that power. One sector of supervisory jurisdiction could appropriately lie with the court trying the accused, and it would be desirable for the custodial authority to inform that court of the circumstances in which, and the justification for, imposing a restraint on the body of the accused. It should be for the court concerned to work out the modalities of the procedure requisite for the purpose of enforcing such control."

75. After dealing with the concept of life and liberty under the Indian Constitution, we would like to have the brief survey of other countries to ascertain how life and liberty has been protected in other countries.

UNITED KINGDOM

76. Life and personal liberty has been given prime importance in the United Kingdom. It was in 1215 that the people of England revolted against King John and enforced their rights, first time the King had acknowledged that there were certain rights of the subject could be called Magna Carta 1215. In 1628 the petition of rights was presented to King Charles-I which was the 1st step in the transfer of Sovereignty from the King to Parliament. It was passed as the Bill of Rights 1689.

77. In the Magna Carta, it is stated "no free man shall be taken, or imprisoned or disseised or outlawed or banished or any ways destroyed, nor will the King pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land".

78. Right to life is the most fundamental of all human rights and any decision affecting human right or which may put an individual's life at risk must call for the most anxious scrutiny. See: Bugdaycay v. Secretary of State for the Home Department (1987) 1 All ER 940. The sanctity of human life is probably the most fundamental of the human social values. It is recognized in

all civilized societies and their legal system and by the internationally recognized statements of human rights. See:R on the application of Pretty v. Director of Public Prosecutions (2002) 1 All ER 1.

U.S.A.

79. The importance of personal liberty is reflected in the Fifth Amendment to the Constitution of U.S.A. (1791) which declares as under :-

“No person shall be.....deprived of his life, liberty or property, without due process of law.” (The 'due process' clause was adopted in s.1(a) of the Canadian Bill of Rights Act, 1960. In the Canada Act, 1982, this expression has been substituted by 'the principles of fundamental justice' [s.7].

80. The Fourteenth Amendment imposes similar limitation on the State authorities. These two provisions are conveniently referred to as the 'due process clauses'. Under the above clauses the American Judiciary claims to declare a law as bad, if it is not in accordance with 'due process', even though the legislation may be within the competence of the Legislature concerned. Due process is conveniently understood means procedural regularity and fairness. (Constitutional Interpretation by Craig R. Ducat, 8 th Edn. 2002 p.475.).

WEST GERMANY

81. Article 2(2) of the West German Constitution (1948) declares:

“Everyone shall have the right to life and physical inviolability. The freedom of the individual shall be inviolable. These rights may be interfered with only on the basis of the legal order.”

Though the freedom of life and liberty guaranteed by the above Article may be restricted, such restriction will be valid only if it is in conformity with the 'legal order' (or 'pursuant to a law, according to official translation). Being a basic right, the freedom guaranteed by Article 2(2) is binding on the legislative, administrative and judicial organs of the State [Article 1(3)]. This gives the individual the rights to challenge the validity of a law or an executive act violative the freedom of the person by a constitutional complaint to the Federal Constitutional Court, under Article 93. Procedural guarantee is given by Articles 103(1) and 104. Article 104(1)-2(2) provides:

“(1) The freedom of the individual may be restricted only on the basis of a formal law and only with due regard to the forms prescribed therein.....

(2) Only the Judge shall decide on the admissibility and continued deprivation of liberty.”

82. These provisions correspond to Article 21 of our Constitution and the court is empowered to set a man to liberty if it appears that he has been imprisoned without the authority of a formal law or in contravention of the procedure prescribed there.

JAPAN

83. Article XXXI of the Japanese Constitution of 1946 says :

“No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law.”

This article is similar to Article 21 of our Constitution save that it includes other criminal penalties, such as fine or forfeiture within its ambit.

CANADA

84. S. 1(1) of the Canadian Bill of Rights Act, 1960, adopted the 'Due Process' Clause from the American Constitution. But the difference in the Canadian set-up was due to the fact that this Act was not a constitutional instrument to impose a direct limitation on the Legislature but only a statute for interpretation of Canadian status, which, again, could be excluded from the purview of the Act of 1960, in particular cases, by an express declaration made by the Canadian Parliament itself (s.2). The result was obvious: The Canadian Supreme Court in R. v. Curr (1972) S.C.R. 889 held that the Canadian Court would not import 'substantive reasonableness' into s.1(a), because of the unsalutary experience of substantive due process in the U.S.A.; and that as to 'procedural reasonableness', s.1(a) of the Bill of Rights Act only referred to 'the legal processes recognized by Parliament and the Courts in Canada'. The result was that in Canada, the 'due process clause' lost its utility as an instrument of judicial review of legislation and it came to mean practically the same thing as whatever the Legislature prescribes, - much the same as 'procedure established by law' in Article 21 of the Constitution of India, as interpreted in A.K. Gopalan (supra).

BANGADESH

85. Article 32 of the Constitution of Bangladesh, 1972 [3 SCW 385] reads as under:

“No person shall be deprived of life or personal liberty save in accordance with law.”

This provision is similar to Article 21 of the Indian Constitution. Consequently, unless controlled by some other provision, it

should be interpreted as in India.

PAKISTAN

86. Article 9 Right to life and Liberty. - “Security of Person : No person shall be deprived of life and liberty save in accordance with law.”

NEPAL

87. In the 1962 - Constitution of Nepal, there is Article 11(1) which deals with right to life and liberty which is identical with Article 21 of the Indian Constitution.

INTERNATIONAL CHARTERS

88. Universal Declaration, 1948. - Article 3 of the Universal Declaration says:

“Everyone has the right to life, liberty and security of person.”

Article 9 provides:

“No one shall be subjected to arbitrary arrest, detention or exile.”

Cl.10 says:

“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” [As to its legal effect, see M. v. Organisation Belge, (1972) 45 Inter, LR 446 (447, 451, et. Sq.)]

89. Covenant on Civil and Political Rights - Article 9(1) of the U.N. 1966, 1966 says:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

90. European Convention on Human Rights, 1950. - This Convention contains a most elaborate and detailed codification of the rights and safeguards for the protection of life and personal liberty against arbitrary invasion.

91. In every civilized democratic country, liberty is considered to be the most precious human right of every person. The Law Commission of India in its 177th Report under the heading 'Introduction to the doctrine of “arrest” has described as follows:

“Liberty is the most precious of all the human rights”. It has been the founding faith of the human race for more than 200 years. Both the American Declaration of Independence, 1776 and the French Declaration of the Rights of Man and the Citizen, 1789, spoke of liberty being one of the natural and inalienable rights of man. The universal declaration of human rights adopted by the general assembly on United Nations on December 10, 1948 contains several articles designed to protect and promote the liberty of individual. So does the international covenant on civil and political rights, 1996. Above all, Article 21 of the Constitution of India proclaims that no one shall be deprived of his right to personal liberty except in accordance with the procedure prescribed by law. Even Article 20(1) & (2) and Article 22 are born out of a concern for human liberty. As it is often said, “one realizes the value of liberty only when he is deprived of it.” Liberty, along with equality is the most fundamental of human rights and the fundamental freedoms guaranteed by the Constitution. Of equal importance is the maintenance of peace, law and order in the society. Unless, there is peace, no real progress is possible. Societal peace lends stability and security to the polity. It provides the necessary conditions for growth, whether it is in the economic sphere or in the scientific and technological spheres.”

92. Just as the Liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order. Both are equally important.

93. It is a matter of common knowledge that a large number of undertrials are languishing in jail for a long time even for allegedly committing very minor offences. This is because section 438 Cr.P.C. has not been allowed its full play. The Constitution Bench in Sibbia's case (supra) clearly mentioned that section 438 Cr.P.C. is extraordinary because it was incorporated in the Code of Criminal Procedure, 1973 and before that other provisions for grant of bail were sections 437 and 439 Cr.P.C. It is not extraordinary in the sense that it should be invoked only in exceptional or rare cases. Some courts of smaller strength have erroneously observed that section 438 Cr.P.C. should be invoked only in exceptional or rare cases. Those orders are contrary to the law laid down by the judgment of the Constitution Bench in Sibbia's case (supra). According to the report of the National Police Commission, the power of arrest is grossly abused and clearly violates the personal liberty of the people, as enshrined under Article 21 of the Constitution, then the courts need to take serious notice of it. When conviction rate is admittedly less than 10%, then the police should be slow in arresting the accused. The courts considering the bail application should try to maintain fine balance between the societal interest vis-a-vis personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused that the accused is presumed to be innocent till he is found guilty by the competent court.

94. The complaint filed against the accused needs to be thoroughly examined including the aspect whether the complainant has filed false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or

frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.

95. The gravity of charge and exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.

96. It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided.

97. A great ignominy, humiliation and disgrace is attached to the arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.

Whether the powers under section 438 Cr.P.C. are subject to limitation of section 437 Cr.P.C.?

98. The question which arises for consideration is whether the powers under section 438 Cr.P.C. are unguided or uncanalised or are subject to all the limitations of section 437 Cr.P.C.? The Constitution Bench in Sibbia's case (supra) has clearly observed that there is no justification for reading into section 438 Cr.P.C. and the limitations mentioned in section 437 Cr.P.C. The Court further observed that the plentitude of the section must be given its full play. The Constitution Bench has also observed that the High Court is not right in observing that the accused must make out a “special case” for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by section 438 Cr.P.C. to a dead letter. The Court observed that “We do not see why the provisions of Section 438 Cr.P.C. should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable.”

99. As aptly observed in Sibbia's case (supra) that a wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.

100. The Constitution Bench in the same judgment also observed that a person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall enlarged on bail.

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.

104. The intention of the legislature is quite clear that the power of grant or refusal of bail is entirely discretionary. The Constitution Bench in Sibbia's case (supra) has clearly stated that grant and refusal is discretionary and it should depend on the facts and circumstances of each case. The Constitution Bench in the said case has aptly observed that we must respect the wisdom of the Legislature entrusting this power to the superior courts namely, the High Court and the Court of Session. The Constitution Bench observed as under:

“We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognized over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down inflexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the grounds that, after all “the legislature in, its wisdom” has thought it fit to use a particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected.”

GRANT OF BAIL FOR LIMITED PERIOD IS CONTRARY TO THE LEGISLATIVE INTENTION AND LAW DECLARED BY THE CONSTITUTION BENCH:

105. The court which grants the bail has the right to cancel the bail according to the provisions of the General Clauses Act but ordinarily after hearing the public prosecutor when the bail order is confirmed then the benefit of the grant of the bail should continue till the end of the trial of that case.

106. The judgment in Salauddin Abdulsamad Shaikh (supra) is contrary to legislative intent and the spirit of the very provisions of the anticipatory bail itself and has resulted in an artificial and unreasonable restriction on the scope of enactment contrary to the legislative intention.

107. The restriction on the provision of anticipatory bail under section 438 Cr.P.C. limits the personal liberty of the accused granted under Article 21 of the constitution. The added observation is nowhere found in the enactment and bringing in restrictions which are not found in the enactment is again an unreasonable restriction. It would not stand the test of fairness and reasonableness which is implicit in Article 21 of the Constitution after the decision in Maneka Gandhi's case (supra) in which the court observed 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.

108. Section 438 Cr.P.C. does not mention anything about the duration to which a direction for release on bail in the event of arrest can be granted. The order granting anticipatory bail is a direction specifically to release the accused on bail in the event of his arrest. Once such a direction of anticipatory bail is executed by the accused and he is released on bail, the concerned court would be fully justified in imposing conditions including direction of joining investigation.

109. The court does not use the expression 'anticipatory bail' but it provides for issuance of direction for the release on bail by the High Court or the Court of Sessions in the event of arrest. According to the aforesaid judgment of Salauddin's case, the accused has to surrender before the trial court and only thereafter he/she can make prayer for grant of bail by the trial court. The trial court would release the accused only after he has surrendered.

110. In pursuance to the order of the Court of Sessions or the High Court, once the accused is released on bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

111. The court must bear in mind that at times the applicant would approach the court for grant of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. In fact, the investigating or concerned agency may not otherwise arrest that applicant who has applied for anticipatory bail but just because he makes an application before the court and gets the relief from the court for a limited period and thereafter he has to surrender before the trial court and only thereafter his bail application can be considered and life of anticipatory bail comes to an end. This may lead to disastrous and unfortunate consequences. The applicant who may not have otherwise lost his liberty loses it because he chose to file application of anticipatory bail on mere apprehension of being arrested on accusation of having committed a non-bailable offence. No arrest should be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. This finding of the said judgment (supra) is contrary to the legislative intention and law which has been declared by a Constitution Bench of this court in Sibbia's case (supra).

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

113. It is a settled legal position crystallized by the Constitution Bench of this court in Sibbia's case (supra) that the courts should not impose restrictions on the ambit and scope of section 438 Cr.P.C. which are not envisaged by the Legislature. The court cannot rewrite the provision of the statute in the garb of interpreting it.

114. It is unreasonable to lay down strict, inflexible and rigid rules for exercise of such discretion by limiting the period of which an order under this section could be granted. We deem it appropriate to reproduce some observations of the judgment of the Constitution Bench of this court in the Sibbia's case (supra).

“The validity of that section must accordingly be examined by the test of fairness and reasonableness which is implicit in Article 21; If the legislature itself were to impose an unreasonable restriction on the grant of anticipatory bail, such a restriction could have been struck down as being violative of Article 21; Therefore, while determining the scope of Section 438, the court should not impose any unfair or unreasonable limitation on the individual's right to obtain an order of anticipatory bail. Imposition of an unfair or unreasonable limitation, according to the learned Counsel, would be violative of Article 21, irrespective of whether it is imposed by legislation or by judicial decision.

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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.”

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"I desire in the first instance to point out that the discretion given by the section is very wide. . . Now it seems to me that when the Act is so expressed to provide a wide discretion, ... it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament. It is quite a different thing to place conditions upon a free discretion entrusted by statute to the court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the court wish it had kept a free hand."

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"The concern of the courts generally is to preserve their discretion without meaning to abuse it. It will be strange if we exhibit concern to stultify the discretion conferred upon the courts by law."

115. The Apex Court in Salauddin's case (supra) held that anticipatory bail should be granted only for a limited period and on the expiry of that duration it should be left to the regular court to deal with the matter is not the correct view. The reasons quoted in the said judgment is that anticipatory bail is granted at a stage when an investigation is incomplete and the court is not informed about the nature of evidence against the alleged offender.

116. The said reason would not be right as the restriction is not seen in the enactment and bail orders by the High Court and Sessions Court are granted under sections 437 and 439 also at such stages and they are granted till the trial.

117. The view expressed by this Court in all the above referred judgments have to be reviewed and once the anticipatory bail is granted then the protection should ordinarily be available till the end of the trial unless the interim protection by way of the grant of anticipatory bail is curtailed when the anticipatory bail granted by the court is cancelled by the court on finding fresh material or circumstances or on the ground of abuse of the indulgence by the accused.

SCOPE AND AMBIT OF ANTICIPATORY BAIL:

118. A good deal of misunderstanding with regard to the ambit and scope of section 438 Cr.P.C. could have been avoided in case the Constitution Bench decision of this court in Sibbia's case (supra) was correctly understood, appreciated and applied.

119. This Court in the Sibbia's case (supra) laid down the following principles with regard to anticipatory bail:

(a) Section 438(1) is to be interpreted in light of Article 21 of the Constitution of India.

(b) Filing of FIR is not a condition precedent to exercise of power under section 438.

(c) Order under section 438 would not affect the right of police to conduct investigation.

(d) Conditions mentioned in section 437 cannot be read into section 438.

(e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the circumstances of each case.

(f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re- examined after hearing. Such ad interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant.

120. The Law Commission in July 2002 has severely criticized the police of our country for the arbitrary use of power of arrest which, the Commission said, is the result of the vast discretionary powers conferred upon them by this Code. The Commission expressed concern that there is no internal mechanism within the police department to prevent misuse of law in this manner and the stark reality that complaint lodged in this regard does not bring any result. The Commission intends to suggest amendments in the Criminal Procedure Code and has invited suggestions from various quarters. Reference is made in this Article to the 41st Report of the Law Commission wherein the Commission saw 'no justification' to require a person to submit to custody, remain in prison for some days and then apply for bail even when there are reasonable grounds for holding that the person accused of an offence is not likely to abscond or otherwise misuse his liberty. Discretionary power to order anticipatory bail is required to be exercised keeping in mind these sentiments and spirit of the judgments of this court in Sibbia's case (supra) and Joginder Kumar v. State of U.P. and Ors., (1994) 4 SCC 260 .

Relevant consideration for exercise of the power

121. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly

observed in the Constitution Bench decision in Sibbia's case (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

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

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences.

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

123. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

124. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.

125. These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualize all situations and circumstances in which a person may pray for anticipatory bail. If a wise discretion is exercised by the concerned judge, after consideration of entire material on record then most of the grievances in favour of grant of or refusal of bail will be taken care of. The legislature in its wisdom has entrusted the power to exercise this jurisdiction only to the judges of the superior courts. In consonance with the legislative intention we should accept the fact that the discretion would be properly exercised. In any event, the option of approaching the superior court against the court of Sessions or the High Court is always available.

126. Irrational and Indiscriminate arrest are gross violation of human rights. In Joginder Kumar's case (supra), a three Judge Bench of this Court has referred to the 3rd report of the National Police Commission, in which it is mentioned that the quality of arrests by the Police in India mentioned power of arrest as one of the chief sources of corruption in the police. The report suggested that, by and large, nearly 60% of the arrests were either unnecessary or unjustified and that such unjustified police action accounted for 43.2% of the expenditure of the jails.

127. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.

128 In case, the State consider the following suggestions in proper perspective then perhaps it may not be necessary to curtail the personal liberty of the accused in a routine manner. These suggestions are only illustrative and not exhaustive.

(1) Direct the accused to join investigation and only when the accused does not cooperate with the investigating agency, then only the accused be arrested.

(2) Seize either the passport or such other related documents, such as, the title deeds of properties or the Fixed Deposit Receipts/Share Certificates of the accused.

(3) Direct the accused to execute bonds;

(4) The accused may be directed to furnish sureties of number of persons which according to the prosecution are necessary in view of the facts of the particular case.

(5) The accused be directed to furnish undertaking that he would not visit the place where the witnesses reside so that the possibility of tampering of evidence or otherwise influencing the course of justice can be avoided.

(6) Bank accounts be frozen for small duration during investigation.

129 In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer.

130. Exercise of jurisdiction under section 438 of Cr.P.C. is extremely important judicial function of a judge and must be entrusted to judicial officers with some experience and good track record. Both individual and society have vital interest in orders passed by the courts in anticipatory bail applications.

131. It is imperative for the High Courts through its judicial academies to periodically organize workshops, symposiums, seminars and lectures by the experts to sensitize judicial officers, police officers and investigating officers so that they can properly comprehend the importance of personal liberty vis-a-vis social interests. They must learn to maintain fine balance between the personal liberty and the social interests.

132. The performance of the judicial officers must be periodically evaluated on the basis of the cases decided by them. In case, they have not been able to maintain balance between personal liberty and societal interests, the lacunae must be pointed out to them and they may be asked to take corrective measures in future. Ultimately, the entire discretion of grant or refusal of bail has to be left to the judicial officers and all concerned must ensure that grant or refusal of bail is considered basically on the facts and circumstances of each case.

133. In our considered view, the Constitution Bench in Sibbia's case (supra) has comprehensively dealt with almost all aspects of the concept of anticipatory bail under section 438 Cr.P.C. A number of judgments have been referred to by the learned counsel for the parties consisting of Benches of smaller strength where the courts have observed that the anticipatory bail should be of limited duration only and ordinarily on expiry of that duration or standard duration, the court granting the anticipatory bail should leave it to the regular court to deal with the matter. This view is clearly contrary to the view taken by the Constitution Bench in Sibbia's case (supra). In the preceding paragraphs, it is clearly spelt out that no limitation has been envisaged by the Legislature under section 438 Cr.P.C. The Constitution Bench has aptly observed that “we see no valid reason for rewriting section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court or the Court of Session but, for the purpose of limiting it”.

134. In view of the clear declaration of law laid down by the Constitution Bench in Sibbia's case (supra), it would not be proper to limit the life of anticipatory bail. When the court observed that the anticipatory bail is for limited duration and thereafter the accused should apply to the regular court for bail, that means the life of section 438 Cr.P.C. would come to an end after that limited duration. This limitation has not been envisaged by the legislature. The Constitution Bench in Sibbia's case (supra) clearly observed that it is not necessary to re-write section 438 Cr.P.C. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under section 438 Cr.P.C. granting bail cannot be curtailed.

135. The ratio of the judgment of the Constitution Bench in Sibbia's case (supra) perhaps was not brought to the notice of their Lordships who had decided the cases of Salauddin Abdulsamad Shaikh v. State of Maharashtra, K. L. Verma v.State and Another, Adri Dharan Das v. State of West Bengal and Sunita Devi v. State of Bihar and Another (supra).

136. In Naresh Kumar Yadav v. Ravindra Kumar (2008) 1 SCC 632 , a two-Judge Bench of this Court observed “the power exercisable under section 438 Cr.P.C. is somewhat extraordinary in character and it should be exercised only in exceptional cases. This approach is contrary to the legislative intention and the Constitution Bench's decision in Sibbia's case (supra).

137. We deem it appropriate to reiterate and assert that discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under section 438 Cr.P.C. should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject to the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

138. The judgments and orders mentioned in paras 135 and 136 are clearly contrary to the law declared by the Constitution Bench of this Court in Sibbia's case (supra). These judgments and orders are also contrary to the legislative intention. The Court would not be justified in re-writing section 438 Cr.P.C.

139. Now we deem it imperative to examine the issue of per incuriam raised by the learned counsel for the parties. In Young v. Bristol Aeroplane Company Limited (1994) All ER 293 the House of Lords observed that 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority. The same has been accepted, approved and adopted by this court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law.

“..... In Halsbury's Laws of England (4th Edn.) Vol. 26: Judgment and Orders: Judicial Decisions as Authorities (pp. 297-98, para 578) per incuriam has been elucidated as under:

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow (Young v. Bristol Aeroplane Co. Ltd., 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300.

In Huddersfield Police Authority v. Watson, 1947 KB 842 : (1947) 2 All ER 193.); or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

140. Lord Godard, C.J. in Huddersfield Police Authority v. Watson (1947) 2 All ER 193 observed that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam.

141. This court in Government of A.P. and Anr. v. B. Satyanarayana Rao (dead) by LRs. and Ors., (2000) 4 SCC 262 observed as under:

"The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

142. In a Constitution Bench judgment of this Court in Union of India v. Raghubir Singh (1989) 2 SCC 754 , Chief Justice Pathak observed as under:

"The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

143. In Thota Sesharathamma and Anr. v. Thota Manikyamma (Dead) by LRs. and Ors., (1991) 4 SCC 312 a two Judge Bench of this Court held that the three Judge Bench decision in the case of Mst. Karmi v. Amru (1972) 4 SCC 86 was per incuriam and observed as under:

"...It is a short judgment without adverting to any provisions of Section 14 (1) or 14(2) of the Act. The judgment neither makes any mention of any argument raised in this regard nor there is any mention of the earlier decision in Badri Pershad v. Smt. Kanso Devi. The decision in Mst. Karmi cannot be considered as an authority on the ambit and scope of Section 14(1) and (2) of the Act."

144. In R. Thiruvirkolam v. Presiding Officer and Anr., (1997) 1 SCC 9 a two Judge Bench of this Court observed that the question is whether it was bound to accept the decision rendered in Gujarat Steel Tubes Ltd. v. Mazdoor Sabha (1980) 2 SCC 593 , which was not in conformity with the decision of a Constitution Bench in P.H. Kalyani v. Air France, (1964) 2 SCR 104 . J.S. Verma, J. speaking for the court observed as under:

"With great respect, we must say that the above-quoted observations in Gujarat Steel at P. 215 are not in line with the decision in Kalyani which was binding or with D.C. Roy to which the learned Judge, Krishna Iyer, J. was a party. It also does not match with the underlying juristic principle discussed in Wade. For the reasons, we are bound to follow the Constitution Bench decision in Kalyani, which is the binding authority on the point."

145. In Bharat Petroleum Corporation Ltd. v. Mumbai Shramik Sangra and Ors., (2001) 4 SCC 448 a Constitution Bench of this Court ruled that a decision of a Constitution Bench of this Court binds a Bench of two learned Judges of this Court and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness.

146. A Constitution Bench of this Court in Central Board of Dawoodi Bohra Community v. State of Maharashtra (2005) 2 SCC 673 has observed that the law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

147. A three-Judge Bench of this court in Official Liquidator v. Dayanand and Ors., (2008) 10 SCC 1 again reiterated the clear position of law that by virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in State of Karnataka and Ors. v. Umadevi (3) and Ors., (2006) 4 SCC 1 is binding on all courts including this court till the same is overruled by a larger Bench. The ratio of the Constitution Bench has to be followed by Benches of lesser strength. In para 90, the court observed as under:-

"We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed."

148. In Subhash Chandra and Anr. v. Delhi Subordinate Services Selection Board and Ors., (2009) 15 SCC 458 , this court again reiterated the settled legal position that Benches of lesser strength are bound by the judgments of the Constitution Bench and any

Bench of smaller strength taking contrary view is per incuriam. The court in para 110 observed as under:-

“Should we consider S. Pushpa v. Sivachanmugavelu (2005) 3 SCC 1 to be an obiter following the said decision is the question which arises herein. We think we should. The decisions referred to hereinbefore clearly suggest that we are bound by a Constitution Bench decision. We have referred to two Constitution Bench decisions, namely, Marri Chandra Shekhar Rao v. Seth G.S. Medical College (1990) 3 SCC 139 and E.V. Chinnaiah v. State of A.P. (2005) 1 SCC 394 . Marri Chandra Shekhar Rao (supra) had been followed by this Court in a large number of decisions including the three-Judge Bench decisions. S. Pushpa (supra) therefore, could not have ignored either Marri Chandra Shekhar Rao (supra) or other decisions following the same only on the basis of an administrative circular issued or otherwise and more so when the constitutional scheme as contained in clause (1) of Articles 341 and 342 of the Constitution of India putting the State and Union Territory in the same bracket. Following Official Liquidator v. Dayanand and Others (2008) 10 SCC 1 therefore, we are of the opinion that the dicta in S. Pushpa (supra) is an obiter and does not lay down any binding ratio.”

149. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of judges of co-equal strength. In the instant case, judgments mentioned in paragraphs 135 and 136 are by two or three judges of this court. These judgments have clearly ignored a Constitution Bench judgment of this court in Sibbia's case (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under section 438 of Cr.P.C.. Consequently, judgments mentioned in paragraphs 135 and 136 of this judgment are per incuriam.

150. In case there is no judgment of a Constitution Bench or larger Bench of binding nature and if the court doubts the correctness of the judgments by two or three judges, then the proper course would be to request Hon'ble the Chief Justice to refer the matter to a larger Bench of appropriate strength.

151. In the instant case there is a direct judgment of the Constitution Bench of this court in Sibbia's case (supra) dealing with exactly the same issue regarding ambit, scope and object of the concept of anticipatory bail enumerated under section 438 Cr.P.C. The controversy is no longer res integra. We are clearly bound to follow the said judgment of the Constitution Bench. The judicial discipline obliges us to follow the said judgment in letter and spirit.

152. In our considered view the impugned judgment and order of the High Court declining anticipatory bail to the appellant cannot be sustained and is consequently set aside.

153. We direct the appellant to join the investigation and fully cooperate with the investigating agency. In the event of arrest the appellant shall be released on bail on his furnishing a personal bond in the sum of Rs. 50,000/- with two sureties in the like amount to the satisfaction of the arresting officer.

154. Consequently, this appeal is allowed and disposed of in terms of the aforementioned observations.

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IN THE SUPREME COURT OF INDIA

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[Before : Altamas Kabir, Cyriac Joseph, Surinder Singh Nijjar]

Om Prakash & Anr.

versus

Union of India & Anr.

Case No. : Writ Petition (Crl.) No. 66 of 2011, with Writ Petition (Crl.) Nos. 74, 85 of 2010, 36, 37, 51, 74, 84, 87, 101, 102 of 2011 & Crl. MP No. -, Date of Decision : 30/09/2011

(A) Central Excise Act, 1944 -- Sections 9-A, 9, 13, 18, 19, 20 & 21 r/w Section 436 Cr.P.C. -- Non-cognizable offences whether Bailable -- Offences under the 1944 Act cannot be equated with offences under the Indian Penal Code which have been made non-cognizable and non-bailable -- Offences under the Central Excise Act, as set out in Section 9 of the Act, are bailable, since the Officer in-Charge of a police station has been mandated to grant bail to the person arrested and brought before him in terms of Section 19 of the Act -- Writ Petitions allowed.

(B) Customs Act, 1962 -- Section 104(4) r/w Section 436 Cr.P.C. -- Non-cognizable offence whether bailable -- As in the case of offences under the Central Excise Act, 1944, it is held that offences under Section 135 of the Customs Act, 1962, are bailable and if the person arrested offers bail, he shall be released on bail in accordance with the provisions of sub-Section (3) of Section 104 of the Customs Act, 1962, if not wanted in connection with any other offence -- Writ Petitions allowed.

Advocates Appeared :

Mukul Rohatgi, Sujay N. Kantawala, Vikaram Chaudhary, Saurabh Kirpal, Sanjay Agarwal, Dilip Kumar Sharma, R.K. Adsure, Rakesh Dahiya, Nikhil Jain, Vikaram Choudhary, Satish Pandey, Rajiv Nanda, Naresh Kaushik, Chetan Chawla, D.L. Chidanand, B.K. Prasad, T.A. Khan, Shamunddin Khan, Arvind Kumar Sharma, Satish Aggarwala, Sushil Kaushik, Anirudha Sharma, Anando Mukherjee, Harsh N. Parekh, Rajiv Nands, D.L. Chidarands, R. Balasubramanium, A.K. Sharma, Anirudh Sharma, Anando Mukherjee, P.P. Malhotra, Mohan Parasaran, Atul Nanda, U.U. Lalit, Jyoti Taneja, Gauram Awasthi, Ranjeeta Rohatgi, Diksha Rai, Ravindra Keshavrao Adsure, B. Krishna Prasad, Arvind Kumar Sharma, Asha Gopalan Nair, Shankar Chillarge

Statutes Referred :

1. Code of Criminal Procedure -- S.436 2. Central Excise Act -- S.13 3. Central Excise Act -- S.18 4. Central Excise Act -- S.19 5. Central Excise Act -- S.20 6. Central Excise Act -- S.21 7. Customs Act -- S.104(4) 8. Customs Act -- S.104(3) 9. Central Excise Act -- S.9(A) 10. Central Excise Act -- S.9

Cases Referred :

1. Bhavin Impex Pvt. Ltd. v. State of Gujarat, 2010 (260) ELT 526 (Guj) [Para 20]

2. Bhupinder Singh v. Jarnail Singh, (2006) 6 SCC 207 [Para 23]

3. Choith Nanikram Harchandani v. Union of India & Ors., Writ Petition (Crl) No. 74 of 2010 [Para 43]

4. Commissioner of Customs v. Kanhaiya Exports (P) Ltd., Civil Appeal No. 81 of 2002 [Para 35]

5. Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440 [Para 19]

6. N.H. Dave, Inspector of Customs v. Mohd. Akhtar Hussain Ibrahim Iqbal Kadar Amad Wagher (Bhatt) & Ors., 1984 (15) ELT 353 (Guj.) [Para 39]

7. Om Prakash & Anr. v. Union of India & Anr., Writ Petition (Crl) No. 66 of 2011 [Para 43]

8. Ramesh Chandra Mehta v. State of West Bengal, AIR 1970 SC940 [Para 18]

9. Sunil Gupta v. Union of India, 2000 (118) ELT 8 P&H [Para 20]

10. Superintendent of Police, CBI & Ors. v. Tapan Kumar Singh, (2003) 6 SCC 175 [Para 23]

11. Union of India v. Padam Narain Aggarwal, (2008) 13 SCC 305 [Para 38]

12. Union of India v. Padam Narian Aggarwal, 2008 (231) ELT 397 (SC) [Para 20]

JUDGMENT/ORDER:
Altamas Kabir, J.:--

1. Two sets of matters have been heard together, one relating to the provisions of the Customs Act, 1962, and the other involving the provisions of the Central Excise Act, 1944, since the issue in both sets of matters is the same. The common question in these two sets of matters is that since all offences under the Central Excise Act, 1944 and the Customs Act, 1962, are non-cognizable, are such offences bailable? Although, the provisions of both the two Acts in this regard are pari materia to each other, we shall first take up the matters relating to the Central Excise Act, 1944, hereinafter referred to as "the 1944 Act", namely, (1) Writ Petition (Crl) No. 66 of 2011, Om Prakash & Anr. v. Union of India & Anr., which has been heard as the lead case, (2) Writ Petition No. 85 of 2010 and (3) Writ Petition (Crl.) Nos. 74, 87, 101 and 102 of 2011.

2. Section 9A of the 1944 Act, which was introduced in the Act with effect from 1st September, 1972, provides that certain offences are to be non- cognizable. Since we shall be dealing with this provision in some detail, the same is extracted hereinbelow:-

"9A. Certain offences to be non-cognizable. -- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), offences under section 9 shall be deemed to be non-cognizable within the meaning of that Code.

(2) Any offence under this Chapter may, either before or after the institution of prosecution, be compounded by the Chief Commissioner of Central Excise on payment, by the person accused of the offence to the Central Government, of such compounding amount and in such manner of compounding, as may be prescribed.

Provided that nothing contained in this sub-section shall apply to --

(a) a person who has been allowed to compound once in respect of any of the offences under the provisions of clause (a), (b), (bb), (bbb), (bbbb) or (c) of sub-section (1) of Section 9;

(b) a person who has been accused of committing an offence under this Act which is also an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985);

(c) a person who has been allowed to compound once in respect of any offence under this Chapter for goods of value exceeding rupees one crore;

(d) a person who has been convicted by the court under this Act on or after the 30th day of December, 2005."

3. What is important is the non-obstante clause with which the Section begins and in very categorical terms makes it clear that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 of the 1944 Act would be deemed to be non-cognizable within the meaning of the Code. In fact, Sub-section (2) of Section 9A also provides for compounding of offences upon payment of the compounding amount with the exceptions as mentioned in the proviso thereto.

4. Mr. Mukul Rohatgi, learned senior counsel appearing for the Petitioners in both sets of matters, submitted that since the expressions "cognizable" or "non-cognizable" or even "bailable offences" had not been defined in either the 1944 Act or the Customs Act, 1962, one would have to refer to the provisions of the Code of Criminal Procedure, 1973 (Cr.P.C.) to understand the meaning of the said expressions in relation to criminal offences. Section 2(a) Cr.P.C. defines "bailable offence" as follows:-

"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;"

Section 2(c) defines cognizable offence" as follows:-

"2(c). "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;"

Section 2(1) defines "non-cognizable offence" as follows:-

"2(1). "non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant;"

5. Mr. Rohatgi then submitted that offences which are punishable under the 1944 Act have been indicated in Section 9 of the said Act and these sets of cases relate to the offences indicated in Section 9(1)(d) of the said Act. Section 9(1)(d) is again divided into two sub-clauses and reads as follows:-

"9. Offences and penalties. (1) Whoever commits any of the following offences, namely:-

(a) to (c) .....

(d) attempts to commit, or abets the commission of, any of the offences mentioned in clauses (a) and (b) of this section;

shall be punishable,-

(i) in the case of an offence relating to any excisable goods, the duty leviable thereon under this Act exceeds one lakh of rupees, with imprisonment for a term which may extend to seven years and with fine:

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the Court such imprisonment shall not be for a term of less than six months;

(ii) in any other case, with imprisonment for a term which may extend to three years or with fine or with both."

6. What is of significance is that offences covered by clauses (a) and (b) and the subsequent amendments thereto relating to any excisable goods, where the duty leviable thereon under the Act exceeds one lakh of rupees, would be punishable with imprisonment for a term which may extend to seven years and with fine, whereas under Section 9(1)(d)(ii), in any other case, the offence would be punishable with imprisonment for a term which may extend to three years or with fine or with both.

7. Since the question of arrest is in issue in these sets of cases, Mr. Rohatgi then referred to the provisions of Section 13 of the 1944 Act, which deals with the power to arrest in the following terms:-

"13. Power to arrest: -- Any Central Excise Officer not below the rank of Inspector of Central Excise may, with the prior approval of the Commissioner of Central Excise, arrest any person whom he has reason to believe to be liable to punishment under this Act or the rules made thereunder."

8. Mr. Rohatgi submitted that the said power would have to be read along with Sections 18, 19, 20 and 21 of the 1944 Act along with Section 155 Cr.P.C. Section 18 of the 1944 Act provides for searches and how arrests are to be made under the Act and rules framed thereunder and reads as follows:-

"18. Searches and arrests how to be made.-- All searches made under this Act or any rules made thereunder and all arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating respectively to searches and arrests made under that Code."

9. Sections 19, 20 and 21 deal with how a person arrested is to be dealt with after his arrest and the procedure to be followed by the Officer in- Charge of the police station concerned to whom any person is forwarded under Section 19. For the sake of understanding the Scheme, the provisions of Sections 19, 20 and 21 of the 1944 Act are extracted hereinbelow ad seriatim:-

"19. Disposal of persons arrested.-- Every person arrested under this Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise Officer within a reasonable distance, to the officer-in-charge of the nearest police station.

20. Procedure to be followed by officer-in-charge of police station.-- The officer-in- charge of a police station to whom any person is forwarded under section 19 shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate.

21. Inquiry how to be made by Central Excise Officers against arrested persons forwarded to them under Section 19.-- (1) When any person is forwarded under section 19 to a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to enquire into the charge against him.

(2) For this purpose, the Central Excise Officer may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police station may exercise, and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case:

Provided that -

(a) if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the Central Excise Officer that there is not sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise Officer may direct, to appear, if and when so required, before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior."

10. As indicated in Section 18, all steps taken under Sections 19, 20 and 21 would have to be taken in accordance with the provisions of the Code of Criminal Procedure and the relevant provision thereof is Section 155 which deals with information as to non-cognizable cases and investigation of such cases, since under Section 9A of the 1944 Act all offences under the Act are non-cognizable. For the sake of reference Section 155 Cr.P.C. is extracted hereinbelow:-

"155. Information as to non-cognizable cases and investigation of such cases.-- (1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer, the informant to the Magistrate.

(2) No police officer shall investigate a non- cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."

11. As will be evident from the aforesaid provisions of Section 155 Cr.P.C., no police officer in charge of a police station is entitled to investigate a non-cognizable case without the order of a Magistrate having the power to try such case or to commit the case for trial. Furthermore, no such police officer is entitled to effect arrest in a non-cognizable case without a warrant to effect such arrest. According to Mr. Rohatgi, since all offences under the 1944 Act, irrespective of the length of punishment are deemed to be non-cognizable, the aforesaid provisions would fully apply to all such cases. This now brings us to the question as to whether all offences under the 1944 Act are bailable or not. As has been indicated hereinbefore in this judgment, Section 2(a) of the Code defines "bailable offence" to be an offence shown as bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force. The First Schedule to the Code which deals with classification of offences is in two parts. The first part deals with offences under the Indian Penal Code, while the second part deals with classification of offences in respect of other laws. Inasmuch as, the offences relate to the offences under the 1944 Act, it is the second part of the First Schedule which will have application to the cases in hand. The last item in the list of offences provides that if the offence is punishable with imprisonment for less than three years or with fine only, the offence will be non-cognizable and bailable. Accordingly, if the offences come under the said category, they would be both non- cognizable as well as bailable offences. However, in the case of the 1944 Act, in view of Section 9A, all offences under the Act have been made non- cognizable and having regard to the provisions of Section 155, neither could any investigation be commenced in such cases, nor could a person be arrested in respect of such offence, without a warrant for such arrest.

12. Mr. Rohatgi submitted that Section 20 of the 1944 Act would also make it clear that the Officer in-Charge of a police station to whom any person arrested is forwarded under Section 19, shall either admit him to bail to appear before the Magistrate having jurisdiction, or in default of bail forward him in custody to such Magistrate. In other words, unless the offence was bailable, the Officer in-Charge of the police station would not have been vested with the power to admit him to bail and to direct him to appear before the Magistrate having jurisdiction. Mr. Rohatgi pointed out that Section 21 which deals with the manner in which the enquiry is to be made by the Central Excise Officer against the arrested person forwarded to him under Section 19, is similar to the procedure prescribed under Section 20.

13. The submissions made by Mr. Rohatgi will have to be considered in the context of the provisions of Sections 9A, 13 and 18 to 21 of the 1944 Act and Section 155 Cr.P.C.

14. Section 41 of the Code provides the circumstances in which a police officer may, without an order from a Magistrate and without a warrant, arrest any person. What is relevant for our purpose are Sub-section (1)(a) and Sub-section (2) of Section 41 which are extracted hereinbelow:-

"41. When police may arrest without warrant.-- (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person--

(a) Who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or

(b)to(h) .....

(2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any, person, belonging to one or more of the categories of persons specified in section 109 or section 110."

15. An exception to the provisions of Section 41 has been made in Section 42 of the Code which enables a police officer to arrest a person who has committed in the presence of such officer or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false.

16. One other provision of the Code referred to is Section 46 which deals with how arrests are to be made. The same merely provides the procedure for effecting the arrest for which purpose the officer or other person making the same shall actually touch or confine the body of the person to be arrested. The said provision is not really material for a determination of the issues in this case and need not detain us.

17. In this connection, Section 436 Cr.P.C. which provides in what cases bail could be taken, may be taken note of. The said Section provides as under:-

"436. In what cases bail to be taken.-- (1) When any person other than a person accused of a 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, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail:

Provided that such officer or court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 [or section 446A].

(2) Notwithstanding anything contained in sub- section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the court or is brought in custody and any such refusal shall be without prejudice to the powers of the court to call upon any person bound by such bond to pay the penalty thereof under section 446."

As will be evident from the above, when any person, other than a person accused of a non- bailable offence, is arrested or detained without warrant by an Officer in-Charge of a police station, or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before a Court to give bail, he shall be released on bail. In other words, in respect of a non-cognizable case, a person who is arrested without warrant shall be released on bail if he is prepared to give bail. The scheme of the Section is that without a warrant, if a person is arrested by the Officer in- Charge of a police station or if such person is brought before the Court, he is entitled to be released on bail, either by the police officer, or the Court concerned.

18. The legal contentions indicated hereinabove were opposed on behalf of the Union of India and the stand taken by Mr. Mohan Parasaran, learned Additional Solicitor General, was that what was required to be considered in the Writ Petitions was whether there is a power to arrest vested in the officers exercising powers under Section 13 of the 1944 Act without issuance of a warrant and whether such power could be exercised only after an FIR/complaint had been lodged under Section 13 of the aforesaid Act. It was also contended that it was necessary to consider further whether criminal prosecution or investigation could be initiated, which could lead to arrest, without final adjudication of a dual liability. The last contention raised was whether offences referred to in Section 9(1)(d)(i) of the 1944 Act were bailable or not on account of the fact that in the said Act by a deeming fiction all offences under the respective Sections are deemed to be non- cognizable. Mr. Parasaran pointed out that the Preamble to the 1944 Act states that it is expedient to consolidate and amend the law relating to central excise duty on goods manufactured or produced in certain parts of India. Under the Act it is the duty of the officers to ensure that duty is not evaded and persons who attempt to evade duty are proceeded against. The learned Additional Solicitor General submitted that wide powers have been conferred on the Officers under the Act to enable them to discharge their duties in an effective manner, though not for the purpose of prevention and detection of crime, but to prevent smuggling of goods or clandestine removal thereof and for due realization of excise duties. It was also urged that the Officers under the said Act are not police officers and that the said question is no longer res integra. Consequently, in Ramesh Chandra Mehta v. State of West Bengal [AIR 1970 SC 940], a Constitution Bench of this Court held that since a customs officer is not a police officer, as would also be the case in respect of an officer under the Excise Act, submissions made before him would not be covered under Section 25 of the Evidence Act.

19. Mr. Prasaran submitted that the High Court had also made a distinction on the basis that while Section 13 of the 1944 Act refers to a "person" and not to an "accused" or "accused person", the power under the Central Excise Act is for arrest of any person who is suspected of having committed an offence and is not an accused, but is a person who would become an accused after the filing of a complaint or lodging of an FIR, as was held by this Court in the case of Directorate of Enforcement v. Deepak Mahajan [(1994) 3 SCC 440]. The learned ASG submitted that although under the powers reserved under the Customs Act and the Excise Act to a Customs Officer or a Central Excise Officer, as the case may be, the said Officer would be entitled to exercise powers akin to that of a police officer, but that did not mean that such officers are police officers in the eyes of law. The said officers had no authority or power to file an investigation report under Section 173 Cr.P.C. and in all cases the officer concerned has to produce the suspect before the Magistrate after investigation for the purpose of remand. The learned ASG submitted that only on the filing of a complaint, can the criminal law be set in motion.

20. Mr. Prasaran also urged that the power to arrest must necessarily be vested in the Officer concerned under the 1944 Act for the efficient discharge of his functions and duties, inter alia, in order to prevent and tackle the menace of black money and money laundering. Mr. Prasaran submitted that in Union of India v. Padam Narian Aggarwal [2008 (231) ELT 397 (SC)], this Court had held that even though personal liberty is taken away, there are norms and guidelines providing safeguards so that such a power is not abused, but is exercised on objective facts with regard to commission of any offence. Reference was also made to the decision of the Punjab & Haryana High Court in Sunil Gupta v. Union of India [2000 (118) ELT 8 P&H] and Bhavin Impex Pvt. Ltd.v. State of Gujarat[2010 (260) ELT 526 (Guj)], in which the issue, which is exactly in issue in the present case, was considered and, as submitted by the learned ASG, it has been held that the FIR or complaint or warrant is not a necessary pre-condition for an Officer under the Act to exercise powers of arrest. It was also submitted that the Petitioners had nowhere questioned the vires of the Section granting power to investigate to the Officer under the Act as being unconstitutional and ultra vires and as such in case of any mistake or illegality in the exercise of such statutory powers, the affected persons would always have recourse to the Courts.

21. Coming to the question of the provisions of Section 9A of the 1944 Act wherein in Sub-section (1) it has been clearly mentioned that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 shall be deemed to be non-cognizable within the meaning of the Code, the learned ASG submitted that the aforesaid Section does not state anything as to whether such offences are also bailable or not. It was contended that if the submissions made by Mr. Rohatgi on this point were to be accepted, it would mean that all offences under Section 9, including offences punishable with imprisonment upto seven years, would also be bailable, which could not have been the intention of the legislators enacting the 1944 Act. Mr. Prasaran submitted that the provisions of Section 9A of the 1944 Act merely import the provisions of Section 2(i) Cr.P.C., thereby debarring a "police officer" from arresting a person without warrant for an offence under the Act. It was submitted that Section 9A does not refer to a Central Excise Officer and as such there is no embargo on an Officer under the 1944 Act from arresting a person.

22. Mr. Prasaran's next submission was with regard to the provisions of part 2 of the First Schedule to the Code of Criminal

Procedure and it was submitted that the same has to be given a meaningful interpretation. It was urged that merely because a discretion had been given to the Magistrate to award punishment of less than three years, it must fall under the third head of the said Schedule and, therefore, be non-cognizable and bailable. On the other hand, as long as the Magistrate had the power to sentence a person for imprisonment of three years or more, notwithstanding the fact that he has discretion to provide a sentence of less than three year, the same will make the offence fall under the second head thereby making such offence non-bailable. It was submitted that in essence it is the maximum punishment which has to determine the head under which the offence falls in Part 2 of the First Schedule to the Code and not the use of discretion by the Magistrate to award a lesser sentence.

23. In support of his submissions, Mr. Prasaran referred to the decisions of this Court in Superintendent of Police, CBI & Ors. v. Tapan Kumar Singh [(2003) 6 SCC 175] and Bhupinder Singh v. Jarnail Singh [(2006) 6 SCC 207], to which reference will be made, if necessary.

24. As we have indicated in the first paragraph of this judgment, the question which we are required to answer in this batch of matters relating to the Central Excise Act, 1944, is whether all offences under the said Act are non-cognizable and, if so, whether such offences are bailable? In order to answer the said question, it would be necessary to first of all look into the provisions of the said Act on the said question. Sub-section (1) of Section 9A, which has been extracted hereinbefore, states in completely unambiguous terms that notwithstanding anything contained in the Code of Criminal Procedure, offences under Section 9 shall be deemed to be non-cognizable within the meaning of that Code. There is, therefore, no scope to hold otherwise. It is in the said context that we will have to consider the submissions made by Mr. Rohatgi that since all offences under Section 9 are to be deemed to be non-cognizable within the meaning of the Code of Criminal Procedure, such offences must also be held to be bailable. The expression "bailable offence" has been defined in Section 2(a) of the Code and set out hereinabove in paragraph 3 of the judgment, to mean an offence which is either shown to be bailable in the First Schedule to the Code or which is made bailable by any other law for the time being in force. As noticed earlier, the First Schedule to the Code consists of Part 1 and Part 2. While Part 1 deals with offences under the Indian Penal Code, Part 2 deals with offences under other laws. Accordingly, if the provisions of Part 2 of the First Schedule are to be applied, an offence in order to be cognizable and bailable would have to be an offence which is punishable with imprisonment for less than three years or with fine only, being the third item under the category of offences indicated in the said Part. An offence punishable with imprisonment for three years and upwards, but not more than seven years, has been shown to be cognizable and non-bailable. If, however, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable, then, in such event, even the second item of offences in Part 2 could be attracted for the purpose of granting bail since, as indicated above, all offences under Section 9 of the 1944 Act are deemed to be non-cognizable.

25. This leads us to the next question as to meaning of the expression "non-cognizable".

26. Section 2(i) Cr.P.C. defines a "non-cognizable offence", in respect whereof a police officer has no authority to arrest without warrant. The said definition defines the general rule since even under the Code some offences, though "non- cognizable" have been included in Part I of the First Schedule to the Code as being non-bailable. For example, Sections 194, 195, 466, 467, 476, 477 and 505 deal with non-cognizable offences which are yet non-bailable. Of course, here we are concerned with offences under a specific Statute which falls in Part 2 of the First Schedule to the Code. However, the language of the Scheme of 1944 Act seem to suggest that the main object of the enactment of the said Act was the recovery of excise duties and not really to punish for infringement of its provisions. The introduction of Section 9A into the 1944 Act by way of amendment reveals the thinking of the legislature that offences under the 1944 Act should be non- cognizable and, therefore, bailable. From Part 1 of the First Schedule to the Code, it will be clear that as a general rule all non-cognizable offences are bailable, except those indicated hereinabove. The said provisions, which are excluded from the normal rule, relate to grave offences which are likely to affect the safety and security of the nation or lead to a consequence which cannot be revoked. One example of such a case would be the evidence of a witness on whose false evidence a person may be sent to the gallows.

27. In our view, the definition of "non-cognizable offence" in Section 2(l) of the Code makes it clear that a non-cognizable offence is an offence for which a police officer has no authority to arrest without warrant. As we have also noticed hereinbefore, the expression "cognizable offence" in Section 2(c) of the Code means an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. In other words, on a construction of the definitions of the different expressions used in the Code and also in connected enactments in respect of a non-cognizable offence, a police officer, and, in the instant case an excise officer, will have no authority to make an arrest without obtaining a warrant for the said purpose. The same provision is contained in Section 41 of the Code which specifies when a police officer may arrest without order from a Magistrate or without warrant.

28. Having considered the various provisions of the Central Excise Act, 1944, and the Code of Criminal Procedure, which have been made applicable to the 1944 Act, we are of the view that the offences under the 1944 Act cannot be equated with offences under the Indian Penal Code which have been made non-cognizable and non-bailable. In fact, in the Code itself exceptions have been carved out in respect of serious offences directed against the security of the country, which though non- cognizable have been made non-bailable.

29. However, Sub-section (2) of Section 9A makes provision for compounding of all offences under Chapter II. Significantly, Chapter II of the 1944 Act deals with levy and collection of duty and offences under the said Act have been specified in Section 9, which provides that whoever commits any of the offences set out in Section 9, would be punishable in the manner indicated under Sub- section (1) itself. What is even more significant is that Section 20 of the 1944 Act, which has been extracted hereinabove, provides that the Officer in-Charge of a police station to whom any person is forwarded under Section 19, shall (emphasis supplied) either admit him to bail to appear before the Magistrate having jurisdiction, or on his failure to provide bail, forward him in custody to such Magistrate. The said provision clearly indicates that offences under the Central Excise Act, as set out in Section 9 of the Act, are bailable, since the Officer in-Charge of a police station has been mandated to grant bail to the person arrested and brought before him in terms of Section 19 of the Act. The decisions which have been cited by Mr. Parasaran deal mainly with powers of arrest

under the Customs Act. The only cited decision which deals with the provisions of the Central Excise Act is the decision of the Division Bench of the Punjab & Haryana High Court in the case of Sunil Gupta v. Union of India. In the said case also, the emphasis is on search and arrest and the learned Judges in paragraph 22 of the judgment specifically indicated that the basic issue before the Bench was whether arrest without warrant was barred under the provisions of the 1944 Act and the Courts had no occasion to look into the aspect as to whether the offences under the said Act were bailable or not.

30. In the circumstances, we are inclined to agree with Mr. Rohatgi that in view of the provisions of Sections 9 and 9A read with Section 20 of the 1944 Act, offences under the Central Excise Act, 1944, besides being non-cognizable, are also bailable, though not on the logic that all non-cognizable offences are bailable, but in view of the aforesaid provisions of the 1944 Act, which indicate that offences under the said Act are bailable in nature.

31. Consequently, this batch of Writ Petitions in regard to the Central Excise Act, 1944, must succeed and are, accordingly, allowed in terms of the determination hereinabove, and we hold that the offences under the Central Excise Act, 1944, are bailable.

32. The remaining writ petitions which deal with offences under the Customs Act, 1962, namely, Writ Petition (Crl.) No. 74 of 2010, Choith Nanikram Harchandani v. Union of India & others, which has been heard as the lead case, and Writ Petition (Crl.) Nos. 36, 37, 51, 76 and 84 of 2011 and Crl. M.P. No. 10673 of 2011 in W.P. (Crl.) No. 76 of 2011, all deal with offences under the Customs Act, though the issues are exactly the same as those canvassed in the cases relating to the provisions of the Central Excise Act, 1944. Mr. Mukul Rohatgi, learned Senior Advocate, appearing for the Writ Petitioners in these matters submitted that the provisions of the Customs Act, 1962, are in pari materia with the provisions of the Central Excise Act, 1944, which are relevant to the facts of these cases. The same submissions as were made by Mr. Rohtagi in relation to Writ Petitions filed in respect of offences under the Central Excise Act, 1944, were also advanced by him with regard to offences under the Customs Act. In addition, certain decisions were also referred to and relied upon by him in support of the contention that offences under the Customs Act were also intended to be bailable and they aimed at recovery of unpaid and/or avoided custom duties. Mr. Rohatgi submitted that, as in the case of the provisions of the 1944 Act, the ultimate object of the Customs Act is to recover revenue which the State was being wrongly deprived of.

33. Mr. Rohatgi submitted that the provisions of Section 104(4) of the Customs Act are the same as the provisions of Section 9A of the Central Excise Act, 1944. Section 104 of the Customs Act empowers an officer of Customs to arrest a person in case of offences alleged to have been committed and punishable under Sections 132, 133, 135, 135A or Section 136 of the Act. In addition, Sub-section (4) of Section 104, which is similar to Section 9A(i) of the Central Excise Act, 1944, provides as follows:-

"104. Power to arrest. --

(1) to (3) .....

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under this Act shall not be cognizable."

34. It was further pointed out that as in the case of Section 20 of the Central Excise Act, 1944, under Sub-section (3) of Section 104 of the Customs Act, an Officer of Customs has been vested with the same power and is subject to the same provisions as an Officer in-Charge of a police station has under the Code of Criminal Procedure, for the purpose of releasing the arrested person on bail or otherwise. Mr. Rohatgi submitted that as in the case of Section 20 of the 1944 Act, the provisions of Sub- section (3) of Section 104 of the Customs Act, 1962, indicate that offences under the Customs Act would not only be non-cognizable, but would also be bailable.

35. Reverting to his submissions in relation to the Writ Petitions under the Central Excise Act, 1944, Mr. Rohatgi submitted that if it is assumed that the bailability in respect of an offence was to be determined by the length of punishment in relation to Part 2 of the First Schedule to Cr.P.C., it would be necessary that the duty leviable under the provisions of the Customs Act would first have to be adjudicated upon and determined. It was further submitted that there has to be a process of adjudication to determine the amount of levy before any punitive action by way of arrest could be taken. Reference was also made to the decision of this Court in Commissioner of Customs v. Kanhaiya Exports (P) Ltd. (Civil Appeal No. 81 of 2002), in which it had been held that a show cause notice is mandatory before initiation of any action under the Customs Act. Mr. Rohatgi contended that arrest by prosecution could follow only thereafter.

36. Appearing for the Union of India in the matters relating to the Customs Act, 1962, the learned Additional Solicitor General, Mr. P.P. Malhotra, urged that the submissions made by Mr. Rohatgi that since offences under the Customs Act are non-cognizable, they are, therefore, bailable, was wholly incorrect, as all non-cognizable offences are not bailable. The learned ASG submitted that from the First Schedule to the Cr.P.C., it would be clear that offences under Sections 194, 195, 274, 466, 467, 476, 493 and 505 IPC, though non- cognizable are yet non-bailable. It was submitted that Section 505 IPC is punishable with imprisonment upto 3 years or with fine or both. The said offence being both non-cognizable and non-bailable is in consonance with the last entry of Part 2 of Schedule I to the Code, dealing with offences under other laws. The learned ASG submitted that the bailability or non-bailability of an offence is not dependent upon the offence being cognizable or non-cognizable. It was submitted that the bailable offences are those which are made bailable in terms of Section 2(a) Cr.P.C. which are defined as such under the First Schedule itself. The learned ASG contended that whether an offence was bailable or not, was to be determined with reference to the First Schedule to the Code of Criminal Procedure, 1973.

37. Referring to Part 2 of Schedule I to the Code, the learned ASG submitted that in terms of the third entry if the offence was punishable with imprisonment which was less than three years or with fine only, in that event, the offence would be bailable. If, however, the punishment was for three years and upwards, it would be non-bailable. It was further submitted that the offences

under Section 135 of the Customs Act, 1962, being punishable upto three years and seven years depending on the facts, would be non-bailable.

38. In response to Mr. Rohatgi's submissions that since offences under Section 9A of the Excise Act were non-cognizable and the Excise Officer, therefore, had no power to arrest such a person, the learned ASG submitted that such an argument was fallacious since it was only for the purposes of the Code of Criminal Procedure that the offences would be non-cognizable, but it did not mean that the concerned officer, who had been authorized to investigate into the evasion of excise duty, would have no power to investigate or arrest a person involved in such offences. In support of his submissions, Mr. Malhotra referred to the decision of this Court in Union of India v. Padam Narain Aggarwal [(2008) 13 SCC 305], wherein this Court had considered powers of arrest under other provisions such as the Customs Act. While deciding the matter, this Court had held that the power to arrest a person by a Customs Officer is statutory in character and cannot be interfered with. However, such power of arrest can be exercised only in such cases where the Customs Officer has reasons to believe that a person has committed an offence punishable under Sections 132, 133, 135, 135-A or 136 of the Customs Act. It was further observed that the power of arrest was circumscribed by objective considerations and could not be exercised on whims, caprice or fancies of the officer.

39. The learned ASG submitted that in N.H. Dave, Inspector of Customs v. Mohd. Akhtar Hussain Ibrahim Iqbal Kadar Amad Wagher (Bhatt) & Ors. [1984 (15) ELT 353 (Guj.)], the Division Bench of the Gujarat High Court, inter alia, observed that since offences under Section 135 of the Customs Act, 1962, are punishable with imprisonment exceeding three years, the offences would be non- bailable. The learned ASG submitted that the aforesaid view had been confirmed by this Court in Deepak Mahajan's case (supra), wherein it was held that although the powers of the Customs Officer and Enforcement Officer are not identical to those of Police Officers in relation to investigation under Chapter XII of the Code, yet Officers under the Foreign Exchange Regulation Act and the Customs Act are vested with powers which are similar to the powers of a police officer. The learned ASG submitted further that such officers, who have the power to arrest, do not derive their power from the Code, but under the special statutes, such as the Central Excise Act, 1944, and the Customs Act, 1962.

40. The learned ASG submitted further that the powers of the Customs Officer to release an arrested person on bail is limited and when an accused is to be produced before the Court, it is the Court which would grant bail and not the Customs Officer. He only ensures that the person is produced before the Magistrate. According to the learned ASG, what is of paramount importance is the nature of the offence which would determine whether a person is to be released by the Court on bail. The learned ASG submitted that while in a cognizable case a police officer could arrest without warrant and in non-cognizable cases he could not, the offences under the Excise Act, Customs Act or Foreign Exchange Regulation Act, 1973, are offences under special Acts which deal in the evasion of excise, custom and foreign exchange. According to the learned ASG, in such matters, police officers have been restrained from investigating into the offences and arresting without warrant, but the concerned Customs, Excise, Foreign Exchange, Food Authorities, were not police officers within the meaning of the Code, and, they could, accordingly arrest such persons for the purposes of the investigation, their interrogation and for finding out the manner and extent of evasion of the excise duty, customs duty and foreign exchange etc. The learned ASG submitted that cognizability of an offence did not mean that the person could not be arrested by the officials of the Department for the purpose of the investigation and interrogation. It was further submitted that Section 104(4) of the Customs Act, 1962, indicates that the offences thereunder would be non-cognizable within the meaning of the Code and would prevent police officers under the Code from exercising powers of arrest, but such restriction do not apply to the special officers under various special statutes.

41. Mr. Malhotra submitted that the offences which were non-cognizable were not always bailable and special officers under special Statutes would continue to have the power to arrest offenders, even if under the Code police officers were prevented from doing so.

42. The submissions advanced by Mr. Rohatgi and the learned ASG, Mr. Malhotra, with regard to the question of bailability of offences under the Customs Act, 1962, are identical to those involving the provisions of the Central Excise Act, 1944. The provisions of the two above-mentioned enactments on the issue whether offences under both the said Acts are bailable, are not only similar, but the provisions of the two enactments are also in pari materia in respect thereof.

43. The provisions of Section 104(3) of the Customs Act, 1962, and Section 13 of the Central Excise Act, 1944, vest Customs Officers and Excise Officers with the same powers as that of a Police Officer in charge of a Police Station, which include the power to release on bail upon arrest in respect of offences committed under the two enactments which are uniformly non-cognizable. Both Section 9A of the 1944 Act and Section 104(4) of the Customs Act, 1962, provide that notwithstanding anything in the Code of Criminal Procedure, offences under both the Acts would be non-cognizable. The arguments advanced on behalf of respective parties in Om Prakash & Anr. v. Union of India & Anr. (Writ Petition (Crl) No. 66 of 2011) and other similar cases under the Central Excise Act, 1944, are equally applicable in the case of Choith Nanikram Harchandani v. Union of India & Ors. (Writ Petition (Crl) No. 74 of 2010 and the other connected Writ Petitions in respect of the Customs Act, 1962.

44. Accordingly, on the same reasoning, the offences under the Customs Act, 1962 must also be held to be bailable and the Writ Petitions must, therefore, succeed. The same are, accordingly, allowed. Crl. M.P. No. 10673 of 2011 in WP (Crl.) No. 76 of 2011 is also disposed of accordingly. Consequently, as in the case of offences under the Central Excise Act, 1944, it is held that offences under Section 135 of the Customs Act, 1962, are bailable and if the person arrested offers bail, he shall be released on bail in accordance with the provisions of sub-Section (3) of Section 104 of the Customs Act, 1962, if not wanted in connection with any other offence.

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IN THE SUPREME COURT OF INDIA

Equivalent Citations : 2012 (1) SCC(Cri) 26 : 2012 (2) SCC(L&S) 397 : 2011 (8) SLT 428 : 2012 (1) SCC 40 : 2011 AIOL 823 : 2012 AIR(SC) 830 : 2012 CrLJ 702 : 2011 (13) JT 530 : 2011 (4) RCR(Criminal) 898 : 2011 (13) Scale 107 : 2012 (1) Mh.L.J. (Cri.) 516 : 2011 (13) SCR 309

[Before : G.S.Singhvi, H.L.Dattu]

Sanjay Chandra

versus

CBI

Case No. : Criminal Appeal No. 2178 of 2011 (Arising out of SLP (Crl.) No. 5650 of 2011) with Criminal Appeal No. 2179-2182 of 2011 -, Date of Decision : 23/11/2011

(A) Special Leave Petition -- Practice and procedure -- Jurisdiction of Supreme Court -- Earlier refusal to entertain SLP pertaining to bail to co-accused -- Opposing bail application of 2-G Spectrum Scam accused Sanjay Chandra, Vinod Goenka, Gautam Doshi, Hari Nair and Surendra Piparia, CBI asserted that Supreme Court has refused to entertain SLP filed by a co-accused in Sahrad Kumar v. CBI, SLP (Crl.) No. 4584-4585/11 by order dated 20.6.2011 -- It is pleaded that there is no reason to take a different view in appellants' case who are also Charge-sheeted for the same offence -- Rejecting the plea, Court observe that, in that case petitioner was before the Court before charges were framed -- Now charges have been framed and trial has commenced -- It cannot be said that there are no changed circumstances, so to reject the petitions. [Paras 10 & 12]

(B) Indian penal code, 1860 -- Sections 420-B, 468, 471 & 109 -- Criminal Trial -- Bail -- Object, purpose and relevant factors -- Constitutional right of personal liberty -- Charges qua cheating, forgery, abetment etc. besides, charges of illegal gratification and bribery -- While rejecting bail applications of accused-appellants, Trial court as also High Court have listed factors, on which they think, are relevant for rejecting bail pleas -- Those factors are, seriousness of charge; nature of evidence in support of charge; likely sentence to be imposed on conviction; possibility of interference with witnesses; objections of prosecution authorities; possibility of absconding from justice -- In bail applications as laid down from earliest times that the object of bail is to secure appearance of accused at the time of his trial by reasonable amount of bail -- Its object is neither punitive or preventative -- Deprivation of liberty must be held to be a punishment, unless it can be required to ensure that accused will stand his trial when called for -- Courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and duly found guilty -- From earliest times, it was appreciated that detention in custody pending completion of trial could be cause of great hardship -- Detention could be a necessity in some cases, but that ;necessity' is the test therein -- Save in most extraordinary circumstances, deprivation of personal liberty only upon the belief that he will tamper with witnesses, if left at liberty, would be contrary to very concept of personal liberty enshrined in Constitution -- Nor can it be permitted to refuse a bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not, or to refuse bail to an un-convicted person to give him a taste of imprisonment as a lesson -- Court had time and again has held that 'bail is the rule, rejection an exception' -- Refusal of bail is a restriction on personal liberty of an individual guaranteed under Article 21 of Constitution -- Constitution of India, 1950 -- Article 21 -- Code of Criminal Procedure, 1973 -- Sections 439, 437 & 88 -- Prevention of Corruption Act, 1988 -- Sections 13(2) & 13(1)(d). [Paras 13 to 16, 25 to 27]

(C) Indian Penal Code, 1860 -- Sections 420-B, 468, 471 & 109 -- Criminal Trial -- Bail -- Charges qua cheating, forgery, abetment etc. besides, charges of illegal gratification and bribery -- 'Pointing finger of accusations' against appellants is, 'seriousness of charges' -- As noted, offences alleged are economic offences, resulting in loss to exchequer -- Though, possibility of tampering with witnesses is alleged, but no material is placed in support of such allegations -- Seriousness of charges is one of the factors to be considered, but, it is not only the factor, other factors, like, punishment to be imposed on conviction -- Both grounds need be considered -- Otherwise, if former is the only test, Courts would not be balancing Constitutional rights, rather, 'recalibration of the scales of justice' -- Under Cr. P. C. discretion is given for bail , either during trial or in appeal on conviction, but that discretion has to be exercised with great care and caution balancing valuable right of liberty of an individual and the interest of society in general -- Reasoning adopted by District Judge, as affirmed by High Court, held to be a denial of the whole basis of our system of law and normal rule of bail system -- Court noticed that accused are charged with economic offences of huge magnitude, also that, offences, if proved, may jeopardize economy of the Country -- At the same time, it is seen that investigation has already been completed and charge-sheet has already been filed, thus, their presence in custody may not be necessary for further investigation -- Bail to be granted but with stringent conditions as apprehension expressed by CBI -- Appellants to be released on execution of Bond with two solvent sureties of Rs. 5 lakhs each to the satisfaction of Trial Court -- Besides, other directions like, surrender of Pass-ports etc. issued -- Appeals disposed of, so. [Para 15, 16, 25, 28 to 30]

Advocates Appeared :

Ram Jethmalani, Mukul Rohatgi, Soli, J.Sorabjee, Ashok H.Desai, Manu Sharma, Karan Kalia, Pranav Diesh, Sahil Sharma,

Vijay Agarwal, Saurabh Kirpal, Ninad Laud, Mahesh Agarwal, Siddarth Singla, Tapesh Kumar Singh, Rajiv Nanda, Anirudh Sharma, Harsh N.Parekh, Anando Mukherjee, Arvind Kumar Sharma, Harin P.Raval, Ritu Bhalla, Ananya Ghosh, Purnima Bhat Kak, Shally Bhasin Maheshwari, Padmalakshmi Nigam

Statutes Referred :

1. Indian Penal Code -- S.109 2. Indian Penal Code -- S.420(B) 3. Indian Penal Code -- S.471 4. Indian Penal Code -- S.468 5. Code of Criminal Procedure -- S.437 6. Code of Criminal Procedure -- S.439 7. Code of Criminal Procedure -- S.88 8. Constitution of India -- Art.21 9. Prevention of Corruption Act -- S.13(2) 10. Prevention of Corruption Act -- S.13(1)(d)

Cases Referred :

1. Babba v. State of Maharashtra, (2005) 11 SCC 569 [Para 22]

2. Babu Singh v. State of U.P., (1978) 1 SCC 579 [Para 19]

3. Court on its own motion v. CBI', 2004 (I) JCC 308 [Para 6]

4. Gudikanti Narasimhulu v. Public Prosecutor, (1978) 1 SCC 240 [Para 17]

5. Gurcharan Singh and Ors. v. State AIR 1978 SC179 [Para 25]

6. Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118 [Para 18]

7. Kalyan Chandra Sarkar v. Rajesh Ranjan- (2005) 2 SCC 42 [Para 15]

8. Mahesh Kumar Bhawsinghka v. State of Delhi, (2000) 9 SCC 383 [Para 22]

9. Moti Ram v. State of M.P., (1978) 4 SCC 47 [Para 20]

10. Prahlad Singh Bhati v. NCT, Delhi, (2001) 4 SCC 280 [Para 23]

11. R v. Griffiths and Ors., (1966) 1 Q.B. 589) [Para 6]

12. Sharad Kumar Etc. v. Central Bureau of Investigation in SLP (Crl) No. 4584- 4585 of 2011, dt. 20.06.2011

13. Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 [Para 22]

14. State of Kerala v. Raneef (2011) 1 SCC 784 [Para 26]

15. State of Rajasthan v. Balchand, (1977) 4 SCC 308 [Para 16]

16. State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21 [Para 24]

17. Vaman Narain Ghiya v. State of Rajasthan, (2009) 2 SCC 281 [Para 21]

18. Vivek Kumar v. State of U.P., (2000) 9 SCC 443 [Para 22]

JUDGMENT/ORDER:
H.L. Dattu, J.:--

(1) Leave granted in all the Special Leave Petitions.

(2) These appeals are directed against the common Judgment and Order of the learned Single Judge of the High Court of Delhi, dated 23rd May 2011 in Bail Application No. 508/2011, Bail Application No. 509/2011 & Crl. M.A. 653/2011, Bail Application No. 510/2011, Bail Application No. 511/2011 and Bail Application No. 512/2011, by which the learned Single Judge refused to grant bail to the accused-appellants. These cases were argued together and submitted for decision as one case.

(3) The offence alleged against each of the accused, as noticed by the Ld. Special Judge, CBI, New Delhi, who rejected bail applications of the appellants, vide his order dated 20.4.2011, is extracted for easy reference:

Sanjay Chandra (A7) in Crl. Appeal No. 2178 of 2011 [arising out of SLP (Crl.) No. 5650 of 2011]:

"6. The allegations against accused Sanjay Chandra are that he entered into criminal conspiracy with accused A. Raja, R.K. Chandolia and other accused persons during September 2009 to get UAS licence for providing telecom services to otherwise an ineligible company to get UAS licences. He, as Managing Director of M/s Unitech Wireless (Tamil Nadu) Limited, was looking after the business of telecom through 8 group companies of Unitech Limited. The first-come-first- served procedure of allocation of UAS Licences and spectrum was manipulated by the accused persons in order to benefit M/s Unitech Group Companies. The cutoff date of 25.09.2007 was decided by accused public servants of DoT primarily to allow consideration of Unitech group applications for UAS licences. The Unitech Group Companies were in business of realty and even the objects of companies were not changed to 'telecom' and registered as required before applying. The companies were ineligible to get the licences till the grant of UAS licences.

The Unitech Group was almost last within the applicants considered for allocation of UAS licences and as per existing policy of first-come-first-served, no licence could be issued in as many as 10 to 13 circles where sufficient spectrum was not available. The Unitech companies got benefit of spectrum in as many as 10 circles over the other eligible applicants. Accused Sanjay Chandra, in conspiracy with accused public servants, was aware of the whole design of the allocation of LOIs and on behalf of the Unitech group companies was ready with the drafts of Rs. 1658 crores as early as 10th October, 2007."

Vinod Goenka (A5) in Crl. Appeal No. 2179 of 2011 [arising out of SLP(Crl) No. 5902 of 2011]:

"5. The allegations against accused Vinod Goenka are that he was one of the directors of M/s Swan Telecom (P) Limited in addition to accused Shahid Usman Balwa w.e.f. 01.10.2007 and acquired majority stake on 18.10.2007 in M/s Swan Telecom (P) Limited (STPL) through DB Infrastructure (P) Limited. Accused Vinod Goenka carried forward the fraudulent applications of STPL dated 02.03.2007 submitted by previous management despite knowing the fact that STPL was ineligible company to get UAS licences by virtue of clause 8 of UASL guidelines 2005. Accused Vinod Goenka was an associate of accused Shahid Usman Balwa to create false documents including Board Minutes of M/s Giraffe Consultancy (P) Limited fraudulently showing transfer of its shares by the companies of Reliance ADA Group during February 2007 itself. Accused/applicant in conspiracy with accused Shahid Usman Balwa concealed or furnished false information to DoT regarding shareholding pattern of STPL as on the date of application thereby making STPL an eligible company to get licence on the date of application, that is, 02.03.2007. Accused/applicant was an overall beneficiary with accused Shahid Usman Balwa for getting licence and spectrum in 13 telecom circles.

12. Investigation has also disclosed pursuant to TRAI recommendations dated 28.08.2007 when M/s Reliance Communications Ltd. got the GSM spectrum under the Dual Technology policy, accused Gautam Doshi, Hari Nair and Surendra Pipara transferred the control of M/s Swan Telecom Pvt. Ltd., and said structure of holding companies, to accused Shahid Balwa and Vinod Goenka. In this manner they transferred a company which was otherwise ineligible for grant of UAS license on the date of application, to the said two accused persons belonging to Dynamix Balwa (DB) group and thereby facilitated them to cheat the DoT by getting issued UAS Licences despite the ineligibility on the date of application and till 18.10.2007.

13. Investigation has disclosed that accused Shahid Balwa and Vinod Goenka joined M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. as directors on 01.10.2007 and DB group acquired the majority stake in TTPL/ M/s Swan Telecom Pvt. Ltd. (STPL) on 18.10.2007. On 18.10.2007 a fresh equity of 49.90 lakh shares was allotted to M/s DB Infrastructure Pvt. Ltd. Therefore on 01.10.2007, and thereafter, accused Shahid Balwa and Vinod Goenka were in- charge of, and were responsible to, the company M/s Swan Telecom Pvt. Ltd. for the conduct of business. As such on this date, majority shares of the company were held by D.B. Group."

Gautam Doshi (A9), Surendra Pipara (A10) and Hari Nair (A 11) in Crl. Appeal Nos. 2180,2182 & 2181 of 2011 [arising out of SLP (Crl) Nos. 6190,6315 & 6288 of 2011]:

"7. It is further alleged that in January-February, 2007 accused Gautam Doshi, Surendra Pipara and Hari Nath in furtherance of their common intention to cheat the Department of Telecommunications, structured/created net worth of M/s Swan Telecom Pvt. Ltd., out of funds arranged from M/s Reliance Telecom Ltd. or its associates, for applying to DoT for UAS Licences in 13 circles, where M/s Reliance Telecom Ltd. had no GSM spectrum, in a manner that its associations with M/s Reliance Telecom Ltd. may not be detected, so that DOT could not reject its application on the basis of clause 8 of the UASL Guidelines dated 14.12.2005.

8. In pursuance of the said common intention of accused persons, they structured the stake-holding of M/s Swan Telecom Pvt. Ltd. in a manner that only 9.9% equity was held by M/s Reliance Telecom Ltd. (RTL) and rest 90.1% was shown as held by M/s Tiger Traders Pvt. Ltd. (later known as M/s Tiger Trustees Pvt. Ltd. - TTPL), although the entire company was held by the Reliance ADA Group of companies through the funds raised from M/s Reliance Telecom Ltd. etc.

9. It was further alleged that M/s Swan Telecom Pvt. Ltd. (STPL) was, at the time of application dated 02.03.2007, an associate of M/s Reliance ADA Group / M/s Reliance Communications Limited/M/s Reliance Telecom Limited, having existing UAS Licences in all telecom circles. Investigations have also disclosed that M/s Tiger Traders Pvt. Ltd., which held majority stake (more than 90%) in M/s Swan Telecom Pvt. Ltd. (STPL), was also an associate company of Reliance ADA Group. Both the companies has not business history and were activated solely for the purpose of applying for UAS Licences in 13 telecom circles, where M/s Reliance Telecom Ltd. did not have GSM spectrum and M/s Reliance Communications Ltd. had already applied for dual technology spectrum for these circles. Investigation has disclosed that the day to day affairs of M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. were managed by the said three accused persons either themselves or through other officers/consultants related to the Reliance ADA group. Commercial decisions of M/s Swan Telecom Pvt. Ltd. and M/s Tiger Traders Pvt. Ltd. were also taken by these accused persons of Reliance ADA group. Material inter-company transactions (bank transactions) of M/s Reliance Communications/M/s Reliance Telecommunications Ltd. and M/s Swan Telecom Pvt. Ltd. (STPL) and M/s Tiger Traders Pvt. Ltd. were carried out by same group of persons as per the instructions of said accused Gautam Doshi and Hari Nair.

10. Investigations about the holding structure of M/s Tiger Traders Pvt. Ltd. has revealed that the aforesaid accused persons also structured two other companies i.e. M/s Zebra Consultancy Private Limited & M/s Parrot Consultants Private Limited. Till April, 2007, by when M/s Swan Telecom Pvt. Ltd. applied for telecom licences, 50% shares of M/s Zebra Consultancy Private Limited & M/s Parrot Consultants Private Limited, were purchased by M/s Tiger Traders Pvt. Ltd. Similarly, 50% of equity shares of M/s Parrot Consultants Private Limited & M/s Tiger Traders Private Limited were purchased by M/s Zebra Consultancy Private Limited. Also, 50% of equity shares of M/s Zebra Consultancy Private Limited and M/s Tiger Traders Private Limited were purchased by M/s Parrot Consultants Private Limited. These 3 companies were, therefore, cross holding each other in an inter- locking structure w.e.f. March 2006 till 4th April, 2007.

11. It is further alleged that accused Gautam Doshi, Surendra Pipara and Hari Nair instead of withdrawing the fraudulent

applications preferred in the name of M/s Swan Telecom (P) Limited, which was not eligible at all, allowed the transfer of control of that company to the Dynamix Balwa Group and thus, enabled perpetuating and (sic.) illegality. It is alleged that TRAI in its recommendations dated 28.08.2007 recommended the use of dual technology by UAS Licencees. Due to this reason M/s Reliance Communications Limited, holding company of M/s Reliance Telecom Limited, became eligible to get GSM spectrum in telecom circles for which STPL had applied. Consequently, having management control of STPL was of no use for the applicant/accused persons and M/s Reliance Telecom Limited. Moreover, the transfer of management of STPL to DB Group and sale of equity held by it to M/s Delphi Investments (P) Limited, Mauritius, M/s Reliance Telecom Limited has earned a profit of around Rs. 10 crores which otherwise was not possible if they had withdrawn the applications. M/s Reliance Communications Limited also entered into agreement with M/s Swan Telecom (P) Limited for sharing its telecom infrastructure. It is further alleged that the three accused persons facilitated the new management of M/s Swan Telecom (P) Limited to get UAS licences on the basis of applications filed by the former management. It is further alleged that M/s Swan Telecom (P) Limited on the date of application, that is, 02.03.2007 was an associate company of Reliance ADA group, that is, M/s Reliance Communications Limited/ M/s Reliance Telecom Limited and therefore, ineligible for UAS licences.

12. Investigation has also disclosed pursuant to TRAI recommendations dated 28.08.2007 when M/s Reliance Communications Ltd. got the GSM spectrum under the Dual Technology policy, accused Gautam Doshi, Hari Nair and Surendra Pipara transferred the control of M/s Swan Telecom Pvt. Ltd., and said structure of holding companies, to accused Shahid Balwa and Vinod Goenka. In this manner they transferred a company which was otherwise ineligible for grant of UAS license on the date of application, to the said two accused persons belonging to Dynamix Balwa (DB) group and thereby facilitated them to cheat the DoT by getting issued UAS Licences despite the ineligibility on the date of application and till 18.10.2007."

(4) The Special Judge, CBI, New Delhi, rejected Bail Applications filed by the appellants by his order dated 20.04.2011. The appellants moved the High Court by filing applications under Section 439 of the Code of Criminal Procedure (in short, "Cr. P.C."). The same came to be rejected by the learned Single Judge by his order dated 23.05.2011. Aggrieved by the same, the appellants are before us in these appeals.

(5) Shri. Ram Jethmalani, Shri. Mukul Rohatgi, Shri Soli J. Sorabjee and Shri. Ashok H. Desai, learned senior counsel appeared for the appellants and Shri. Harin P. Raval, learned Additional Solicitor General, appears for the respondent-CBI.

(6) Shri. Ram Jethmalani, learned senior counsel appearing for the appellant Sanjay Chandra, would urge that the impugned Judgment has not appreciated the basic rule laid down by this Court that grant of bail is the rule and its denial is the exception. Shri. Jethmalani submitted that if there is any apprehension of the accused of absconding from trial or tampering with the witnesses, then it is justified for the Court to deny bail. The learned senior counsel would submit that the accused has cooperated with the investigation throughout and that his behavior has been exemplary. He would further submit that the appellant was not arrested during the investigation, as there was no threat from him of tampering with the witnesses. He would submit that the personal liberty is at a very high pedestal in our Constitutional system, and the same cannot be meddled with in a causal manner. He would assail the impugned Judgment stating that the Ld. Judge did not apply his mind, and give adequate reasons before rejecting bail, as is required by the legal norms set down by this Court. Shri. Jethmalani further contends that it was only after the appellants appeared in the Court in pursuance of summons issued, they were made to apply for bail, and, thereafter, denied bail and sent to custody. The learned senior counsel states that the trial Judge does not have the power to send a person, who he has summoned in pursuance of Section 87 Cr.P.C to judicial custody. The only power that the trial Judge had, he would contend, was to ask for a bond as provided for in Section 88 Cr.P.C. to ensure his appearance. Shri. Jethmalani submits that when a person appeared in pursuance of a bond, he was a free man, and such a free man cannot be committed to prison by making him to apply for bail and thereafter, denying him the same. Shri. Jethmalani further submits that if it was the intention of the Legislature to make a person, who appears in pursuance of summons to apply for bail, it would have been so legislated in Section 88 Cr.P.C. The learned senior counsel assailed the Judgment of the Delhi High Court in the 'Court on its own motion v. CBI', 2004 (I) JCC 308, by which the High Court gave directions to Criminal Courts to call upon the accused who is summoned to appear to apply for bail, and then decide on the merits of the bail application. He would state that the High Court has ignored even the CBI Manual before issuing these directions, which provided for bail to be granted to the accused, except in the event of there being commission of heinous crime. The learned senior counsel would also argue that it was an error to have a "rolled up charge", as recognized by the Griffiths' case (R v. Griffiths and Ors., (1966) 1 Q.B. 589). Shri Jethmalani submitted that there is not even a prima facie case against the accused and would make references to the charge sheet and the statement of several witnesses. He would emphatically submit that none of the ingredients of the offences charged with were stated in the charge sheet. He would further contend that even if, there is a prima facie case, the rule is still bail, and not jail, as per the dicta of this Court in several cases.

(7) Shri. Mukul Rohatgi, learned senior counsel appearing for the appellant Vinod Goenka, while adopting the arguments of Shri. Jethmalani, would further supplement by arguing that the Ld. Trial Judge erred in making the persons, who appeared in pursuance of the summons, apply for bail and then denying the same, and ordering for remand in judicial custody. Shri. Rohatgi would further contend that the gravity of the offence charged with, is to be determined by the maximum sentence prescribed by the Statute and not by any other standard or measure. In other words, the learned senior counsel would submit that the alleged amount involved in the so-called Scam is not the determining factor of the gravity of the offence, but the maximum punishment prescribed for the offence. He would state that the only bar for bail pending trial in Section 437 is for those persons who are charged with offences punishable with life or death, and there is no such bar for those persons who were charged with offences with maximum punishment of seven years. Shri. Rohatgi also cited some case laws.

(8) Shri. Ashok H. Desai, learned senior counsel appearing for the appellants Hari Nair and Surendra Pipara, adopted the principal arguments of Shri.Jethmalani. In addition, Shri. Desai would submit that a citizen of this country, who is charged with a criminal offence, has the right to be enlarged on bail. Unless there is a clear necessity for deprivation of his liberty, a person should not be remanded to judicial custody. Shri. Desai would submit that the Court should bear in mind that such custody is not punitive in nature, but preventive, and must be opted only when the charges are serious. Shri. Desai would further submit that the power of the

High Court and this Court is not limited by the operation of Section 437; He would further contend that Surendra Pipara deserves to be released on bail in view of his serious health conditions.

(9) Shri. Soli J. Sorabjee, learned senior counsel appearing for Gautam Doshi, adopted the principal arguments of Shri. Jethmalani. Shri. Sorabjee would assail the finding of the Learned Judge of the High Court in the impugned Judgment that the mere fact that the accused were not arrested during the investigation was proof of their influence in the society, and hence, there was a reasonable apprehension that they would tamper with the evidence if enlarged on bail. Shri. Sorabjee would submit that if this reasoning is to be accepted, then bail is to be denied in each and every criminal case that comes before the Court. The learned senior counsel also highlighted that the accused had no criminal antecedents.

(10) Shri. Haren P. Raval, the learned Additional Solicitor General, in his reply, would submit that the offences that are being charged, are of the nature that the economic fabric of the country is brought at stake. Further, the learned ASG would state that the quantum of punishment could not be the only determinative factor for the magnitude of an offence. He would state that one of the relevant considerations for the grant of bail is the interest of the society at large as opposed to the personal liberty of the accused, and that the Court must not lose sight of the former. He would submit that in the changing circumstances and scenario, it was in the interest of the society for the Court to decline bail to the appellants. Shri. Raval would further urge that consistency is the norm of this Court and that there was no reason or change in circumstance as to why this Court should take a different view from the order of 20th June 2011 in Sharad Kumar Etc. v. Central Bureau of Investigation [in SLP (Crl) No. 4584-4585 of 2011] rejecting bail to some of the co- accused in the same case. Shri. Raval would further state that the investigation in these cases is monitored by this Court and the trial is proceeding on a day-to-day basis and that there is absolutely no delay on behalf of the prosecuting agency in completing the trial. Further, he would submit that the appellants, having cooperated with the investigation, is no ground for grant of bail, as they were expected to cooperate with the investigation as provided by the law. He would further submit that the test to enlarge an accused on bail is whether there is a reasonable apprehension of tampering with the evidence, and that there is an apprehension of threat to some of the witnesses. The learned ASG would further submit that there is more reason now for the accused not to be enlarged on bail, as they now have the knowledge of the identity of the witnesses, who are the employees of the accused, and there is an apprehension that the witnesses may be tampered with. The learned ASG would state that Section 437 of the Cr.P.C. uses the word “appears”, and, therefore, that the argument of the learned senior counsel for the appellants that the power of the trial Judge with regard to a person summoned under Section 87 is controlled by Section 88 is incorrect. Shri. Raval also made references to the United Nations Convention on Corruption and the Report on the Reforms in the Criminal Justice System by Justice Malimath, which, we do not think, is necessary to go into. The learned ASG also relied on a few decisions of this Court, and the same will be dealt with in the course of the judgment. On a query from the Bench, the learned ASG would submit that in his opinion, bail should be denied in all cases of corruption which pose a threat to the economic fabric of the country, and that the balance should tilt in favour of the public interest.

(11) In his reply, Shri. Jethmalani would submit that as the presumption of innocence is the privilege of every accused, there is also a presumption that the appellants would not tamper with the witnesses if they are enlarged on bail, especially in the facts of the case, where the appellants have cooperated with the investigation. In recapitulating his submissions, the learned senior counsel contended that there are two principles for the grant of bail - firstly, if there is no prima facie case, and secondly, even if there is a prima facie case, if there is no reasonable apprehension of tampering with the witnesses or evidence or absconding from the trial, the accused are entitled to grant of bail pending trial. He would submit that since both the conditions are satisfied in this case, the appellants should be granted bail.

(12) Let us first deal with a minor issue canvassed by Mr. Raval, learned ASG. It is submitted that this Court has refused to entertain the Special Leave Petition filed by one of the co-accused [Sharad Kumar v. CBI (supra)] and, therefore, there is no reason or change in the circumstance to take a different view in the case of the appellants who are also charge- sheeted for the same offence. We are not impressed by this argument. In the aforesaid petition, the petitioner was before this Court before framing of charges by the Trial Court. Now the charges are framed and the trial has commenced. We cannot compare the earlier and the present proceedings and conclude that there are no changed circumstances and reject these petitions.

(13) The appellants are facing trial in respect of the offences under Sections 420-B, 468, 471 and 109 of Indian Penal Code and Section 13(2) read with 13(i)(d) of Prevention of Corruption Act, 1988. Bail has been refused first by the Special Judge, CBI, New Delhi and subsequently, by the High Court. Both the courts have listed the factors, on which they think, are relevant for refusing the Bail applications filed by the applicants as seriousness of the charge; the nature of the evidence in support of the charge; the likely sentence to be imposed upon conviction; the possibility of interference with witnesses; the objection of the prosecuting authorities; possibility of absconding from justice.

(14) In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

(15) In the instant case, as we have already noticed that the “pointing finger of accusation” against the appellants is 'the seriousness of the charge'. The offences alleged are economic offences which has resulted in loss to the State exchequer. Though, they contend that there is possibility of the appellants tampering witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor: The other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Indian Penal Code and Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the Constitutional Rights but rather “recalibration of the scales of justice.” The provisions of Cr.P.C. confer discretionary jurisdiction on Criminal Courts to grant bail to accused pending trial or in appeal against convictions, since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual. This Court, in Kalyan Chandra Sarkar v. Rajesh Ranjan- (2005) 2 SCC 42 , observed that “under the criminal laws of this country, a person accused of offences which are non-bailable, is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 of the Constitution, since the same is authorized by law. But even persons accused of non-bailable offences are entitled to bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied by reasons to be recorded that in spite of the existence of prima facie case, there is need to release such accused on bail, where fact situations require it to do so.”

(16) This Court, time and again, has stated that bail is the rule and committal to jail an exception. It is also observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution. In the case of State of Rajasthan v. Balchand, (1977) 4 SCC 308 , this Court opined:

“2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the Court. We do not intend to be exhaustive but only illustrative.

3. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime. Even so, the record of the petitioner in this case is that, while he has been on bail throughout in the trial court and he was released after the judgment of the High Court, there is nothing to suggest that he has abused the trust placed in him by the court; his social circumstances also are not so unfavourable in the sense of his being a desperate character or unsocial element who is likely to betray the confidence that the court may place in him to turn up to take justice at the hands of the court. He is stated to be a young man of 27 years with a family to maintain. The circumstances and the social milieu do not militate against the petitioner being granted bail at this stage. At the same time any possibility of the absconsion or evasion or other abuse can be taken care of by a direction that the petitioner will report himself before the police station at Baren once every fortnight.”

(17) In the case of Gudikanti Narasimhulu v. Public Prosecutor, (1978) 1 SCC 240 , V.R. Krishna Iyer, J., sitting as Chamber Judge, enunciated the principles of bail thus:

“3. What, then, is “judicial discretion” in this bail context? In the elegant words of Benjamin Cardozo:

“The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life”. Wide enough in all conscience is the field of discretion that remains.”

Even so it is useful to notice the tart terms of Lord Camden that “the discretion of a Judge is the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable....”

Perhaps, this is an overly simplistic statement and we must remember the constitutional focus in Articles 21 and 19 before following diffuse observations and practices in the English system. Even in England there is a growing awareness that the working of the bail system requires a second look from the point of view of correct legal criteria and sound principles, as has been pointed out by Dr Bottomley.

6. Let us have a glance at the pros and cons and the true principle around which other relevant factors must revolve. When the case is finally disposed of and a person is sentenced to incarceration, things stand on a different footing. We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the Court punishing him with imprisonment. In this perspective, relevance of considerations is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible in the case. As Erle. J. indicated, when the crime charged (of which a conviction has been sustained) is of the highest magnitude and the punishment of it assigned by law is of extreme severity, the Court may reasonably presume, some evidence warranting, that no amount of bail would secure the presence of the convict at the stage of judgment, should he be enlarged. Lord Campbell, C.J. concurred in this approach in that case and Coleridge J. set down the order of priorities as follows:

“I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds

for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial .... It is a very important element in considering whether the party, if admitted to bail, would appear to take his trial; and I think that in coming to a determination on that point three elements will generally be found the most important: the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted.

In the present case, the charge is that of wilful murder; the evidence contains an admission by the prisoners of the truth of the charge, and the punishment of the offence is, by law, death."

7. It is thus obvious that the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.

8. Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being.

9. Thus the legal principles and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record - particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant is therefore not an exercise in irrelevance.

13. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the Court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding -- if that be so -- of innocence has been recorded by one Court. It may not be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate reprisal, if enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and socio- geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a complacent refusal."

(18) In Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118 , this Court took the view:

"22. In other non-bailable cases the Court will exercise its judicial discretion in favour of granting bail subject to sub- section (3) of Section 437 CrPC if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437(1) CrPC and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.

24. Section 439(1) CrPC of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike under Section 437(1) there is no ban imposed under Section 439(1), CrPC against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail under Section 439(1) CrPC of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1) CrPC of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out."

(19) In Babu Singh v. State of U.P., (1978) 1 SCC 579 , this Court opined:

"8. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden on the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit Court I had to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorise impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right.

...

16. Thus the legal principle and practice validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice. It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record--particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance.

17. The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good and State necessity spelt out in Article 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice--to the individual involved and society affected.

18. We must weigh the contrary factors to answer the test of reasonableness, subject to the need for securing the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted. In the United States, which has a constitutional perspective close to ours, the function of bail is limited, “community roots” of the applicant are stressed and, after the Vera Foundation's Manhattan Bail Project, monetary suretyship is losing ground. The considerable public expense in keeping in custody where no danger of disappearance or disturbance can arise, is not a negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of our sub-jails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible.

20. Viewed from this perspective, we gain a better insight into the rules of the game. When a person, charged with a grave offence, has been acquitted at a stage, has the intermediate acquittal pertinence to a bail plea when the appeal before this Court pends? Yes, it has. The panic which might prompt the accused to jump the gauntlet of justice is less, having enjoyed the confidence of the Court's verdict once. Concurrent holdings of guilt have the opposite effect. Again, the ground for denial of provisional release becomes weaker when the fact stares us in the face that a fair finding -- if that be so -- of innocence has been recorded by one Court. It may be conclusive, for the judgment of acquittal may be ex facie wrong, the likelihood of desperate reprisal, it enlarged, may be a deterrent and his own safety may be more in prison than in the vengeful village where feuds have provoked the violent offence. It depends. Antecedents of the man and socio-geographical circumstances have a bearing only from this angle. Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the Court into a complacent refusal.”

(20) In Moti Ram v. State of M.P., (1978) 4 SCC 47 , this Court, while discussing pre-trial detention, held:

“14. The consequences of pre-trial detention are grave. Defendants presumed innocent arc subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.”

(21) The concept and philosophy of bail was discussed by this Court in Vaman Narain Ghiya v. State of Rajasthan, (2009) 2 SCC 281 , thus:

“6. “Bail” remains an undefined term in CrPC. Nowhere else has the term been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints. Since the UN Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place within the scope of human rights. The dictionary meaning of the expression “bail” denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb “bailer” which means to “give” or “to deliver”, although another view is that its derivation is from the Latin term “baiulare”, meaning “to bear a burden”. Bail is a conditional liberty. Stroud's Judicial Dictionary (4th Edn., 1971) spells out certain other details. It states:

“... when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sums of money, or body for body, that he shall appear before the justices of goal delivery at the next sessions, etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed--that is to say, set at liberty until the day appointed for his appearance.”

Bail may thus be regarded as a mechanism whereby the State devolutes upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice.

7. Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of

innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have. (See A.K. Gopalan v. State of Madras)

8. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt."

(22) More recently, in the case of Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 , this Court observed that "(j)ust as liberty is precious to an individual, so is the society's interest in maintenance of peace, law and order. Both are equally important." This Court further observed:

"116. Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case."

This Court has taken the view that when there is a delay in the trial, bail should be granted to the accused [See Babba v. State of Maharashtra, (2005) 11 SCC 569, Vivek Kumar v. State of U.P., (2000) 9 SCC 443 , Mahesh Kumar Bhawsinghka v. State of Delhi, (2000) 9 SCC 383].

(23) The principles, which the Court must consider while granting or declining bail, have been culled out by this Court in the case of Prahlad Singh Bhati v. NCT, Delhi, (2001) 4 SCC 280 , thus:

"The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of the evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

(24) In State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21 , this Court held as under:

"18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see Prahlad Singh Bhati v. NCT, Delhi and Gurcharan Singh v. State (Delhi Admn.)]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in Kalyan Chandra Sarkar v. Rajesh Ranjan: (SCC pp. 535-36, para 11)

"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh and Puran v. Rambilas.)"

22. While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the existence or otherwise of a prima facie case is necessary."

(25) Coming back to the facts of the present case, both the Courts have refused the request for grant of bail on two grounds:- The primary ground is that offence alleged against the accused persons is very serious involving deep rooted planning in which, huge financial loss is caused to the State exchequer ; the secondary ground is that the possibility of the accused persons tempering with the witnesses. In the present case, the charge is that of cheating and dishonestly inducing delivery of property, forgery for the purpose of cheating using as genuine a forged document. The punishment of the offence is punishment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the

seriousness of the charge and the severity of the punishment should be taken into consideration. The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required. This Court in Gurcharan Singh and Ors. v. State AIR 1978 SC 179 observed that two paramount considerations, while considering petition for grant of bail in non-bailable offence, apart from the seriousness of the offence, are the likelihood of the accused fleeing from justice and his tampering with the prosecution witnesses. Both of them relate to ensure of the fair trial of the case. Though, this aspect is dealt by the High Court in its impugned order, in our view, the same is not convincing.

(26) When the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. Every person, detained or arrested, is entitled to speedy trial, the question is: whether the same is possible in the present case. There are seventeen accused persons. Statement of the witnesses runs to several hundred pages and the documents on which reliance is placed by the prosecution, is voluminous. The trial may take considerable time and it looks to us that the appellants, who are in jail, have to remain in jail longer than the period of detention, had they been convicted. It is not in the interest of justice that accused should be in jail for an indefinite period. No doubt, the offence alleged against the appellants is a serious one in terms of alleged huge loss to the State exchequer, that, by itself, should not deter us from enlarging the appellants on bail when there is no serious contention of the respondent that the accused, if released on bail, would interfere with the trial or tamper with evidence. We do not see any good reason to detain the accused in custody, that too, after the completion of the investigation and filing of the charge-sheet. This Court, in the case of State of Kerala v. Raneef (2011) 1 SCC 784 , has stated:-

“15. In deciding bail applications an important factor which should certainly be taken into consideration by the court is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case the respondent has already spent 66 days in custody (as stated in Para 2 of his counter-affidavit), and we see no reason why he should be denied bail. A doctor incarcerated for a long period may end up like Dr. Manette in Charles Dicken's novel A Tale of Two Cities, who forgot his profession and even his name in the Bastille.”

(27) In 'Bihar Fodder Scam', this Court, taking into consideration the seriousness of the charges alleged and the maximum sentence of imprisonment that could be imposed including the fact that the appellants were in jail for a period more than six months as on the date of passing of the order, was of the view that the further detention of the appellants as pre-trial prisoners would not serve any purpose.

(28) We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardize the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI.

(29) In the view we have taken, it may not be necessary to refer and discuss other issues canvassed by the learned counsel for the parties and the case laws relied on in support of their respective contentions. We clarify that we have not expressed any opinion regarding the other legal issues canvassed by learned counsel for the parties.

(30) In the result, we order that the appellants be released on bail on their executing a bond with two solvent sureties, each in a sum of Rs. 5 lakhs to the satisfaction of the Special Judge, CBI, New Delhi on the following conditions:-

a. The appellants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts or the case so as to dissuade him to disclose such facts to the Court or to any other authority.

b. They shall remain present before the Court on the dates fixed for hearing of the case. If they want to remain absent, then they shall take prior permission of the court and in case of unavoidable circumstances for remaining absent, they shall immediately give intimation to the appropriate court and also to the Superintendent, CBI and request that they may be permitted to be present through the counsel.

c. They will not dispute their identity as the accused in the case.

d. They shall surrender their passport, if any (if not already surrendered), and in case, they are not a holder of the same, they shall swear to an affidavit. If they have already surrendered before the Ld. Special Judge, CBI, that fact should also be supported by an affidavit.

e. We reserve liberty to the CBI to make an appropriate application for modification/recalling the order passed by us, if for any reason, the appellants violate any of the conditions imposed by this Court.

(31) The appeals are disposed of accordingly.

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2012 Legal Eagle (SC) 444

IN THE SUPREME COURT OF INDIA

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[Before : P.Sathasivam, Ranjan Gogoi]

Vilas Pandurang Pawar & Anr.

versus

State of Maharashtra & Ors.

Case No. : Special Leave Petition (Crl.) No. 6432 of 2012, Date of Decision : 10/09/2012

Code of Criminal Procedure, 1973 -- Section 438 -- Anticipatory bail -- Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 -- Sections 18 & 3(1)(x) -- Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code -- However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the SC/ST Act has been prima facie made out -- In other words, if there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.

Advocates Appeared :

For the Appellants : Dilip Annasaheb Taur, Anil Kumar Advocates.

Statutes Referred :

1. Code of Criminal Procedure -- S.438 2. Scheduled Castes And Scheduled Tribes (Prevention Of Atrocities) Act -- S.3(1)(x) 3. Scheduled Castes And Scheduled Tribes (Prevention Of Atrocities) Act -- S.18

Cases Referred :

1. R.K. Sangwan & Anr. v. State, 2009 (112) DRJ 473 (DB) [Para 10] 2. Ramesh Prasad Bhanja & Ors. v. State of Orissa, 1996 Cri. L.J. 2743 [Para 10]

JUDGMENT/ORDER:
P. Sathasivam, J.:--

1. The short question to be decided in this petition is whether an accused charged with various offences under the Indian Penal Code, 1860 (in short 'IPC') along with the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short 'the SC/ST Act') is entitled for anticipatory bail under Section 438 of the Code of Criminal Procedure, 1973 (in short 'the Code').

2. In the complaint filed by Savita Madhav Akhade – Respondent No. 3 herein, it has been alleged that she has been residing with her family members at Khandeshwari, Taluq Karjat, Ahmednagar, Maharashtra and earning their livelihood from agricultural work. It is further alleged that the complainant is having an agricultural land adjacent to the agricultural land of one Balu Bhanudas Pawar and Arun Bhanudas Pawar. On 15.06.2012, the complainant allowed the rain water, which was accumulated, to flow into the field of Balu Bhanudas Pawar. When the complainant and her husband was standing on S.T. stand for going to Karjat, at that time, Balu Bhanudas Pawar came there and abused them on caste on account of the rain water flowing from the agricultural land of the complainant to his land. The complainant has also alleged that after their return to home, the petitioner along with other co-accused persons gathered at their house and they again abused them on their caste and assaulted the complainant and her family members by using sticks, stones, fighters etc. Thereafter, on the same day, an FIR was registered being No. 139/2012 at Karjat P.S., Ahmednagar, Maharashtra.

3. The petitioners along with other co-accused filed an application for anticipatory bail under Section 438 of the Code being Criminal Miscellaneous Application No. 712 of 2012 before the Court of Sessions Judge, Ahmednagar. By order dated 04.07.2012, the Additional Sessions Judge rejected their application for anticipatory bail.

4. Aggrieved by the order of Sessions Judge, the petitioners filed Criminal Application No. 3012 of 2012 before the High Court of Bombay, Bench at Aurangabad. By impugned judgment and order dated 19.07.2012, the High Court, while rejecting the anticipatory bail application of the present petitioners, allowed the anticipatory bail to 13 accused out of 15. Being aggrieved, the petitioners approached this court by filing special leave petition under Article 136 of the Constitution of India.

5. Heard Mr. Dilip Annasaheb Taur, learned counsel for the petitioners.

6. Taking note of the fact that the complaint not only refers to various offences under IPC but also under Section 3(1)(x) of the SC/ST Act, we posed a question to the counsel by drawing his attention to Section 18 of the SC/ST Act as to how the petitioners

are entitled to anticipatory bail. It is useful to reproduce Section 18 of the SC/ST Act which 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."

A reading of the above provision makes it clear that Section 438 of the Code is not applicable to persons committing an offence under the SC/ST Act. In the complaint, the complainant has specifically averred that she and her family members were insulted by the petitioners by mentioning her caste and also assaulted them by saying "Beat the Mahar so that, they should not live in the village."

7. In order to understand the grievance of the Complainant and the claim of the petitioners, it is useful to extract the complaint dated 15.06.2012.

"COMPLAINT

I. Sau. Savita Madhav Akhade, Age-45 years, Occu. Household, R/o Takali-Khandeshwari. Tq. Karjat, (Caste-Hindu Mahar)

I am giving in writing the complaint in the Police Station that, I am residing on the above place with hushand – Madhav, my sons Ramesh, Umesh jointly. My husband is in service in the Beed district. Near my house, Dadasaheb Paraji Akhade, Sadashiv Paraji Akhade and Deelip Paraji Akhade are residing with their families and doing the agricultural work. There is my agricultural land in Khandeshwari area. Near my agricultural land, there is agricultural land of Balu Bhanudas Pawar and Arun Bhanudas Pawar and they are cultivating their lands. On 15.06.2012, we allowed the rain water to flow the lower side and that flow is running from previously.

Today on dated 15.06.2012 at about 7.00 O'Clock, my husband stood on Takali-Khandeshwari S.T. stand for going to Karjat, at that time, Balu Bhanudas Pawar came there and said my husband that, "Mahardya", I will not be allowed your water to come in my field and started beating him. After that, the people, who gathered along with Shivaji Anna Thombe has rescued the quarrel. After that, my husband came at home. After we came at home, while I was fetching the water from water tank, the TATA ACC belongs to Vilas Pawar in that all the people, namely, Balu Bhanudas Pawar, Vilas Pandurang Pawar, Ravi Dada Pawar, Arun Bhanudas, Pawar, Shrirang Pawar, Deepak Bhagade, Parmeshwar Indrajit Phadtare, Sudhir Chhagan Phadtare, Satish Namdeo Kirdat, Raghunath Tukaram Savant, Vitthal Raghunath Savant, Sandeep Raghunath Savant, Aba Kaka Phadtare, Dattatray Namdeo Pawar, Nephew of Balu Pawar, all R/o Takali Khandeshwari (Pawar Vasti) came there and said that, beat the Mahar so that, they should not live in the village, they are behaving arrogantly, saying that, they started beating with the weapons in hand like sticks, stones, fighters. In that quarrel, I myself, Dada Paraji Akhade, Sadashiv Paraji Akhade, Kundlik Gaikwad, Ramesh Akhade, Umesh Akhade, Rahul Akhade, Asru Akhade, Deelip Akhade are beaten at the hands of these people, so also, Nanda Deelip Akhade, Chhabubai Dadasaheb Akhade including myself were snatched on corner and beaten by these people. Thereafter, Vilas Pandurang Pawar told to Raghunath Tukaram Savant to help them. Thereafter, we phoned to police and the quarrel is stopped after the Police came on the spot.

Therefore, on 15.06.2012, near about 7.00 to 7.30 A.M. the persons namely, Balu Bhanudas Pawar, Vilas Pandurang Pawar, Ravi Dada Pawar, Arun Bhanudas Pawar, Shrirang Pawar, Deepak Bhagade, Parmeshwar Indrajit Phadtare, Sudhir Chhagan Phadtare, Satish Namdeo Kirdat, Raghunath Tukaram Savant, Vitthal Raghunath Savant, Sandeep Raghunath Savant, Aba Kaka Phadtare, Dattatray Namdeo Pawar, Nephew of Balu Pawar, name is not known, all R/o Takali Khandeshwari have gathered unlawful assembly and assaulted the complainant and her relatives by means of sticks, stones, fighters and also abused on caste by saying, "Beat the Mahar so that, they should not live in the village", on the ground that, the rain water is allowed to flow in the filed of Balu Bhanudas Pawar. I and others have sustained injuries. We want to go in Hospital.

My complaint is read over to me and it is true as stated by me.

Before Hence, written

Sd/- Date: 15/06/12

Police Station Officer,

Karjat Police Station.

Sent to: Hon'ble JMFC

Karjat.

Sd/-

Police Station Officer

Karjat Police Station."

A perusal of the complaint shows that the petitioners and other accused persons abused the complainant and her husband by calling their caste (Mahar) and assaulted them for their action of letting rain water to their field.

8. Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the SC/ST Act has been prima facie made out. In other words, if there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.

9. The scope of Section 18 of the SC/ST Act read with Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no Court shall entertain application for anticipatory bail, unless it prima facie finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. Court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence.

10. Learned counsel appearing for the petitioners, relying on the decisions of the Delhi High Court in Dr. R.K. Sangwan & Anr. v. State, 2009 (112) DRJ 473 (DB) and in Crl. M.C. No. 3866/2008 and Crl. M.C. No. 1222/2009 titled M.A. Rashid v. Gopal Chandra decided on 23.03.2012 and a decision of the Orissa High Court in Ramesh Prasad Bhanja & Ors. v. State of Orissa, 1996 Cri. L.J. 2743, submitted that in spite of the specific bar under Section 438 of the Code, the Courts have granted anticipatory bail to the accused who were charged under Section 3(1) of the SC/ST Act.

11. In view of the specific statutory bar provided under Section 18 of the SC/ST Act, the above decisions relied on by the petitioners cannot be taken as a precedent and as discussed above, it depends upon the nature of the averments made in the complaint.

12. In view of the above discussion and in the light of the specific averments in the complaint made by the complainant-respondent No. 3 herein, we are of the view that Section 18 of the SC/ST Act is applicable to the case on hand and in view of the same, the petitioners are not entitled to anticipatory bail under Section 438 of the Code. Accordingly, the special leave petition is dismissed. However, it is made clear that the present conclusion is confined only to the disposal of this petition and the trial Court is free to decide the case on merits.

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IN THE SUPREME COURT OF INDIA

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[Before : P.Sathasivam, M.Y.Eqbal]

Nimmagadda Prasad

versus

Central Bureau of Investigation

Case No. : Criminal Appeal No. 728 of 2013 (Arising out of S.L.P. (Crl.) No. 9706 of 2012), Date of Decision : 09/05/2013

(A) Indian Penal Code, 1860 -- Section 120B r/w Sections 420, 409 & 477-A -- Prevention of Corruption Act, 1988 -- Section 13(2) r/w Section 13(1)(c) and (d) -- Code of Criminal Procedure, 1973 -- Section 173(8) -- Economic Offence -- Bail -- Pending investigation -- Appellant-Nimmagadda Prasad was named as an accused -- He was arrested on 15.05.2012 for his involvement and complicity in the case -- Investigation of the case is still continuing -- Trial Court dismissed his two successive bail applications -- Taking note of serious nature of the offence and having regard to personal and financial clout of the appellant and finding that it cannot be ruled out that witnesses cannot be influenced by appellant in case he is released on bail at this stage -- High Court also dismissed his bail application -- Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail -- The economic offence having deep rooted conspiracies -- Involving huge loss of public funds -- It needs to be viewed seriously -- And considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country -- Bail refused -- CBI directed to complete the investigation and file charge sheet(s) as early as possible preferably within a period of four months from today -- Liberty given to appellant to renew his prayer for bail before the trial Court. [Para 28 & 29]

(B) Bail -- Grant of -- Duty of Court -- While granting bail, the court has to keep in mind -- (i) the nature of accusations -- (ii) the nature of evidence in support thereof -- (iii) the severity of the punishment which conviction will entail -- (iv) the character of the accused -- (v) circumstances which are peculiar to the accused -- (vi) reasonable possibility of securing the presence of the accused at the trial -- (vii) reasonable apprehension of the witnesses being tampered with -- (viii) the larger interests of the public/State and other similar considerations -- (ix) Further, the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" -- Which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused -- And that the prosecution will be able to produce prima facie evidence in support of the charge -- It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt. [Para 27]

Advocates Appeared :

For the Appearing Parties : H.N. Salve, Parag P. Tripathi, Mukul Gupta , Ashok Bhan, Sr. Advocates, Gopal Sankaranarayan, Rajeshekar Rao, Nikhilesh Kumar, Robit Bhat, Ranjeeta R. Harsha Vardhan Reddy, Naved, Arup Banerjee, Ms. Anjali Chauhan, D.L., Chidananda , B.V. Balaram Das, Advocates.

Statutes Referred :

1. Indian Penal Code -- S.477A 2. Indian Penal Code -- S.420 3. Indian Penal Code -- S.120B 4. Indian Penal Code -- S.409 5. Indian Penal Code -- S.120B 6. Indian Penal Code -- S.420 7. Code of Criminal Procedure -- S.173(8) 8. Code of Criminal Procedure -- S.173(8) 9. Prevention of Corruption Act -- S.13(2) 10. Prevention of Corruption Act -- S.13(1)(d) 11. Prevention of Corruption Act -- S.13(1)(c) 12. Prevention of Corruption Act -- S.13(1)(c) 13. Prevention of Corruption Act -- S.13(2) 14. Prevention of Corruption Act -- S.13(1)(d)

Cases Referred :

State of Gujarat v. Mohanlal Jitamalji Porwal and Anr., (1987) 2 SCC 364 [Para 26]

JUDGMENT/ORDER:
P. Sathasivam, J.:--

1. Leave granted.

2. This appeal is directed against the final judgment and order dated 08.10.2012 passed by the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Petition No. 6732 of 2012 in R.C. 19(A)/2011-CBI- Hyderabad, whereby the High Court dismissed the petition filed by the appellant herein for grant of bail.

3. The only question posed for consideration is whether the appellant- herein has made out a case for bail.

Brief facts:

4. On the orders of the High Court of Andhra Pradesh in Writ Petition Nos. 794, 6604 and 6979 of 2011 dated 10.08.2011, the Central Bureau of Investigation (in short "the CBI"), Hyderabad, registered a case being R.C. No. 19(A)/2011-CBI-Hyderabad dated 17.08.2011 under Section 120B read with Sections 420, 409 and 477-A of the Indian Penal Code, 1860 (for short 'IPC') and Section 13(2) read with Section 13(1)(c) and (d) of the Prevention of Corruption Act, 1988 (in short "the PC Act") against Y.S. Jagan Mohan Reddy (A-1), Member of Parliament and 73 others.

5. The appellant-Nimmagadda Prasad was named as an accused at Sl. No. 12 in the FIR dated 17.08.2011 (after the chargesheet was framed, he was arrayed as A-3 and hereinafter, he will be referred to as A-3). It is further seen that during the course of investigation, the appellant was arrested on 15.05.2012 for his involvement and complicity in the case and presently, he is in judicial custody.

6. After filing two successive bail applications before the trial Court which ended in dismissal, the appellant moved the High Court for enlarging him on bail on 06.09.2012 by filing Criminal Petition No. 6732 of 2012. The High Court, taking note of serious nature of the offence and having regard to personal and financial clout of the appellant (A-3) and finding that it cannot be ruled out that witnesses cannot be influenced by A-3 in case he is released on bail at this stage and also taking note of the submission of the Special Public Prosecutor that the investigation of the case is still continuing even after filing of the charge sheet(s), by impugned order dated 08.10.2012, dismissed his bail application.

7. Heard Mr. Harish N. Salve, learned senior counsel for the appellant and Mr. Ashok Bhan, learned senior counsel for the respondent-CBI.

Contentions:

8. After taking us through the entire materials commencing from the filing of FIR dated 17.08.2011, contents of charge sheet dated 13.08.2012, orders of the trial Court rejecting the bail applications twice, the stand taken by the CBI before the trial Court and the High Court, Mr. Salve, learned senior counsel, vehemently contended that the appellant is entitled to an order of bail from this Court. He also submitted that in view of the inconsistent stand taken by the CBI at every stage and taking note of the fact that the appellant is in jail since 15.05.2012, by imposing appropriate conditions, the appellant may be released on bail.

9. Mr. Ashok Bhan, learned senior counsel for the CBI, by placing reliance on all the materials filed by the prosecution pointed out that the appellant, along with others, is involved in a serious economic offence. He also submitted that the appellant (A-3) himself is a beneficiary of land worth several crores of rupees and properties in association with Jagan Mohan Reddy (A-1), who enriched himself for more than 40,000 crores by the influence of his father who was the then Chief Minister of Andhra Pradesh. He also submitted that even after filing of the charge sheet on 13.08.2012, in view of further investigation under Section 173(8) of the Code of Criminal Procedure, 1973 (in short "the Code"), the CBI is looking into all the aspects of investment of the appellant in M/s Indus Projects and its group of companies, has collected a number of files from different departments of the Government of Andhra Pradesh, Banks/NBFCs and other private companies/individuals. He finally concluded that in view of the Status Report dated 30.04.2013 filed by the DIG of Police, CBI, Hyderabad, stating that a further period of 4-6 months is required for completing the investigation under Section 173(8) of the Code, it would not be proper to release him on bail at this juncture.

10. We have carefully considered the rival submissions and perused all the relevant materials relied on by both the sides.

Discussion:

11. In the Status Report dated 30.04.2013, it is stated that the allegations in the FIR against the appellant is that the Government of Andhra Pradesh awarded VANPIC (Vodarevu and Nizampatnam Port Industrial Corridor) Project to the present appellant (A-3) and allotted more than 15,000 acres of land in Prakasam and Guntur Districts to the companies promoted by the appellant in violation of all the laws, rules and norms and granted several concessions. As a quid pro quo, the appellant invested in the following companies, viz., M/s Carmel Asia Holdings Pvt. Ltd., M/s Bharathi Cements, M/s Jagathi Publications Pvt. Ltd., M/s Silicon Builders, M/s Sandur Power Company etc. belonging to Y.S. Jagan Mohan Reddy, s/o the then Chief Minister, late Dr. Y.S. Rajasekhara Reddy.

12. It is also brought to our notice that the investigation into the above said allegations revealed that during the period between 2006 and 2009, the Government of Andhra Pradesh, led by the then Chief Minister late Dr. Y.S. Rajasekhara Reddy extended many undue favours to the appellant by abusing his official position and thereby, an extent of 18878 acres was allotted in his favour, in return, A-3 paid illegal gratifications amounting to Rs. 854.50 crores to Y.S. Jagan Mohan Reddy (A-1) and his group of companies for exercising personal influence over his father, the then Chief Minister of Andhra Pradesh. It is the claim of the CBI that illegal gratifications were paid in the guise of investments/share application money to give them corporate colour in order to escape the criminal liability.

13. It is also the claim of the prosecution that the appellant acted as a conduit to Y.S. Jagan Mohan Reddy (A-1) to channelize the bribe amounts paid by other individuals/companies as a quid pro quo for the undue benefits received by him from the Government of Andhra Pradesh led by late Dr. Y.S. Rajasekhara Reddy.

14. It is also pointed out that based on the available oral and documentary evidence, a charge sheet was filed against the appellant

and other accused (A-1 to A-14) on 13.08.2012 before the Court of Principal Special Judge for CBI cases, Hyderabad which was numbered as CC No. 14 of 2012. Thereafter, according to the CBI, based on various materials, further investigation under Section 173(8) of the Code is still continuing in respect of other aspects of the case.

15. It is highlighted by the CBI that during further investigation in CC No. 14 of 2012, the role of A.J. Jagannathan and Dr. Khater Massaad, who represented on behalf of the Government of Ras Al Khaima (RAK) – UAE has to be ascertained in view of various dubious transactions revealed. It is the stand of the CBI that A.J. Jagannathan, alleged Advisor to the Government of RAK-UAE had been a Director on the Board of Directors of M/s Indus Projects Ltd., along with the present appellant. According to the CBI, the further investigation has revealed that Rs. 140 crores, out of Rs. 525 crores, the money of the appellant flown from Mauritius based companies into India under Automatic Route have been diverted and invested in M/s Jagathi Publications Pvt. Ltd. and M/s Bharathi Cements Corporation Pvt. Ltd., hence, the source of this money ought to be ascertained and investigated which is likely to take some time.

16. According to the CBI, the appellant (A-3) had been a Director in M/s Indus Projects Ltd., which was awarded many projects/contracts by the Government of Andhra Pradesh during the period between 2004 and 2009.

17. The CBI has also projected the order dated 05.10.2012 passed by this Court in Special Leave Petition (Criminal) No. 5902 of 2012 filed by Y.S. Jagan Mohan Reddy (A-1), directing A-1 to apply for bail only after completion of the investigation in seven issues including Indus Projects Ltd. and Lepakshi Knowledge Hub Private Ltd. Mr. Ashok Bhan, by drawing our attention to the said order submitted that those directions are also applicable to Nimmagadda Prasad (A-3) - appellant herein, who was also a Director in M/s Indus Projects Ltd. which is under active investigation.

18. From the status report, it is also brought to our notice that during the year 2008-09, the Government of Andhra Pradesh alienated 8,844 acres of land in Ananthapur District in favour of M/s Lepakshi Knowledge Hub Private Limited, a newly incorporated company, with more exemptions/subsidies at a cost ranging between Rs. 50,000 to Rs. 1,75,000 per acre. It is also highlighted that files were processed despite serious objections by the Finance Department about (i) the financial implications of the proposed concessions proposed on the State exchequer, (ii) company's financial standing; lack of credibility in terms of their past experience of the fledging company incorporated in July, 2008; and (iii) absence of safety clauses in the proposed Memorandum of Agreement (MoA) to resume land in case of violation/failure to implement the project. However, the Government of Andhra Pradesh led by late Dr. Y.S. Rajasekhara Reddy went ahead and entered into the MoA and alienated the said land by passing various Government Orders between 22.09.2008 and 21.02.2009.

19. In the status report, it is also mentioned that M/s Indus Projects Limited suddenly came into picture claiming to be the holding company of M/s Lepakshi Knowledge Hub Private Limited and availed loans amounting to Rs. 790 crores from different banks/NBFCs by mortgaging about 4,397 acres of land. It is the assertion of the prosecution that all the funds were misappropriated by M/s Indus Projects Ltd. for their real estate activities and other business needs. According to the CBI, so far, the investigation has revealed that at least Rs. 88 crores out of the above funds have come back to M/s Indus Projects Ltd. through hawala channels/fake work orders/forged RA bills. It is the grievance of the CBI that the investigation so far has revealed that after more than four and a half years, the project has failed to take off and no job has been generated so far. It is also the allegation of the CBI that the Banks/NBFCs adopted an average market value of Rs. 20 lakh per acre while disbursing loans to M/s Indus Projects Ltd. which were given to the company at a price ranging between Rs. 50,000 to Rs. 1,75,000 lakh per acre. According to the CBI, the value of 8,844 acres of land dishonestly alienated to a private company would be around Rs. 1,768 crores approx. Though they secured loan documents from various banks, yet they are awaiting similar documents from Punjab National Bank, Bank of India, UCO Bank, Kotak Mahindra Bank and State Bank of India.

20. In the status report, it is also claimed that the CBI has to examine various persons from different Government Departments, Banks/NBFCs, private companies/individuals involved in diversion/misappropriation of funds, employees of M/s Indus Projects Ltd., M/s Lepakshi Knowledge Hub Pvt. Ltd., and their group companies to ascertain the facts related to the case.

21. In addition to the same, it is also highlighted that M/s Indus Projects Ltd., who did not fulfil the technical and financial criteria, submitted an application stating that they would develop the project through a consortium consisting of IDFC (Financial Member) and M/s Embassy Group (Technical Member) and would form a Special Purpose Vehicle (SPV). In this regard, it is pointed out that M/s Indus Techzone Pvt. Ltd., projected as SPV, is fully owned by M/s Indus Projects Ltd. While allotting 250 acres of prime land at Shamshabad, near new International Airport of Hyderabad, several exemptions such as stamp-duty and registration expenses, subsidized power, all external infrastructures up to the boundary of SEZ, tax exemptions/holiday were provided under ICT Policy and SEZ Act, 2005 justifying that the project would create 45,000 new jobs. In addition, land worth about Rs. 1 crore per acre was given at a price of Rs. 20 lakh per acre. It is further pointed out that the said project has to be completed within five years of allotment of land which ended in the year 2011-2012, however, except developing a skeleton structure of about 7.50 lakh SFT against 45 lakh SFT, M/s Indus Techzone Pvt. Ltd. has failed to develop the project and has not created any new employment so far.

22. It is also pointed out that M/s Indus Techzone Pvt. Ltd., availed Rs. 175 crores of loans by mortgaging about 75 acres of land which is shown to have been spent for the development of project. The investigating agency is of the opinion that a major chunk of the funds was diverted/misappropriated by way of fake work orders/RA bills.

23. No doubt, Mr. Salve, learned senior counsel for the appellant pointed out the different stand of the CBI from court to court, he also commented upon the reasoning and the ultimate conclusion of the trial Judge, namely, the Principal Special Judge for CBI Cases, Hyderabad for rejecting the bail application of the appellant. It is true that after highlighting the stand taken by the prosecution as well as the right of the accused and taking note of the various aspects, the trial Judge was of the view that if the appellant is enlarged on bail, he will influence the witnesses, since some of them are on his pay rolls, and thereby investigation will

suffer a set back. Even if it is accepted that the statements have been recorded from those employees, as rightly pointed out by the counsel for the CBI, the matter is not going to end with their statements.

24. Mr. Salve, after taking us through various documents/correspondences from the Government of Ras Al Khaima submitted that in view of the contents of the same and the specific stand of the Government of Andhra Pradesh, there is no basis for the claim made by the CBI. Though we were taken through all those details, it is not proper for this Court to make a comment about the acceptability or otherwise at this juncture and those materials ought to be considered only at the trial.

25. As pointed out by Mr. Ashok Bhan, learned senior counsel for the CBI, after filing of the charge sheet on 13.08.2012, in view of further materials, the CBI started investigation which is permissible under Section 173(8) of the Code to look into the aspects of the involvement of the appellant in M/s Indus Projects Ltd. and its group companies, viz., M/s Lepakshi Knowledge Hub Private Ltd. as well as M/s Indus Techzone Private Limtied. In view of the same, undoubtedly, the investigating agency may require further time to collect all the materials, particularly, the nexus of the appellant with those concerns and the appellant being the beneficiary of the quantum of the amount secured. In the course of the arguments, it is also brought to our notice by learned senior counsel for the CBI that a sitting Minister in-charge of the Ports had nexus with those transactions. Considering all these developments, taking note of various details furnished in the Status Report dated 30.04.2013, we are of the view that though the appellant is in custody for nearly 11 months, at the same time, the claim of the premier investigating agency cannot be underestimated. As pointed out by the CBI, if ultimately it is established, it is a grave economic offence of alienating prime lands to selected private companies/individuals under the garb of development using deceptive means resulting in wrongful ownership and control of material resources detrimental to the common good. Further, in order to establish all those events, it is the claim of the CBI that documents have to be obtained from different banks, other private companies/individuals, who facilitated the said diversion of funds. In addition to the same, public servants involved in processing of government files have to be examined apart from private persons/companies. A higher officer of the investigating agency, namely, DIG of Police, CBI assured this Court that further investigation is being carried out at a faster pace and is expected to be completed within six months.

26. Unfortunately, in the last few years, the country has been seeing an alarming rise in white-collar crimes, which has affected the fiber of the country's economic structure. Incontrovertibly, economic offences have serious repercussions on the development of the country as a whole. In State of Gujarat v. Mohanlal Jitamalji Porwal and Anr. (1987) 2 SCC 364 this Court, while considering a request of the prosecution for adducing additional evidence, inter alia, observed as under:--

"5.....The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest…."

27. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

28. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

29. Taking note of all these aspects, without expressing any opinion on the merits of the case and also with regard to the claim of the CBI and the defence, we are of the opinion that the appellant cannot be released at this stage, however, we direct the CBI to complete the investigation and file charge sheet(s) as early as possible preferably within a period of four months from today. Thereafter, the appellant is free to renew his prayer for bail before the trial Court and if any such petition is filed, the trial Court is free to consider the prayer for bail independently on its own merits without being influenced by dismissal of the present appeal.

30. With the above direction, the appeal is dismissed.

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2013 Legal Eagle (SC) 927

IN THE SUPREME COURT OF INDIA

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[Before : P.Sathasivam; CJI, Ranjan Gogoi]

State of Madhya Pradesh

versus

Pradeep Sharma

Case No. : Criminal Appeal No. 2049 of 2013 (Arising out of S.L.P. (Crl.) No. 4102 of 2013) With Criminal Appeal No. 2050 of 2013 (Arising out of S.L.P. (Crl.) No. 4406 of 2013), Date of Decision : 06/12/2013

(A) Code of Criminal Procedure, 1973 -- Section 438 -- Anticipatory Bail -- Accused absconding -- Anticipatory Bail Granted by High Court -- Held: power exercisable under Section 438 of the Code is somewhat extraordinary in character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty -- Order of High court set aside -- Indian Penal Code, 1860 -- Sections 302 & 34.

(B) Code of Criminal Procedure, 1973 -- Section 82 -- It is a settled position of law that where the accused has been declared as an absconder and has not co-operated with the investigation, he should not be granted anticipatory bail.

Advocates Appeared :

For the Appellant : Ms. Vibha Datta Makhija, Sr. Advocate, Saurabh Mishra, Ms. Vanshaja Sukla , Ms. Archi Agnihotri, Advocates.

For the Respondent : Niraj Sharma, Advocate.

Statutes Referred :

1. Indian Penal Code -- S.34 2. Indian Penal Code -- S.302 3. Indian Penal Code -- S.34 4. Indian Penal Code -- S.302 5. Code of Criminal Procedure -- S.438 6. Code of Criminal Procedure -- S.438

Cases Referred :

1. Adri Dharan Das v. State of W.B., (2005) 4 SCC 303 [Para 11] 2. Lavesh v. State (NCT of Delhi), (2012) 8 SCC 730 [Para 12]

JUDGMENT/ORDER:
P. Sathasivam, CJI.:--

1. Leave granted.

2. These appeals are filed against the orders dated 10.01.2013 and 17.01.2013 passed by the High Court of Madhya Pradesh Principal Seat at Jabalpur in Misc. Criminal Case Nos. 9996 of 2012 and 15283 of 2012 respectively whereby the High Court granted anticipatory bail to the respondents herein.

3. Brief facts:

(a) The case of the prosecution is that Rajesh Singh Thakur (the deceased), resident of village Gopalpur, Tehsil Chaurai, District Chhindwara, Madhya Pradesh and Pradeep Sharma (respondent herein), resident of the same village, were having enmity with each other on account of election to the post of Sarpanch.

(b) On 10.09.2011, Pradeep Sharma (respondent herein), in order to get rid of Rajesh Singh Thakur (the deceased), conspired along with other accused persons and managed to call him to the Pawar Tea House, Chhindwara on the pretext of setting up of a tower in a field where they offered him poisoned milk rabri (sweet dish).

(c) After consuming the same, when he left the place to meet his sister, his condition started getting deteriorated because of vomiting and diarrhea. Immediately, the father of the deceased took him to the District Hospital, Chhindwara wherefrom he was referred to the Government Hospital, Chhindwara.

(d) Since there was no improvement in his condition, on 11.09.2011, he was shifted to the Care Hospital, Nagpur where he took his last breath. The hospital certified the cause of death to be poisoning. On the very same day, after sending the information to the Police Station, Sitabardi, Nagpur, the body was sent for the post mortem.

(e) Inder Singh Thakur-father of the deceased submitted a written complaint to the Police Station Kotwali, Chhindwara on 13.09.2011 suspecting the role of the respondents herein. After investigation, a First Information Report (in short 'the FIR') being No. 1034/2011 dated 18.10.2011 was registered under Sections 302 read with 34 of the Indian Penal Code, 1860 (in short 'the IPC').

(f) On 01.08.2012, Pradeep Sharma (respondent herein) moved an application for anticipatory bail by filing Misc. Criminal Case No. 7093 of 2012 before the High Court which got rejected vide order dated 01.08.2012 on the ground that custodial interrogation is necessary in the case.

(g) On 26.08.2012, a charge sheet was filed in the court of Chief Judicial Magistrate, Chhindwara against Sanjay Namdev, Rahul Borkar, Ravi Paradkar and Vijay @ Monu Brahambhatt whereas the investigation in respect of Pradeep Sharma, Sudhir Sharma and Gudda @ Naresh Raghuvanshi (respondents herein), absconding accused, continued since the very date of the incident.

(h) On 21.11.2012, arrest warrants were issued against Pradeep Sharma, Sudhir Sharma and Gudda @ Naresh Raghuvanshi but the same were returned to the Court without service. Since the accused persons were not traceable, on 29.11.2012, a proclamation under Section 82 of the Code of Criminal Procedure, 1973 (in short 'the Code') was issued against them for their appearance to answer the complaint.

(i) Instead of appealing the order dated 01.08.2012, Pradeep Sharma (respondent herein) filed another application for anticipatory bail being Misc. Criminal Case No. 9996 of 2012 before the High Court. Vide order dated 10.01.2013, the High Court granted anticipatory bail to Pradeep Sharma (respondent herein). Similarly, another accused-Gudda @ Naresh Raghuvanshi was granted anticipatory bail by the High Court vide order dated 17.01.2013 in Misc. Criminal Case No. 15283 of 2012.

(j) Being aggrieved by the orders dated 10.01.2013 and 17.01.2013, State of Madhya Pradesh has filed the above appeals before this Court.

(k) In the meantime, the respondents herein approached the Court of Chief Judicial Magistrate, Chhindwara for the grant of regular bail. Vide order dated 20.02.2013, the accused persons were enlarged on bail.

4. Heard Ms. Vibha Datta Makhija, learned senior counsel for the appellant-State and Mr. Niraj Sharma, learned counsel for the respondents.

5. The only question for consideration in these appeals is whether the High Court is justified in granting anticipatory bail under Section 438 of the Code to the respondents/accused when the investigation is pending, particularly, when both the accused had been absconding all along and not cooperating with the investigation.

6. Ms. Vibha Datta Makhija, learned senior counsel for the appellant- State, by drawing our attention to the charge sheet, submitted that the charges filed against the respondents/accused relate to Sections 302, 120B and 34 of the IPC which are all serious offences and also of the fact that both of them being absconders from the very date of the incident, the High Court is not justified in granting anticipatory bail that too without proper analysis and discussion.

7. On the other hand, Mr. Niraj Sharma, learned counsel for the respondents in both the appeals supported the order passed by the High Court and prayed for dismissal of the appeals filed by the State.

8. We have carefully perused the relevant materials and considered the rival contentions.

9. In order to answer the above question, it is desirable to refer Section 438 of the Code which reads as under:--

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

(i) the nature and gravity of the accusation;

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

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

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

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

xxx xxx xxx"

10. The above provision makes it clear that the power exercisable under Section 438 of the Code is somewhat extraordinary in character and it is to be exercised only in exceptional cases where it appears that the person may be falsely implicated or where there are reasonable grounds for holding that a person accused of an offence is not likely to otherwise misuse his liberty.

11. In Adri Dharan Das v. State of W.B., (2005) 4 SCC 303, this Court considered the scope of Section 438 of the Code as under:--

"16. Section 438 is a procedural provision which is concerned with the personal liberty of an individual who is entitled to plead innocence, since he is not on the date of application for exercise of power under Section 438 of the Code convicted for the offence in respect of which he seeks bail. The applicant must show that he has "reason to believe" that he may be arrested in a non-bailable offence. Use of the expression "reason to believe" shows that the belief that the applicant may be arrested must be founded on reasonable grounds. Mere "fear" is not "belief" for which reason it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him in pursuance of which he may be arrested. Grounds on which the belief of the applicant is based that he may be arrested in non-bailable offence must be capable of being examined. If an application is made to the High Court or the Court of Session, it is for the court concerned to decide whether a case has been made out for granting of the relief sought. The provisions cannot be invoked after arrest of the accused. A blanket order should not be generally passed. It flows from the very language of the section which requires the applicant to show that he has reason to believe that he may be arrested. A belief can be said to be founded on reasonable grounds only if there is something tangible to go by on the basis of which it can be said that the applicant's apprehension that he may be arrested is genuine. Normally a direction should not issue to the effect that the applicant shall be released on bail "whenever arrested for whichever offence whatsoever". Such "blanket order" should not be passed as it would serve as a blanket to cover or protect any and every kind of allegedly unlawful activity. An order under Section 438 is a device to secure the individual's liberty, it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. On the facts of the case, considered in the background of the legal position set out above, this does not prima facie appear to be a case where any order in terms of Section 438 of the Code can be passed."

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

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

It is clear from the above decision that if anyone is declared as an absconder/proclaimed offender in terms of Section 82 of the Code, he is not entitled to the relief of anticipatory bail. In the case on hand, a perusal of the materials i.e., confessional statements of Sanjay Namdev, Pawan Kumar @ Ravi and Vijay @ Monu Brahambhatt reveals that the respondents administered poisonous substance to the deceased. Further, the statements of witnesses that were recorded and the report of the Department of Forensic Medicine & Toxicology Government Medical College & Hospital, Nagpur dated 21.03.2012 have confirmed the existence of poison in milk rabri. Further, it is brought to our notice that warrants were issued on 21.11.2012 for the arrest of the respondents herein. Since they were not available/traceable, a proclamation under Section 82 of the Code was issued on 29.11.2012. The documents (Annexure-P13) produced by the State clearly show that the CJM, Chhindwara, M.P. issued a proclamation requiring the appearance of both the respondents/accused under Section 82 of the Code to answer the complaint on 29.12.2012. All these materials were neither adverted to nor considered by the High Court while granting anticipatory bail and the High Court, without indicating any reason except stating "facts and circumstances of the case", granted an order of anticipatory bail to both the accused. It is relevant to point out that both the accused are facing prosecution for offences punishable under Sections 302 and 120B read with Section 34 of IPC. In such serious offences, particularly, the respondents/accused being proclaimed offenders, we are unable to sustain the impugned orders of granting anticipatory bail. The High Court failed to appreciate that it is a settled position of law that where the accused has been declared as an absconder and has not cooperated with the investigation, he should not be granted anticipatory bail.

13. In the light of what is stated above, the impugned orders of the High Court dated 10.01.2013 and 17.01.2013 in Misc. Criminal Case Nos. 9996 of 2012 and 15283 of 2012 respectively are set aside. Consequently, the subsequent order of the CJM dated 20.02.2013 in Crime No. 1034 of 2011 releasing the accused on bail after taking them into custody in compliance with the impugned order of the High Court is also set aside.

14. In view of the same, both the respondents/accused are directed to surrender before the court concerned within a period of two weeks failing which the trial Court is directed to take them into custody and send them to jail.

15. Both the appeals are allowed on the above terms.

2014 Legal Eagle (SC) 38

IN THE SUPREME COURT OF INDIA

Equivalent Citations : 2014 AIOL 26 : 2014 AIR(SC) 1066 : 2014 AIR(SCW) 624 : 2014 All.M.R.(Cri.) 1503 : 2014 (1) Bom.C.R.(Cri.) 622 : 2014 (1) Crimes 119 : 2014 CrLJ 1107 : 2014 (2) JCC 1043 : 2014 (2) JT 26 : 2014 (1) MLJ(Cri) 450 : 2014 (1) RCR(Criminal) 666 : 2014 (1) Scale 342 : 2014 (4) SCC 453 : 2014 (1) SCR 465 : 2014 (1) SLT 787 : 2014 (1) Supreme 385

[Before : K.S. Radhakrishnan, A.K. Sikri]

Km. Hema Mishra

versus

State of U.P. and others

Case No. : Criminal Appeal No. 146 of 2014 (Arising out of SLP (Crl.) No. 7439 of 2013). , Date of Decision : 16/01/2014

(A) :(per Hon'ble J.K. S. Radhakrishnan): Code of Criminal Procedure, 1973 -- Section 41(1)(b) r/w Section 41-A and Proviso (amended) to Section 41(1)(b) r/w Section 41-A; Section 438(2) -- Criminal procedure -- Investigation -- Deferment of Arrest or Bail pending investigation/Trial -- Charges of cheating -- Appellant invoked jurisdiction of High Court seeking relief, namely, writ of certiorari, quashing FIR under Sections 419 & 420 IPC; writ of mandamus directing Opposite Parties, including IO to defer with arrest of petitioner/appellant until collection of credible evidence sufficient to file Charge Sheet by following the amended proviso to Sections 41(1)(b) r/w Section 41-A of Cr. P.C. -- By impugned order, High Court declined to quashed FIR holding the same discloses commission of a cognizable offence -- However, in view of the fact that the petitioner/appellant is a lady, it was directed that in case she surrenders and moves an application for bail same shall be considered and decided by Courts below expeditiously -- Initially, Supreme Court directed that in case, petitioner is arrested, she shall be released on Bail on furnishing Personal Bond of Rs. 50,000/- and two solvent sureties for like amount to the satisfaction of Trial Court, subject to condition that she will join the investigation as and when required and shall abide by the provisions of 438 (2), Cr. P.C. -- After considering facts of the case as also questions of law raised, the interim order granting bail directed to continue till completion of Trial -- However, if the appellant is not cooperating with the Investigation, State can always move for vacating the order -- Appeal dismissed, as above -- Hon'ble J. Mr. A.K. Sikri entirely agreed with this judgment however, made certain observation of his own regarding power of High Court under Article 226 to grant relief against pre-arrest (commonly called Anticipatory bail), even when Section 438 is specifically omitted and made inapplicable, so far as, State of Uttar Pradesh is concerned -- Indian Penal Code, 1860 -- Sections 419 & 420. [Paras: per J. Mr. Radhakrishnan 4 to 8, 25; per J. Mr. Sikri 1, 10 to 12]

(B) :(per Hon'ble J.K. S. Radhakrishnan): Constitution of India, 1950 -- Articles 14, 19 & 21 -- Constitutional Law -- Fundamental Right -- Right to pre-arrest bail/protection and jurisdiction of High Court -- Larger Bench decision in Kartar Singh v. State of Punjab, (1994) 3 SCC 569 , while upholding the constitutional validity of omission of Section 438 Cr. P.C. in the State of U.P., it was held that a claim for pre-arrest protection is neither a statutory nor aright guaranteed under Articles 14, 19 or 21 of the Constitution. [Para 14]

(C) :(per Hon'ble J.K. S. Radhakrishnan): Constitution of India, 1950 -- Article 226 -- Public Law -- Writ Jurisdiction -- Scope of exercise -- Entertainment of bail application -- In Kartar Singh (supra), it was also held that though High Court may have jurisdiction under Article 226 to entertain application for bail, either way, in cases relating to 1987 Act, but that power should be exercised sparingly, that too, only in rare and appropriate cases in extreme circumstances -- But judicial discipline and comity of courts require that the High Court should refrain from exercising extraordinary jurisdiction in such matters -- High Court of Allahabad had taken similar view in several judgments. [Para 15]

(D) :(per Hon'ble J.K. S. Radhakrishnan): Code of Criminal Procedure,1973 -- Section 438; Sections 436, 437 & 439 -- Criminal Procedure -- Bail -- Anticipatory Bail or Interim bail -- In the State of U.P. there is no concept of 'anticipatory bail' -- Bail, by itself, cannot be claimed as a matter of right under Cr. P.C. except for bailable offence (Section 436, Cr. P.C.) -- For non-bailable offences, condition are prescribed under Sections 437 & 439 -- Discretion to grant bail in non-bailable offences remains with the Court, hence, it cannot be claimed as a matter of right, but the aggrieved party can only seek a remedy and it is on the discretion of the Court to grant it or not -- In this connection reference may also be made to judgment of Seven Judge Bench of Allahabad High Court in Smt. Amarawati and Ors. v. State of U.P. (2005) Cr. L.J. 755, which stood approved by Supreme Court in Lal Kamlendra Pratap Singh v. State of Uttar Pradesh and Others, (2009) 4 SCC 437 . [Paras 13 to 16]

(E) :(per Hon'ble J.K. S. Radhakrishnan): Code of Criminal Procedure,1973 -- Sections 41, 2(c) & 157(1) vis-a-vis Section 41-A (inserted vide Act of 2009 w.e.f. 01.11.2010) -- Criminal procedure -- Investigation -- Powers and duties of Police qua arrest -- While interpreting provisions of Sections 41, 2(c) & 157(1), besides scope of Sections 437 & 439, Full Bench of Allahabad High Court consisting of Seven Judges in Smt. Amarawati (supra), so far so, question of arrest in case of disclosure of cognizable offence in FIR or Complaint is concerned, High Court observed that, even in such cases, arrest of the accused is not a must, rather, the police officer should be guided by the decision of Supreme Court in Joginder Kumar v. State of U.P., 1994 Cr. L.J. to decide whether to make an arrest or not -- As noted by hon'ble J. Mr. A.K. Sikri, in

Joginder Kumar (supra), it was stressed that, 'no arrest can be made because it is lawful to do so; existence of the power to arrest is one thing, the justification for the exercise of it is quite another; police officer must be able to justify the arrest apart from his power to do so; arrest and detention in police Lock-up of a person can cause incalculable harm to the reputation and self esteem of a person; no arrest should be made in a routine manner; It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness of a complaint and a reasonable belief both as to the person's complicity and even so as to need of his arrest'. [Paras: per J. Mr. Radhakrishnan 15 & 16; per J. Mr. Sikri]

(F) Constitution of India, 1950 -- Articles 21 & 226 -- Writ Jurisdiction -- Powers of High Court -- Scope of Exercise -- Protection against pre-arrest -- Legislation has laid down various parameters, warranting arrest of a person, which itself is a check on arbitrary or unwarranted arrest and the right to personal liberty under Article 21; [Paras 13, 14, 21]

(G) :(per Hon'ble J.K. S. Radhakrishnan): Code of Criminal Procedure, 1973 -- Sections 41, 41(a), 41(b) & 41-A -- Criminal Procedure -- Arrest by Police -- Deferment of arrest, instead, notice of appearance -- Benefit of Section 41(a) Cr. P.C. must be available in a given case, which provides that an investigation officer shall not arrest the accused of such offences in a routine matter and the arrest be made, only after following the restrictions imposed under Section 41(b) -- Amended provisions make it compulsory for the police to record the reasons for making arrest as well as for not making an arrest in respect of a cognizable offence for which the maximum sentence upto seven years -- Section 41-A inserted w.e.f. 01.11.2010, makes it compulsory for police to issue a notice in all such cases where arrest is not required to be made under Section 41(1)(b) -- All the same, unwillingness of a person who has not been arrested to identify himself and to whom a notice has been issued under Section 41-A, could be a ground for arrest -- Indian Penal Code, 1860 -- Sections 419/420. [Paras 19 to 21]

(H) :(per Hon'ble J.K. S. Radhakrishnan): Constitution of India, 1950 -- Article 226 -- Public Law -- Writ Jurisdiction -- Powers of High Court -- Scope of exercise -- Grant of pre-arrest relief, where provisions for anticipatory bail are absent -- There is unanimity of opinion that inspite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh,, still a party aggrieved can invoke jurisdiction of High Court under Article 226 of the Constitution, being extra-ordinary jurisdiction and the vastness of power naturally imposes considerable responsibility in its application -- All the same, the High Court has got the power and sometimes a duty inappropriate cases to grant the reliefs, though, it is not possible to pin-point what are the appropriate cases, which have to be left to the wisdom of the Court exercising powers under Article 226 -- Code of Criminal Procedure,1973 -- Section 438; [Para 22]

(I) :(per Hon'ble J.K. S. Radhakrishnan): Constitution of India, 1950 -- Article 226 -- Writ Jurisdiction -- Scope of exercise -- Criminal prosecution -- Challenge for quashing FIR or Chare-sheet -- Grant of or continuation of interim relief after dismissal of writ petition -- Supreme Court in State of Orissa v. Madan Gopal Rungta, AIR 1952 SC 12 , in the context of Civil Proceedings has held that Article 226 cannot be used for the purposes of giving the relief on the application -- As was noted, directions were given therein, only to circumvent Section 80 CPC and that was not within the scope of Article 226 -- An interim relief can be granted only in aid of as ancillary to main relief which may be available to a party on final determination of his right in a suit or proceeding -- If the court was of the opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on merits and come to the decision as to whether petitioners succeeded in establishing that there was an infringement of any of their legal rights entitling them to a writ of mandamus or any other direction of like nature; and pending such determination it might have made a suitable interim order for maintaining status quo ante -- But once, the Court declined to decide on the rights of the parties and expressly held that they should be investigated properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under Article 226, language whereof does not permit such an action -- Once the court finds no merit in the challenge, writ petition will have to be dismissed and the question of granting further relief after dismissal of writ, does not arise -- Consequently, once a writ is dismissed, all the interim reliefs granted would also go -- In his separate judgment, Hon'ble J. Mr. A.K. Sikri after agreeing with the above proposition, re-iterated the same in his own words -- According to him, considerations which have to weigh with the High Court to decided as to whether such proceedings are to be quashed or not are entirely different than that of granting interim protection against arrest -- Since grounds on which such an FIR or Charge-sheet can be quashed are limited, once writ petition challenging validity of FIR/Charge-sheet is dismissed, the grant of relief, incidental in nature, against arrest, would obviously not arise, even when a justifiable case for grant of anticipatory bail is made out -- Code of Criminal procedure, 1973 -- Section 438; [Paras: per J. Mr. Radhakrishnan per J. Mr. A.K. Sikri 22 to 24; 1 to 3]

Advocates Appeared :

For the Appellant :- Vivek Singh, Advocate.
For the Respondents :- Gaurav Bhatia, AAG, Pragati Neekhra, B. Krishna Prasad, Advocates.

Statutes Referred :

1. Code of Criminal Procedure -- S.41(1)(b) 2. Code of Criminal Procedure -- S.439 3. Code of Criminal Procedure -- S.41A 4. Code of Criminal Procedure -- S.438 5. Code of Criminal Procedure -- S.436 6. Code of Criminal Procedure -- S.437 7. Constitution of India -- Art.21 8. Constitution of India -- Art.226

Cases Referred :

Ajeet Singh v. State of U.P. (2007(1) R.C.R.(Criminal) 654 : 2007 Cri.L.J. 170.
Balchand Jain v. State of M.P., (1976)4 SCC 572.
Gurbaksh Singh v. State of Punjab 1980 Crl.L.J. 417 (P&H).
Joginder Kumar v. State of U.P., 1994(2) R.C.R.(Criminal) 601 : 1994 Cr L.J. 1981 : (1994) 4 SCC 260 .
Kamlesh Singh v. State of U.P., 1997 Cri.L.J. 2705.
Kartar Singh v. State of Punjab 1994(2) R.C.R.(Criminal) 168 : (1994) 3 SCC 569 .
Lal Kamlendra Pratap Singh v. State of Uttar Pradesh, 2009(3) R.C.R.(Criminal) 401 : 2009(4) Recent Apex Judgments (R.A.J.) 151 : (2009)4 SCC 437.
Lalji Yadav v. State of U.P., 1998 Cri.L.J. 2366.
Natho Mal v. State of U.P., 1994 Cri.L.J. 1919.
Satya Pal v. State of U.P. (2000(1) R.C.R.(Criminal) 505 : 2000 Cri.L.J. 569.
Smt. Amarawati v. State of U.P., (2005) Cri.L.J. 755.
Som Mittal v. State of Karnataka, 2008(1) R.C.R.(Criminal) 880 : 2008(1) Recent Apex Judgments (R.A.J.) 447 : (2008) 3 SCC 753 .
State of Orissa v. Madan Gopal Rungta, AIR 1952 SC12 .

JUDGMENT/ORDER:

K.S. Radhakrishnan, J. (A.K. Sikri, J. Concurring)

1. Leave granted.

2. Appellant herein had invoked the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India seeking the following reliefs :

> (i) Issue a writ, order or direction in the nature of Certiorari thereby quashing the impugned FIR dated 21.12.2011, contained in Annexure No. 1 to this writ petition, lodged at crime No. 797/11 under Sections 419/420 IPC, at Police Station Zaidpur, District Barabanki;
> (ii) Issue a writ, order or direction in the nature of Mandamus thereby directing the Superintendant of Police, Barabanki, the opposite Party No. 2, and the Investigating Officer, Case Crime No. 797/11, under Sections 419/420 IPC, Police Station, Zaidpur, District Barabanki, the opposite party No. 3, to defer the arrest of the petitioner until collection of the credible evidence sufficient for filing the charge-sheet by following the amended proviso to Sections 41(1)(b) read with Section 41A Cr.P.C.;
> (iii) Issue a writ, order or direction in the nature of Mandamus thereby directing the Superintendent of Police, Barabanki, the opposite party No. 2, for compliance of the provision of Sections 41(1)(b) and 41A Cr.P.C. in the investigation of the impugned FIR dated 21.12.2011 contained in Annexure No. 1 to this writ petition, lodged in crime No. 797/11, under Sections 419/420 IPC, Zaidpur, District Barabanki; and
> (iv) Allow this writ petition with costs.

3. The High Court, after hearing the parties as well as the State, dismissed the writ petition on 9.1.2012 and passed the following order :

> "Heard learned counsel for the petitioner and learned Additional Government Advocate. Under challenge in the instant writ petition is FIR relating to Case Crime No. 797 of 2011, under Sections 419 & 420 IPC, police station Zaidpur, district Barabanki. We have gone through the FIR, which discloses commission of cognizable offence, as such, the same cannot be quashed. The writ petition lacks merit and is accordingly dismissed.
> However, the petitioner being lady, it is provided that if she surrenders and moves application for bail the same shall be considered and decided by the courts below expeditiously."

4. The appellant, complaining that she was falsely implicated in the case, has approached this Court contending that the High Court had failed to exercise its certiorari jurisdiction under Article 226 of the Constitution of India in not quashing the FIR dated 21.12.2011 and in refusing to grant anticipatory bail to the appellant. Appellant submitted that the High Court ought to have issued a writ of mandamus directing the Superintendent of Police, Barabanki to defer the arrest of the appellant until the collection of credible evidence sufficient for filing the charge-sheet, following the amended proviso to Section 41(1)(b) read with Section 41A Cr.P.C.

5. The Secretary, U.P. Secondary Education Board, Allahabad and the District School Inspector vide their letter dated 8.12.2011 registered a complaint alleging that the appellant had committed fraud and forgery in the matter of preparation of documents of Government Office regarding selection for the post of Assistant Teacher and, consequently, got appointment as the Assistant Teacher in Janpad Inter- College at Harakh, District Barabanki, with payment of salary amounting to L 1,10,000/- from the Government exchequer. On the basis of the FIR, Case Crime No. 797 of 2011 was registered under Sections 419/420 IPC before the Police Station, Jaizpur, District Barabanki. After having come to know of the registration of the crime, the appellant filed a representation on 27.12.2011 before the Superintendent of Police, District Barabanki and the Investigating Officer making the following prayer :

> "As such through this application/representation the applicant prays that keeping in view the willingness of the applicant for cooperating in investigation and to appear before the investigating officer upon being called in case crime No. 797/11 under sections 419/420 IPC, PS Jaipdur, District Barabanki, order for staying the arrest of applicant be passed so that compliance to the provision 41(1)(B) Section 41(A) amended to CrPC 1973 be made."

6. Since the appellant did not get any reply to the said representation, she invoked the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India by filing Writ Petition Misc. Bench No. 171 of 2012 which was dismissed, as already indicated, on 9.1.2012.

7. When the matter came up for hearing before this Court, it passed an interim order on 1.3.2013, the operative portion of which reads as under :

> "Considering the facts and circumstances of the case, we are inclined to direct that in the event of arrest of the petitioner, she shall be released on bail on furnishing personal bond of L 50,000/- (Fifty Thousand only) with two solvent sureties for

the like amount to the satisfaction of the Trial Court, subject to the condition that she will join investigation as and when required and shall abide by the provisions of section 438(2) of the Code of Criminal Procedure."

8. Shri Aseem Chandra, learned counsel appearing for the appellant, submitted that the High Court has committed an error in not quashing the FIR, since the registration of the crime was with *mala fide* intention to harass the appellant and in clear violation of the fundamental rights guaranteed to the appellant under Articles 14, 19 and 21of the Constitution of India. Learned counsel submitted that the appellant was falsely implicated and that the ingredients of the offence under Sections 419/420 IPC were not *prima facie* made out for registering the crime. Learned counsel also pointed out that the High Court has not properly appreciated the scope of Sections 41(1)(b) and 41A Cr.P.C., 1973 and that no attempt has been made to follow those statutory provisions by the State and its officials.

9. Shri Gaurav Bhatia, learned AAG, appearing for the State, submitted that the investigation was properly conducted and the crime was registered. Further, it was also pointed out that the President has also withheld the assent of the Code of Criminal Procedure (Uttar Pradesh Amendment) Bill, 2010, since the provisions of the Bill were found to be in contravention to Section 438 of the Cr.P.C. and hence the High Court rightly declined the stay sought for under Article 226 of the Constitution of India.

10. Shri Siddharth Luthra, Additional Solicitor General, who appeared on our request, submitted that the High Court can in only rarest of rare cases grant pre-arrest bail while exercising powers under Article 226 of the Constitution of India, since the provision for the grant of anticipatory bail under Section 438 Cr.P.C. was consciously omitted by the State Legislature. The legislative intention is, therefore, not to seek or provide pre-arrest bail when the FIR discloses a cognizable offence. Shri Luthra submitted that since there is a conscious withdrawal/deletion of Section 438 Cr.P.C. by the Legislature from the Code of Criminal Procedure, by Section 9 of the Criminal Procedure (Uttar Pradesh) Amendment Act, 1976, the relief which otherwise the appellant could not have obtained under the Code, is sought to be obtained indirectly by invoking the writ jurisdiction of the High Court, which is impermissible in law.

11. Shri Luthra also submitted that since the appellant has no legal right to move for anticipatory bail and that practice is not an integral part of Article 21 of the Constitution of India, the contention that the High Court has failed to examine the charges levelled against the appellant, was mala fide or violative of Articles 14 and 21 of the Constitution of India, does not arise. Shri Luthra also submitted that the High Court was not correct in granting further reliefs after having dismissed the writ petition and that, only in extraordinary cases, the High Court could exercise its jurisdiction under Article 226 of the Constitution of India and the case in hand does not fall in that category.

12. I may indicate that the legal issues raised in this case are no more res integra. All the same, it calls for a relook on certain aspects which I may deal with during the course of the judgment.

13. I am conscious of the fact that since the provisions similar to Section 438 Cr.P.C. being absent in the State of Uttar Pradesh, the High Court is burdened with large number of writ petitions filed under Article 226 of the Constitution of India seeking pre-arrest bail. Section 438 was added to the Code of Criminal Procedure in the year 1973, in pursuance to the recommendation made by the 41st Law Commission, but in the State of Uttar Pradesh by Section 9 Criminal Procedure (Uttar Pradesh) Amendment Act, 1976, Section 438 was specifically omitted, the legality of which came up for consideration before the Constitution Bench of this Court in ***Kartar Singh v. State of Punjab 1994(2) R.C.R.(Criminal) 168 : (1994) 3 SCC 569*** and the Court held that the deletion of the application of Section 438 in the State of Uttar Pradesh by Section 9 of the above mentioned Amendment Act does not offend either Article 14, Article 19 or Article 21 of the Constitution of India and the State Legislature is competent to delete that section, which is one of the matters enumerated in the concurrent list, and such a deletion is valid under Article 254(2) of the Constitution of India.

14. I notice, therefore, as per the Constitution Bench, a claim for pre-arrest protection is neither a statutory nor a right guaranteed under Article 14, Article 19 or Article 21of the Constitution of India. All the same, in Karatar Singh's case (supra), this Court in sub-para (17) of Para 368, has also stated as follows :

"368 xxx xxx xxx
(17) Though it cannot be said that the High Court has no jurisdiction to entertain an application for bail under Article 226 of the Constitution and pass orders either way, relating to the cases under the Act 1987, that power should be exercised sparingly, that too only in rare and appropriate cases in extreme circumstances. But the judicial discipline and comity of courts require that the High Courts should refrain from exercising the extraordinary jurisdiction in such matters;
xxx xxx xxx"

15. The High Court of Allahabad has also taken the same view in several judgments. Reference may be made to the judgments in ***Satya Pal v. State of U.P. (2000(1) R.C.R.(Criminal) 505 : 2000 Cri.L.J. 569), Ajeet Singh v. State of U.P. (2007(1) R.C.R. (Criminal) 654 : 2007 Cri.L.J. 170), Lalji Yadav & Others v. State of U.P. & Another (1998 Cri.L.J. 2366), Kamlesh Singh v. State of U.P. & Another, (1997 Cri.L.J. 2705)*** and ***Natho Mal v. State of U.P., (1994 Cri.L.J. 1919).***

16. We have, therefore, no concept of "anticipatory bail" as understood in Section 438 of the Code in the State of Uttar Pradesh. In ***Balchand Jain v. State of M.P., (1976)4 SCC 572,*** this Court observed that "anticipatory bail" is a misnomer. Bail, by itself, cannot be claimed as a matter of right under the Code of Criminal Procedure, 1973, except for bailable offences (Section 436 Cr.P.C., 1973). For non-bailable offences, conditions are prescribed under Sections 437 and 439 Cr.P.C. The discretion to grant bail in non-bailable offences remains with the Court and hence, it cannot be claimed as a matter of right, but the aggrieved party can only seek a remedy and it is on the discretion of the Court to grant it or not. In this connection reference may also be made to the Judgment of the seven-Judge Bench of the Allahabad High Court in ***Smt. Amarawati and Ors. v. State of U.P., (2005) Cri.L.J. 755,*** wherein the Court, while interpreting the provisions of Sections 41, 2(c) and 157(1) Cr.P.C. as well as the scope of Sections 437 and 439, held as follows:

"47. In view of the above we answer the questions referred to the Full Bench as follows:
(1) Even if cognizable offence is disclosed, in the FIR or complaint the arrest of the accused is not a must, rather the police officer should be guided by the decision of the Supreme Court in ***Joginder Kumar v. State of U.P., 1994(2) R.C.R. (Criminal) 601 : 1994 Cr.L.J. 1981*** before deciding whether to make an arrest or not.
(2) The High Court should ordinarily not direct any Subordinate Court to decide the bail application the same day, as that

would be interfering with the judicial discretion of the Court hearing the bail application. However, as stated above, when the bail application is under Section 437 Cr.P.C. ordinarily the Magistrate should himself decide the bail application the same day, and if he decides in a rare and exceptional case not to decide it on the same day, he must record his reasons in writing. As regards the application under Section 439 Cr.P.C. it is in the discretion of the learned Sessions Judge considering the facts and circumstances whether to decide the bail application the same day or not, and it is also in his discretion to grant interim bail the same day subject to the final decision on the bail application later.
(3) The decision in ***Dr. Vinod Narain v. State of U.P.*** is incorrect and is substituted accordingly by this judgment."

17. This Court in ***Lal Kamlendra Pratap Singh v. State of Uttar Pradesh and Others, 2009(3) R.C.R.(Criminal) 401 : 2009(4) Recent Apex Judgments (R.A.J.) 151 : (2009)4 SCC 437,*** while affirming the judgment in Amarawati (supra), held as follows:

"6. Learned counsel for the appellant apprehends that the appellant will be arrested as there is no provision for anticipatory bail in the State of U.P. He placed reliance on a decision of the Allahabad High Court in ***Amarawati v. State of U.P.*** in which a seven-Judge Full Bench of the Allahabad High Court held that the court, if it deems fit in the facts and circumstances of the case, may grant interim bail pending final disposal of the bail application. The Full Bench also observed that arrest is not a must whenever an FIR of a cognizable offence is lodged. The Full Bench placed reliance on the decision of this Court in ***Joginder Kumar v. State of U.P. 1994(2) R.C.R.(Criminal) 601 : (1994) 4 SCC 260 .***
7. We fully agree with the view of the High Court in Amarawati case and we direct that the said decision be followed by all courts in U.P. in letter and spirit, particularly since the provision for anticipatory bail does not exist in U.P.
8. In appropriate cases interim bail should be granted pending disposal of the final bail application, since arrest and detention of a person can cause irreparable loss to a person's reputation, as held by this Court in Joginder Kumar case. Also, arrest is not a must in all cases of cognizable offences, and in deciding whether to arrest or not the police officer must be guided and act according to the principles laid down in Joginder Kumar case."

18. Later, a two-Judge Bench of this Court in ***Som Mittal v. State of Karnataka, 2008(1) R.C.R.(Criminal) 880 : 2008(1) Recent Apex Judgments (R.A.J.) 447 : (2008) 3 SCC 753 ,*** while dealing with an order of the Karnataka High Court under Section 482 Cr.P.C., one of the Judges made some strong observations as well as recommendations to restore Section 438 in the State of U.P. Learned Judges constituting the Bench also expressed contrary views on certain legal issues, hence, the matter was later placed before a three-Judge Bench, the judgment of which is reported in same caption (2008) 3 SCC 574, wherein this Court opined that insofar as the observations, recommendations and directions in paras 17 to 39 of the concurrent judgment is concerned, they did not relate to the subject matter of the criminal appeal and the directions given were held to be obiter and were set aside.

19. I notice in this case FIR was lodged for offences, under Sections 419 and 420 I.P.C. which carry a sentence of maximum of three years and seven years respectively with or without fine. Benefit of Section 41(a) Cr.P.C. must be available in a given case, which provides that an investigating officer shall not arrest the accused of such offences in a routine manner and the arrest be made, only after following the restrictions imposed under Section 41(b). The relevant provisions, as it stands now reads as follow :

"41. **When police may arrest without warrant.** - (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person -
(a) who commits, in the presence of a police officer, a cognizable offence;
(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely :-
(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;
(ii) the police officer is satisfied that such arrest is necessary -
(a) to prevent such person from committing any further offence; or
(b) for proper investigation of the offence; or
(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner, or
(d) to prevent such person from making 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 the police officer; or
(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,
and the police officer shall record while making such arrest, his reasons in writing :
Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section; record the reasons in writing for not making the arrest."

20. Amended provisions make it compulsory for the police to record the reasons for making arrest as well as for not making an arrest in respect of a cognizable offence for which the maximum sentence is upto seven years. Reference in this connection may also be made to Section 41A inserted vide Act 5 of 2009 w.e.f. 01.11.2010, which reads as follows :

"41A. **Notice of appearance before police officer** - (1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.
(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.
(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.
(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice."

21. Above mentioned provisions make it compulsory for the police to issue a notice in all such cases where arrest is not required to be made under Clause (b) of sub-section (1) of the amended Section 41; But, all the same, unwillingness of a person who has not

been arrested to identify himself and to whom a notice has been issued under Section 41A, could be a ground for his arrest. Legislation has laid down various parameters, warranting arrest of a person, which itself is a check on arbitrary or unwarranted arrest and the right to personal liberty guaranteed under Article 21 of the Constitution of India.

22. I may, however, point out that there is unanimity in the view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in appropriate cases to grant reliefs, though it is not possible to pin-point what are the appropriate cases, which have to be left to the wisdom of the Court exercising powers under Article 226 of the Constitution of India.

23. I am also faced with the situation that on dismissal of the writ by the High Court under Article 226 of the Constitution of India, while examining the challenge for quashing the FIR or a charge-sheet, whether the High Court could grant further relief against arrest for a specific period or till the completion of the trial. This Court in ***State of Orissa v. Madan Gopal Rungta reported in AIR 1952 SC 12*** , while dealing with the scope of Article 226 of the Constitution, held as follows :-

> " Article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application. The directions had been given here only to circumvent the provisions of Section 80 of the Civil Procedure Code, and that was not within the scope of Article 226; An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of mandamus or any other directions of a like nature; and pending such determination it might have made a suitable interim order for maintaining the status quo ante. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under Article 226 of the Constitution. The language of Article 226 does not permit such an action."

24. The language of Article 226 does not permit such an action and once the Court finds no merits in the challenge, writ petition will have to be dismissed and the question of granting further relief after dismissal of the writ, does not arise. Consequently, once a writ is dismissed, all the interim reliefs granted would also go.

25. This Court has already passed an interim order on 1.3.2013 granting bail to the appellant on certain conditions. The said order will continue till the completion of the trial. However, if the appellant is not co-operating with the investigation, the State can always move for vacating the order. The appeal is accordingly dismissed as above.

JUDGMENT

A.K. Sikri, J. (Agreeing with K.S. Radhakrishnan, J.)

26. I have carefully gone through the judgment authored by my esteemed brother, Justice Radhakrishnan. I entirely agree with the conclusions arrived at by my learned brother in the said judgment. At the same time, I would also like to make some observations pertaining to the powers of High Court under Article 226 of the Constitution of India to grant relief against pre-arrest (commonly called as anticipatory bail), even when Section 438, Cr.P.C. authorising the Court to grant such a relief is specifically omitted and made inapplicable in so far as State of Uttar Pradesh is concerned. I would like to start with reproducing the following observations in the opinion of my brother, on this aspect which are contained in paragraph 21 of the judgment. It reads as under :

> "We may, however, point out that there is unanimity in the view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in appropriate cases to grant reliefs, though it is not possible to pin-point what are the appropriate cases, which we have to leave to the wisdom of the Court exercising powers under Article 226 of the Constitution of India."

27. Another aspect which is highlighted in the judgment rendered by Justice Radhakrishnan is that many times in the Writ Petition filed under Article 226 of the Constitution of India seeking quashing of the FIR or the charge-sheet, the petitioners pray for interim relief against arrest. While entertaining the Writ Petition the High Court invariably grants such an interim relief. It is rightly pointed out that once the Writ Petition claiming main relief for quashing of FIR or the charge-sheet itself is dismissed, the question of granting further relief after dismissal of the Writ Petition, does not arise. It is so explained in para 22 and 23 of the judgment of my learned brother.

28. I would like to remark that in the absence of any provisions like Section 438 of Cr.P.C. applicable in the State of Uttar Pradesh, there is a tendency on the part of the accused persons, against whom FIR is lodged and/or charge-sheet is filed in the Court to file Writ Petition for quashing of those proceedings so that they are able to get protection against the arrest in the interregnum which is the primary motive for filing such petitions. It is for this reason that invariably after the lodging of FIR, Writ Petition under Article 226 is filed with main prayer to quash those proceedings and to claim interim relief against pre-arrest in the meantime or till the completion of the trial. However, the considerations which have to weigh with the High Court to decide as to whether such proceedings are to be quashed or not are entirely different than that of granting interim protection against the arrest. Since the grounds on which such an FIR or charge sheet can be quashed are limited, once the Writ Petition challenging the validity of FIR or charge-sheet is dismissed, the grant of relief, incidental in nature, against arrest would obviously not arise, even when a justifiable case for grant of anticipatory bail is made out .

29. It is for this reason, we are of the opinion that in appropriate cases the High Court is empowered to entertain the petition under Article 226 of the Constitution of India where the main relief itself is against arrest. Obviously, when provisions of Section 438 of Cr.P.C. are not available to the accused persons in the State of Uttar Pradesh, under the normal circumstances such an accused persons would not be entitled to claim such a relief under Article 226 of the Constitution. It cannot be converted into a second window for the relief which is consciously denied statutorily making it a case of casus omissus. At the same time, as rightly observed in para 21 extracted above, the High Court cannot be completely denuded of its powers under Article 226 of the

Constitution, to grant such a relief in appropriate and deserving cases; albeit this power is to be exercised with extreme caution and sparingly in those cases where arrest of a person would lead to total miscarriage of justice. There may be cases where pre-arrest may be entirely unwarranted and lead to disastrous consequences. Whenever the High Court is convinced of such a situation, it would be appropriate to grant the relief against pre-arrest in such cases. What would be those cases will have to be left to the wisdom of the High Court. What is emphasised is that the High Court is not bereft of its powers to grant this relief under Article 226 of the Constitution.

> A Bench of this Court, headed by the then Chief Justice Y.V.Chandrachud, laid down first principles of granting anticipatory bail in the ***Gurbaksh Singh v. State of Punjab 1980 Crl.L.J. 417 (P&H),*** reemphasizing that liberty... - `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, in so far as one may, and to give full play to the presumption that he is innocent.

30. In ***Joginder Kumar v. State of U.P. and Others, 1994(2) R.C.R.(Criminal) 601 : 1994 Cr L.J. 1981,*** the Supreme Court observed :

> "No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest."

31. It is pertinent to explain there may be imminent need to grant protection against pre-arrest. The object of this provision is to relieve a person from being disgraced by trumped up charges so that liberty of the subject is not put in jeopardy on frivolous grounds at the instance of the unscrupulous or irresponsible persons who may be in charge of the prosecution. An order of anticipatory bail does not in any way, directly or indirectly; take away for the police their right to investigate into charges made or to be made against the person released on bail.

32. The purposes for which the provisions of anticipatory bail are made are quite obvious. One of the purposes of the arrest is that the accused should be available to the investigating machinery for further investigation and questioning whenever he is required. Another purpose is that the trial should not be jeopardised and for this purpose the restrictions on the movements of the accused are necessary. The genuineness of the alleged need for police custody has to be examined and it must be balanced against the duty of courts to uphold the dignity of every man and to vigilantly guard the right to liberty without jeopardising the state objective of maintenance of law and order.

33. I would also like to reproduce certain paragraphs from ***Kartar Singh and Ors. v. State of Punjab 1994(2) R.C.R.(Criminal) 168 : (1994) 3 SCC 569 ,*** wherein Justice K.Ramaswamy, speaking for the Court, discussed the importance of life and liberty in the following words.

> "The foundation of Indian political and social democracy, as envisioned in the preamble of the Constitution, rests on justice, equality, liberty and fraternity in secular and socialist republic in which every individual has equal opportunity to strive towards excellence and of his dignity of person in an integrated egalitarian Bharat. Right to justice and equality and stated liberties which include freedom of expression, belief and movement are the means for excellence. The right to life with human dignity of person is a fundamental right of every citizen for pursuit of happiness and excellence. Personal freedom is a basic condition for full development of human personality. Article 21 of the Constitution protects right to life which is the most precious right in a civilised society. The trinity i.e. liberty, equality and fraternity always blossoms and enlivens the flower of human dignity. One of the gifts of democracy to mankind is the right to personal liberty. Life and personal freedom are the prised jewels under Article 19 conjointly assured by Article 20(3), 21 and 22 of the Constitution and Article 19 ensures freedom of movement. Liberty aims at freedom not only from arbitrary restraint but also to secure such conditions which are essential for the full development of human personality. Liberty is the essential concomitant for other rights without which a man cannot be at his best. The essence of all civil liberties is to keep alive the freedom of the individual subject to the limitations of social control envisaged in diverse articles in the chapter of Fundamental Rights Part III in harmony with social good envisaged in the Directive Principles in Part IV of the Constitution. Freedom cannot last long unless it is coupled with order. Freedom can never exist without order. Freedom and order may coexist. It is essential that freedom should be exercised under authority and order should be enforced by authority which is vested solely in the executive. Fundamental rights are the means and directive principles are essential ends in a welfare State. The evolution of the State from police State to a welfare State is the ultimate measure and accepted standard of democratic society which is an avowed constitutional mandate. Though one of the main functions of the democratic Government is to safeguard liberty of the individual, unless its exercise is subject to social control, it becomes anti-social or undermines the security of the State. The Indian democracy wedded to rule of law aims not only to protect the fundamental rights of its citizens but also to establish an egalitarian social order. The individual has to grow within the social confines preventing his unsocial or unbridled growth which could be done by reconciling individual liberty with social control. Liberty must be controlled in the interest of the society but the social interest must never be overbearing to justify total deprivation of individual liberty. Liberty cannot stand alone but must be paired with a companion virtue; liberty and morality; liberty and law; liberty and justice; liberty and common good; liberty and responsibility which are concomitants for orderly progress and social stability. Man being a rational individual has to life in harmony with equal rights of others and more differently for the attainment of antithetic desires. This intertwined network is difficult to delineate within defined spheres of conduct within which freedom of action may be confined. Therefore, liberty would not always be an absolute license but must arm itself within the confines of law. In other words, here can be no liberty without social restraint. Liberty, therefore, as a social conception is a right to be assured to all members of a society. Unless restraint is enforced on and accepted by all members of the society, the liberty of some must involve the oppression of others. If liberty be regarded a social order, the problem of establishing liberty must be a problem of organising restraint which society controls over the individual. Therefore, liberty of each citizen is borne of and must be subordinated to the liberty of the greatest number, in other words common

> happiness as an end of the society, lest lawlessness and anarchy will tamper social weal and harmony and powerful courses or forces would be at work to undermine social welfare

and order. Thus the essence of civil liberty is to keep alive the freedom of the individual subject to the limitation of social control which could be adjusted according to the needs of the dynamic social evolution.

> The modem social evolution is the growing need to keep individual to be as free as possible, consistent with his correlative obligation to the society. According to Dr. Ambedkar in his closing speech in the Constituent Assembly, the principles of liberty, equality and fraternity are not to be treated as separate entities but in a trinity. They form the union or trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality. Equality cannot be divorced from liberty. Nor can equality and liberty be divorced from fraternity. Without equality, liberty would produce supremacy of law. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality would not become a natural course of things. Courts, as sentinel on the qui vive, therefore, must strike a balance between the changing needs of the society for peaceful transformation with orders and protection of the rights of the citizen.(Para 374)

34. It was also held in that judgment that the High Courts under Article 226 had the right to entertain writ petitions for quashing of FIR and granting of interim protection from arrest. This position, in the context of contours of Article 226, is stated as follows in the same judgment :

> "From this scenario, the question emerges whether the High Court under Article 226 would be right in entertaining proceedings to quash the charge-sheet or to grant bail to a person accused of an offence under the Act or other offences committed during the course of the same transaction exclusively triable by the Designated Court. Nothing is more striking than the failure of law to evolve a consistent jurisdictional doctrine or even elementary principles, if it is subject to conflicting or inconceivable or inconsistent result which lead to uncertainty, incongruity and disbelief in the efficacy of law. The jurisdiction and power of the High Court under Article 226 of the Constitution is undoubtedly constituent power and the High Court has untrammeled powers and jurisdiction to issue any writ or order or direction to any person or authority within its territorial jurisdiction for enforcement of any of the fundamental rights or for any other purpose. The legislature has no power to divest the court of the constituent power engrafted under Article 226; A superior court is deemed to have general jurisdiction and the law presumes that the court has acted within its jurisdiction. This presumption is denied to the inferior courts. The judgment of a superior court unreservedly is conclusive as to all relevant matters thereby decided, while the judgment of the inferior court involving a question of jurisdiction is not final. The superior court, therefore, has jurisdiction to determine its own jurisdiction, may be rightly or wrongly. Therefore, the court in an appropriate proceeding may erroneously exercise jurisdiction. It does not constitute want of jurisdiction, but it impinges upon its propriety in the exercise of the jurisdiction. Want of jurisdiction can be established solely by a superior court and that in practice no decision can be impeached collaterally by an inferior court. However, acts done by a superior court are always deemed valid wherever they are relied upon. The exclusion thereof from the rule of validity is indispensable in its finality. The superior courts, therefore, are the final arbiters of the validity of the acts done not only by other inferior courts or authorities, but also their own decisions. Though they are immune from collateral attack, but to avoid confusion the superior court's decisions lay down the rules of validity; are not governed by those rules. The valid decision is not only conclusive, it may affect, but it is also conclusive in proceedings where it is sought to be collaterally impeached. However, the term conclusiveness may acquire other specific meanings. It may mean that the finding upon which the decision is founded as distinct or it is the operative part or has to be conclusive or these findings bind only parties on litigated disputes or that the organ which has made the decision is itself precluded from revoking, rescinding or otherwise altering it."

35. It would be pertinent to mention here that in light of above mentioned statements and cases, the High Court would not be incorrect or acting out of jurisdiction if it exercises its power under Article 226 to issue appropriate writ or direction or order in exceptional cases at the behest of a person accused of an offence triable under the Act or offence jointly triable with the offences under the Act.

36. It is pertinent to mention that though the High Courts have very wide powers under Article 226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles, so much so that while entertaining writ petitions for granting interim protection from arrest, the Court would not go on to the extent of including the provision of anticipatory bail as a blanket provision.

37. Thus, such a power has to be exercised very cautiously keeping in view, at the same time, that the provisions of Article 226 are a devise to advance justice and not to frustrate it. The powers are, therefore, to be exercised to prevent miscarriage of justice and to prevent abuse of process of law by authorities indiscriminately making pre-arrest of the accused persons. In entertaining such a petition under Article 226, the High Court is supposed to balance the two interests. On the one hand, the Court is to ensure that such a power under Article 226 is not to be exercised liberally so as to convert it into Section 438, Cr.P.C. proceedings, keeping in mind that when this provision is specifically omitted in the State of Uttar Pradesh, it cannot be resorted to as to back door entry via Article 226; On the other hand, wherever the High Court finds that in a given case if the protection against pre-arrest is not given, it would amount to gross miscarriage of justice and no case, at all, is made for arrest pending trial, the High Court would be free to grant the relief in the nature of anticipatory bail in exercise of its power under Article 226 of the Constitution. It is again clarified that this power has to be exercised sparingly in those cases where it is absolutely warranted and justified.

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IN THE SUPREME COURT OF INDIA

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[Before : K.S.Radhakrishnan, Vikramajit Sen]

Sundeep Kumar Bafna

versus

State of Maharashtra & Anr.

Case No. : Criminal Appeal No. 689 of 2014 [Arising out of SLP (Crl.) No. 1348 of 2014], Date of Decision : 27/03/2014

Criminal Procedure Code, 1973 -- Sections 437 & 439 -- Bail in non-bailable offences -- By the accused, who failed to obtain anticipatory bail -- He was given interim protection to surrender and obtain bail -- High Court refused to grant bail, thus present appeal to the Supreme Court -- Permission granted to surrender before Single Judge in the High Court -- Directions issued -- The impugned order is, accordingly, set aside -- The Learned Single Judge shall consider the Appellant's plea for surrendering to the Court and dependent on that decision, the Learned Single Judge shall, thereafter, consider the Appellant's plea for his being granted bail -- The Appellant shall not be arrested for a period of two weeks or till the final disposal of the said application, whichever is later -- We expect that the learned Single Judge shall remain impervious to any pressure that may be brought to bear upon him either from the public or from the media as this is the fundamental and onerous duty cast on every Judge -- The appeal is allowed in the above terms. [Paras 27 & 28]

Advocates Appeared :

For the Appellant : Mukul Rohatgi and V.K. Bali, Sr. Advocates, Saurabh Kirpal, Ms. Manali Singhal, Aditya Soni, Ms. Christine Aey Kumar, Abhikalp Pratap Singh and Santosh Sachin (for Nikhil Jain), Advocates.

For the Respondents : T.A. Rahman, Satbir Pillania, Somvir Deswal, R.C. Gubrele, Aniruddha P. Mayee and Charudatta Mahindrakar, Advocates.

For the (Complainant-in Person) : R. Merchant, Advocate.

Statutes Referred :

1. Code of Criminal Procedure -- S.439 2. Code of Criminal Procedure -- S.437 3. Code of Criminal Procedure -- S.439 4. Code of Criminal Procedure -- S.437

Cases Referred :

1. Adri Dharan Das v. State of West Bengal, (2005) 4 SCC 303 [Para 12]

2. Balchand Jain v. State of M.P., (1976) 4 SCC 572 [Para 16]

3. Balkrishna Dhondu Rani v. Manik Motiram Jagtap, 2005 (Supp.) Bom C.R.(Cri) 270 [Para 17]

4. Berkemer v. McCarty, 468 U.S. 420 (1984) [Para 11]

5. Bhagwant Singh v. Commissioner of Police, (1985) 2 SCC 537 [Para 24]

6. Chandra Prakash v. State of U.P., AIR 2002 SC 1652 [Para 14]

7. Dilawar Singh v. Parvinder Singh, (2005) 12 SCC 709 [Para 22]

8. Directorate of Enforcement v. Deepak Mahajan, (1994) 3 SCC 440 [Para 10]

9. Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 [Para 19]

10. Gurcharan Singh v. State, (1978) 1 SCC 118 [Para 8]

11. J.K. International v. State, (2001) 3 SCC 462 [Para 24]

12. Minnesota v. Murphy, 465 US 420 (1984) [Para 11]

13. Miranda v. Arizona, 384 US 436 (1966) [Para 11]

14. Niranjan Singh v. Prabhakar Rajaram Kharote, (1980) 2 SCC 559 [Paras 12 & 19]

15. Nirmal Jeet Kaur v. State of M.P., (2004) 7 SCC 558 [Para 12]

16. P.S.R. Sadhanantham v. Arunachalam, (1980) 3 SCC 141 [Para 7]

17. R v. Evans, (2012) 1 WLR 1192 [Para 22]

18. R. v. Suberu, [2009] S.C.J. No. 33 [Para 11]

19. R. v. Whitfield, 1969 CareswellOnt 138 [Para 11]

20. Raghubans Dubey v. State of Bihar, AIR 1967 SC 1167 [Para 22]

21. Rashmi Rekha Thatoi v. State of Orissa, (2012) 5 SCC 690 [Paras 16 & 19]

22. Roshan Beevi v. Joint Secretary, 1984(15) ELT 289 (Mad) [Para 10]

23. Shiv Kumar v. Hukam Chand, (1999) 7 SCC 467 [Para 24]

24. State of Haryana v. Bhajan Lal, 1992 (Supp)1 SCC 335 [Para 8]

25. State of Haryana v. Dinesh Kumar, (2008) 3 SCC 222 [Para 12]

26. Sunita Devi v. State of Bihar, (2005) 1 SCC 608 [Paras 12 & 19]

27. Thakur Ram v. State of Bihar, AIR 1966 SC 911 [Para 24]

28. U.S. ex rel. Wirtz v. Sheehan, D.C. Wis, 319 F. Supp. 146, 147 [Para 9]

29. Union of India v. Raghubir Singh, 1989 (2) SCC 754 [Para 13]

JUDGMENT/ORDER:
Vikramajit Sen, J.:--

1. Leave granted.

2. A neat legal nodus of ubiquitous manifestation and gravity has arisen before us. It partakes the character of a general principle of law with significance sans systems and States. The futility of the Appellant's endeavours to secure anticipatory bail having attained finality, he had once again knocked at the portals of the High Court of Judicature at Bombay, this time around for regular bail under Section 439 of the Code of Criminal Procedure (CrPC), which was declined with the observations that it is the Magistrate whose jurisdiction has necessarily to be invoked and not of the High Court or even the Sessions Judge. The legality of this conclusion is the gravemen of the appeal before us. While declining to grant anticipatory bail to the Appellant, this Court had extended to him transient insulation from arrest for a period of four weeks to enable him to apply for regular bail, even in the face of the rejection of his Special Leave Petition on 28.1.2014. This course was courted by him, in the event again in vain, as the bail application preferred by him under Section 439 CrPC has been dismissed by the High Court in terms of the impugned Order dated 6.2.2014. His supplications to the Bombay High Court were twofold; that the High Court may permit the petitioner to surrender to its jurisdiction and secondly, to enlarge him on regular bail under Section 439 of the Code, on such terms and conditions as may be deemed fit and proper.

3. In the impugned Judgment, the learned Single Judge has opined that when the Appellant's plea to surrender before the Court is accepted and he is assumed to be in its custody, the police would be deprived of getting his custody, which is not contemplated by law, and thus, the Appellant "is required to be arrested or otherwise he has to surrender before the Court which can send him to remand either to the police custody or to the Magisterial custody and this can only be done under Section 167 of CrPC by the Magistrate and that order cannot be passed at the High Court level." Learned Senior Counsel for the Appellant have fervidly assailed the legal correctness of this opinion. It is contended that the Magistrate is not empowered to grant bail to the Appellant, since he can be punished with imprisonment for life, as statutorily stipulated in Section 437(1) CrPC; CR No. 290 of 2013 stands registered with P.S. Mahim for offences punishable under Sections 288, 304, 308, 336, 388 read with 34 and Section 120-B of IPC. Learned Senior Counsel further contends that since the matter stands committed to Sessions, the Magistrate is denuded of all powers in respect of the said matter, for the reason that law envisages the commitment of a case and not of an individual accused.

4. While accepting the Preliminary Objection, the dialectic articulated in the impugned order is that law postulates that a person seeking regular bail must perforce languish in the custody of the concerned Magistrate under Section 167 CrPC. The Petitioner had not responded to the notices/summons issued by the concerned Magistrate leading to the issuance of non-bailable warrants against him, and when even these steps proved ineffectual in bringing him before the Court, measures were set in motion for declaring him as a proclaimed offender under Section 82 CrPC. Since this was not the position obtaining in the case, i.e. it was assumed by the

High Court that the Petitioner was not in custody, the application for bail under Section 439 of CrPC was held to be not maintainable. This conclusion was reached even though the petitioner was present in Court and had pleaded in writing that he be permitted to surrender to the jurisdiction of the High Court. We shall abjure from narrating in minute detail the factual matrix of the case as it is not essential to do so for deciding the issues that have arisen in the present Appeal.

Relevant Provisions in the CrPC Pertaining to Regular Bail:

5. The pandect providing for bail is Chapter XXXIII comprises Sections 436 to 450 of the CrPC, of which Sections 437 and 439 are currently critical. Suffice it to state that Section 438 which deals with directions for grant of bail to persons apprehending arrest does not mandate either the presence of the applicant in Court or for his being in custody. Section 437, inter alia, provides that if 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 if such person appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail in certain circumstances.

6. For facility of reference, Sections 437 and 439, both covering the grant of regular bail in non-bailable offences are reproduced hereunder. Section 438 has been ignored because it is the composite provision dealing only with the grant of anticipatory bail.

“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 --

(i) such person 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;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also 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:

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.

(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, subject to the provisions of section 446A and 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 Indian Penal Code (45 of 1860) or abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub- section (1) – the Court shall impose the conditions --

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter,

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person 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 or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.

(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 or special 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.

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 the 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."

7. Article 21 of the Constitution states that no person shall be deprived of his life or personal liberty except according to procedure established by law. We are immediately reminded of three sentences from the Constitution Bench decision in P.S.R. Sadhanantham v. Arunachalam (1980) 3 SCC 141, which we appreciate as poetry in prose - "Article 21, in its sublime brevity, guards human liberty by insisting on the prescription of procedure established by law, not fiat as sine qua non for deprivation of personal freedom. And those procedures so established must be fair, not fanciful, nor formal nor flimsy, as laid down in Maneka Gandhi case. So, it is axiomatic that our Constitutional jurisprudence mandates the State not to deprive a person of his personal liberty without adherence to fair procedure laid down by law". Therefore, it seems to us that constriction or curtailment of personal liberty cannot be justified by a conjectural dialectic. The only restriction allowed as a general principle of law common to all legal systems is the period of 24 hours post-arrest on the expiry of which an accused must mandatorily be produced in a Court so that his remand or bail can be judicially considered.

8. Some poignant particulars of Section 437 CrPC may be pinpointed. First, whilst Section 497(1) of the old Code alluded to an accused being "brought before a Court", the present provision postulates the accused being "brought before a Court other than the High Court or a Court of Session" in respect of the commission of any non-bailable offence. As observed in Gurcharan Singh v. State (1978) 1 SCC 118, there is no provision in the CrPC dealing with the production of an accused before the Court of Session or the High Court. But it must also be immediately noted that no provision categorically prohibits the production of an accused before either of these Courts. The Legislature could have easily enunciated, by use of exclusionary or exclusive terminology, that the superior Courts of Sessions and High Court are bereft of this jurisdiction or if they were so empowered under the Old Code now stood denuded thereof. Our understanding is in conformity with Gurcharan Singh, as perforce it must. The scheme of the CrPC plainly provides that bail will not be extended to a person accused of the commission of a non-bailable offence punishable with death or imprisonment for life, unless it is apparent to such a Court that it is incredible or beyond the realm of reasonable doubt that the accused is guilty. The enquiry of the Magistrate placed in this position would be akin to what is envisaged in State of Haryana v. Bhajan Lal, 1992 (Supp)1 SCC 335, that is, the alleged complicity of the accused should, on the factual matrix then presented or prevailing, lead to the overwhelming, incontrovertible and clear conclusion of his innocence. The CrPC severely curtails the powers of the Magistrate while leaving that of the Court of Session and the High Court untouched and unfettered. It appears to us that this is the only logical conclusion that can be arrived at on a conjoint consideration of Sections 437 and 439 of the CrPC. Obviously, in order to complete the picture so far as concerns the powers and limitations thereto of the Court of Session and the High Court, Section 439 would have to be carefully considered. And when this is done, it will at once be evident that the CrPC has placed an embargo against granting relief to an accused, (couched by us in the negative), if he is not in custody. It seems to us that any persisting ambivalence or doubt stands dispelled by the proviso to this Section, which mandates only that the Public Prosecutor should be put on notice. We have not found any provision in the CrPC or elsewhere, nor have any been brought to our ken, curtailing the power of either of the superior Courts to entertain and decide pleas for bail. Furthermore, it is incongruent that in the face of the Magistrate being virtually disempowered to grant bail in the event of detention or arrest without warrant of any person accused of or suspected of the commission of any non-bailable offence punishable by death or imprisonment for life, no Court is enabled to extend him succour. Like the science of physics, law also abhors the existence of a vacuum, as is adequately adumbrated by the common law maxim, viz. 'where there is a right there is a remedy'. The universal right of personal liberty emblazened by Article 21 of our Constitution, being fundamental to the very existence of not only to a citizen of India but to every person, cannot be trifled with merely on a presumptive plane. We should also keep in perspective the fact that Parliament has carried out amendments to this pandect comprising Sections 437 to 439, and, therefore, predicates on the well established principles of interpretation of statutes that what is not plainly evident from their reading, was never intended to be incorporated into law. Some salient features of these provisions are that whilst Section 437 contemplates that a person has to be accused or suspect of a non-bailable offence and consequently arrested or detained without warrant, Section 439 empowers the Session Court or High Court to grant bail if such a person is in custody. The difference of language manifests the sublime differentiation in the two provisions, and, therefore, there is no justification in giving the word 'custody' the same or closely similar meaning and content as arrest or detention. Furthermore, while Section 437 severally curtails the power of the Magistrate to grant bail in context of the commission of non-bailable offences punishable with death or imprisonment for life, the two higher Courts have only the procedural requirement of giving notice of the Bail application to the Public Prosecutor, which requirement is also ignorable if circumstances so demand. The regimes regulating the powers of the Magistrate on the one hand and the two superior Courts are decidedly and

intentionally not identical, but vitally and drastically dissimilar. Indeed, the only complicity that can be contemplated is the conundrum of 'Committal of cases to the Court of Session' because of a possible hiatus created by the CrPC.

Meaning of Custody:

9. Unfortunately, the terms 'custody', 'detention' or 'arrest' have not been defined in the CrPC, and we must resort to few dictionaries to appreciate their contours in ordinary and legal parlance. The Oxford Dictionary (online) defines custody as imprisonment, detention, confinement, incarceration, internment, captivity; remand, duress, and durance. The Cambridge Dictionary (online) explains 'custody' as the state of being kept in prison, especially while waiting to go to court for trial. Longman Dictionary (online) defines 'custody' as 'when someone is kept in prison until they go to court, because the police think they have committed a crime'. Chambers Dictionary (online) clarifies that custody is 'the condition of being held by the police; arrest or imprisonment; to take someone into custody to arrest them'. Chambers' Thesaurus supplies several synonyms, such as detention, confinement, imprisonment, captivity, arrest, formal incarceration. The Collins Cobuild English Dictionary for Advance Learners states in terms of that someone who is in custody or has been taken into custody or has been arrested and is being kept in prison until they get tried in a court or if someone is being held in a particular type of custody, they are being kept in a place that is similar to a prison. The Shorter Oxford English Dictionary postulates the presence of confinement, imprisonment, durance and this feature is totally absent in the factual matrix before us. The Corpus Juris Secundum under the topic of 'Escape & Related Offenses; Rescue' adumbrates that 'Custody, within the meaning of statutes defining the crime, consists of the detention or restraint of a person against his or her will, or of the exercise of control over another to confine the other person within certain physical limits or a restriction of ability or freedom of movement.' This is how 'Custody' is dealt with in Black's Law Dictionary, (9th ed. 2009):--

"Custody -- The care and control of a thing or person. The keeping, guarding, care, watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody. Also the detainer of a man's person by virtue of lawful process or authority.

The term is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession. Term "custody" within statute requiring that petitioner be "in custody" to be entitled to federal habeas corpus relief does not necessarily mean actual physical detention in jail or prison but rather is synonymous with restraint of liberty. U.S. ex rel. Wirtz v. Sheehan, D.C. Wis, 319 F. Supp. 146, 147. Accordingly, persons on probation or released on own recognizance have been held to be "in custody" for purposes of habeas corpus proceedings."

10. A perusal of the dictionaries thus discloses that the concept that is created is the controlling of a person's liberty in the course of a criminal investigation, or curtailing in a substantial or significant manner a person's freedom of action. Our attention has been drawn, in the course of Rejoinder arguments to the judgment of the Full Bench of the High Court of Madras in Roshan Beevi v. Joint Secretary 1984(15) ELT 289 (Mad), as also to the decision of the Court in Directorate of Enforcement v. Deepak Mahajan (1994) 3 SCC 440; in view of the composition of both the Benches, reference to the former is otiose. Had we been called upon to peruse Deepak Mahajan earlier, we may not have considered it necessary to undertake a study of several Dictionaries, since it is a convenient and comprehensive compendium on the meaning of arrest, detention and custody.

11. Courts in Australia, Canada, U.K. and U.S. have predicated in great measure, their decisions on paragraph 99 from Vol. II Halsbury's Laws of England (4th Edition) which states that – "Arrest consists of the actual seizure or touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer". The US Supreme Court has been called upon to explicate the concept of custody on a number of occasions, where, coincidentally, the plea that was proffered was the failure of the police to administer the Miranda caution, i.e. of apprising the detainee of his Constitutional rights. In Miranda v. Arizona 384 US 436 (1966), custodial interrogation has been said to mean "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way". In Minnesota v. Murphy 465 US 420 (1984), it was opined by the U.S. Supreme Court that since "no formal arrest or restraint on freedom of movement of the degree associated with formal arrest" had transpired, the Miranda doctrine had not become operative. In R. v. Whitfield 1969 CareswellOnt 138, the Supreme Court of Canada was called upon to decide whether the police officer, who directed the accused therein to stop the car and while seizing him by the shirt said "you are under arrest:", could be said to have been "custodially arrested" when the accused managed to sped away. The plurality of the Supreme Court declined to draw any distinction between an arrest amounting to custody and a mere or bare arrest and held that the accused was not arrested and thus could not have been guilty of "escaping from lawful custody". More recently, the Supreme Court of Canada has clarified in R. v. Suberu [2009] S.C.J. No. 33 that detention transpired only upon the interaction having the consequence of a significant deprivation of liberty. Further, in Berkemer v. McCarty 468 U.S. 420 (1984), a roadside questioning of a motorist detained pursuant to a routine traffic stop was not seen as analogous to custodial interrogation requiring adherence to Miranda rules.

12. It appears to us from the above analysis that custody, detention and arrest are sequentially cognate concepts. On the occurrence of a crime, the police is likely to carry out the investigative interrogation of a person, in the course of which the liberty of that individual is not impaired, suspects are then preferred by the police to undergo custodial interrogation during which their liberty is impeded and encroached upon. If grave suspicion against a suspect emerges, he may be detained in which event his liberty is seriously impaired. Where the investigative agency is of the opinion that the detainee or person in custody is guilty of the commission of a crime, he is charged of it and thereupon arrested. In Roshan Beevi, the Full Bench of the High Court of Madras, speaking through S. Ratnavel Pandian J, held that the terms 'custody' and 'arrest' are not synonymous even though in every arrest there is a deprivation of liberty is custody but not vice versa. This thesis is reiterated by Pandian J in Deepak Mahajan by deriving support from Niranjan Singh v. Prabhakar Rajaram Kharote (1980) 2 SCC 559. The following passages from Deepak Mahajan are worthy of extraction:--

"48. Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide Roshan Beevi.

49. While interpreting the expression 'in custody' within the meaning of Section 439 CrPC, Krishna Iyer, J. speaking for the Bench in Niranjan Singh v. Prabhakar Rajaram Kharote observed that: (SCC p. 563, para 9)

"He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions." (emphasis added)

If the third sentence of para 48 is discordant to Niranjan Singh, the view of the coordinate Bench of earlier vintage must prevail, and this discipline demands and constrains us also to adhere to Niranjan Singh; ergo, we reiterate that a person is in custody no sooner he surrenders before the police or before the appropriate Court. This enunciation of the law is also available in three decisions in which Arijit Pasayat J spoke for the 2-Judge Benches, namely (a) Nirmal Jeet Kaur v. State of M.P. (2004) 7 SCC 558 and (b) Sunita Devi v. State of Bihar (2005) 1 SCC 608, and (c) Adri Dharan Das v. State of West Bengal, (2005) 4 SCC 303, where the Co-equal Bench has opined that since an accused has to be present in Court on the moving of a bail petition under Section 437, his physical appearance before the Magistrate tantamounts to surrender. The view of Niranjan Singh (see extracted para 49 infra) has been followed in State of Haryana v. Dinesh Kumar (2008) 3 SCC 222. We can only fervently hope that member of Bar will desist from citing several cases when all that is required for their purposes is to draw attention to the precedent that holds the field, which in the case in hand, we reiterate is Niranjan Singh.

Rule of Precedent & Per Incuriam:

13. The Constitution Bench in Union of India v. Raghubir Singh, 1989 (2) SCC 754, has come to the conclusion extracted below:

"27. What then should be the position in regard to the effect of the law pronounced by a Division Bench in relation to a case raising the same point subsequently before a Division Bench of a smaller number of Judges? There is no constitutional or statutory prescription in the matter, and the point is governed entirely by the practice in India of the courts sanctified by repeated affirmation over a century of time. It cannot be doubted that in order to promote consistency and certainty in the law laid down by a superior Court, the ideal condition would be that the entire Court should sit in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions, each Division being constituted of Judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relative thereto, and by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the Rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges. …"

14. This ratio of Raghubir Singh was applied once again by the Constitution Bench in Chandra Prakash v. State of U.P.: AIR 2002 SC 1652. We think it instructive to extract the paragraph 22 from Chandra Prakash in order to underscore that there is a consistent and constant judicial opinion, spanning across decades, on this aspect of jurisprudence:

"Almost similar is the view expressed by a recent judgment of a five-Judge Bench of this Court in Parija's case (supra). In that case, a Bench of two learned Judges doubted the correctness of the decision a Bench of three learned Judges, hence, directly referred the matter to a Bench of five learned Judges for reconsideration. In such a situation, the five-Judge Bench held that judicial discipline and propriety demanded that a Bench of two learned Judges should follow the decision of a Bench of three learned Judges. On this basis, the five-Judge Bench found fault with the reference made by the two-Judge Bench based on the doctrine of binding precedent."

15. It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Co-equal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam.

Validation of Ratio in Niranjan Singh:

16. We must now discuss in detail the decision of a Two-Judge Bench in Rashmi Rekha Thatoi v. State of Orissa, (2012) 5 SCC 690, for the reason that in the impugned Order the Single Judge of the High Court has proclaimed, which word we used intentionally, that Niranjan Singh is per incuriam. The 'chronology of cases' mentioned in Rashmi Rekha elucidates that there is only one judgment anterior to Niranjan Singh, namely, Balchand Jain v. State of M.P. (1976) 4 SCC 572, which along with the Constitution Bench decision in Gurbaksh Singh Sibbia, intrinsically concerned itself only with anticipatory bail. It is necessary to give a salutary clarion caution to all Courts, including High Courts, to be extremely careful and circumspect in concluding a judgment of the Supreme Court to be per incuriam. In the present case, in the impugned Order the learned Single Judge appears to have blindly followed the incorrect and certainly misleading editorial note in the Supreme Court Cases* without taking the trouble of conscientiously apprising himself of the context in which Rashmi Rekha appears to hold Niranjan Singh per incuriam, and equally importantly, to which previous judgment. An earlier judgment cannot possibly be seen as per incuriam a later judgment as the latter if numerically stronger only then it would overrule the former. Rashmi Rekha dealt with anticipatory bail under Section 438 and only tangentially with Sections 437 and 439 of the CrPC, and while deliberations and observations found in this clutch of cases may not be circumscribed by the term obiter dicta, it must concede to any judgment directly on point. In the factual matrix before us, Niranjan Singh is the precedent of relevance and not Gurbaksh Singh Sibbia or any other decision where the scope and sweep of anticipatory bail was at the fulcrum of the conundrum.

*(Edited by Corrigendum No. F. 3/Ed. B.J./29/2014, dt. 23.05.2014)

17. Recently, in Dinesh Kumar, this conundrum came to be considered again. This Court adhered to the Niranjan Singh dicta (as it was bound to do), viz. that a person can be stated to be in judicial custody when he surrendered before the Court and submits to its directions. We further regretfully observe that the impugned Judgment is repugnant to the analysis carried out by two coordinate Benches of the High Court of Bombay itself, which were duly cited on behalf of the Appellant. The first one is reported as Balkrishna Dhondu Rani v. Manik Motiram Jagtap 2005 (Supp.) Bom C.R.(Cri) 270 which applied Niranjan Singh; the second is by a different Single Bench, which correctly applied the first. In the common law system, the purpose of precedents is to impart predictability to law, regrettably the judicial indiscipline displayed in the impugned Judgment, defeats it. If the learned Single Judge who had authored the impugned Judgment irrepressibly held divergent opinion and found it unpalatable, all that he could have done was to draft a reference to the Hon'ble Chief Justice for the purpose of constituting a larger Bench; whether or not to accede to this request remains within the discretion of the Chief Justice. However, in the case in hand, this avenue could also not have been traversed since Niranjan Singh binds not only Co-equal Benches of the Supreme Court but certainly every Bench of any High Court of India. Far from being per incuriam, Niranjan Singh has metamorphosed into the structure of stare decisis, owing to it having endured over two score years of consideration, leading to the position that even Larger Benches of this Court should hesitate to remodel its ratio.

18. It will also be germane to briefly cogitate on the fasciculous captioned "Section 438 of the Code of Civil Procedure, as amended by the Code of Criminal Procedure (Amendment) Act, 2005 of the 203rd Report of the Law Commission. Although, the Law Commission was principally focused on the parameters of anticipatory bail, it had reflected on Niranjan Singh, and, thereafter, observed in paragraph 6.3.23 that "where a person appears before the Court in compliance with any Court's order and surrenders himself to the Court's directions or control, he may be granted regular bail, since he is already under restraint. The provisions relating to the anticipatory bail may not be attracted in such a case". An amendment was proposed to the provisions vide CrPC (Amendment) Act, 2005 making the presence of the applicant seeking anticipatory bail obligatory at the time of final hearing of the application for enlargement on bail. The said amendment has not been notified yet and kept in abeyance because of two reasons. Firstly, the amendment led to widespread agitation by the lawyers fraternity since it would virtually enable the police to immediately arrest an accused in the event the Court declined to enlarge the accused on bail. Secondly, in the perception of the Law Commission, it would defeat the very purpose of the anticipatory bail. The conclusion of the Law Commission, in almost identical words to those extracted above are that: "when the applicant appears in the Court in compliance of the Court's order and is subjected to the Court's directions, he may be viewed as in Court's custody and this may render the relief of anticipatory bail infructuous". Accordingly, the Law Commission has recommended omission of sub-section (1- B) of Section 438 CrPC.

19. The Appellant had relied on Niranjan Singh v. Prabhakar Rajaram Kharote (1980) 2 SCC 559, before the High Court as well as before us. A perusal of the impugned Order discloses that the learned Single Judge was of the mistaken opinion that Niranjan Singh was per incuriam, possibly because of an editorial error in the reporting of the later judgment in Rashmi Rekha Thatoi v. State of Orissa (2012) 5 SCC 690. In the latter decision the curial assault was to the refusal to grant of anticipatory bail under Section 438(1) CrPC, yet nevertheless enabling him to surrender before the Sub Divisional Magistrate and thereupon to be released on bail. In the appeal in hand this issue is not in focus; the kernel of the conundrum before us is the meaning to be ascribed to the concept of custody in Section 439 CrPC, and a careful scrutiny of Rashmi Rekha will disclose that it does not even purport to or tangentially intend to declare Niranjan Singh as per incuriam. Any remaining doubt would be dispelled on a perusal of Ranjit Singh v. State of M.P., where our esteemed Brother Dipak Misra has clarified that Rashmi Rekha concerned itself only with anticipatory bail. The impugned Order had therefore to remain in complete consonance with Niranjan Singh. It needs to be clarified that paragraph 14 of Sunita Devi v. State of Bihar (2005) 1 SCC 608, extracts verbatim paragraph 7 of Niranjan Singh, without mentioning so. The annals of the litigation in Niranjan Singh are that pursuant to a private complaint under Section 202 CrPC, the concerned Magistrate issued non-bailable warrants in respect of the accused, and subsequently while refusing bail to them had neglected to contemporaneously cause them to be taken into custody. In that interregnum or hiatus, the accused moved the Sessions Court which granted them bail albeit on certain terms which the High Court did not interfere therewith. This Court, speaking through Krishna Iyer J elucidated the law in these paragraphs:

"6. Here the respondents were accused of offences but were not in custody, argues the petitioner so no bail, since this basic condition of being in jail is not fulfilled. This submission has been rightly rejected by the courts below. We agree that, in one view, an outlaw cannot ask for the benefit of law and he who flees justice cannot claim justice. But here the position is different. The accused were not absconding but had appeared and surrendered before the Sessions Judge. Judicial jurisdiction arises only when persons are already in custody and seek the process of the court to be enlarged. We agree that no person accused of an offence can

move the court for bail under Section 439 CrPC unless he is in custody.

7. When is a person in custody, within the meaning of Section 439 CrPC? When he is in duress either because he is held by the investigating agency or other police or allied authority or is under the control of the court having been remanded by judicial order, or having offered himself to the court's jurisdiction and submitted to its orders by physical presence. No lexical dexterity nor precedential profusion is needed to come to the realistic conclusion that he who is under the control of the court or is in the physical hold of an officer with coercive power is in custody for the purpose of Section 439; This word is of elastic semantics but its core meaning is that the law has taken control of the person. The equivocatory quibblings and hide-and-seek niceties sometimes heard in court that the police have taken a man into informal custody but not arrested him, have detained him for interrogation but not taken him into formal custody and other like terminological dubieties are unfair evasions of the straightforwardness of the law. We need not dilate on this shady facet here because we are satisfied that the accused did physically submit before the Sessions Judge and the jurisdiction to grant bail thus arose.

8. Custody, in the context of Section 439, (we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.

9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. He can be stated to be in judicial custody when he surrenders before the court and submits to its directions. In the present case, the police officers applied for bail before a Magistrate who refused bail and still the accused, without surrendering before the Magistrate, obtained an order for stay to move the Sessions Court. This direction of the Magistrate was wholly irregular and maybe, enabled the accused persons to circumvent the principle of Section 439 CrPC. We might have taken a serious view of such a course, indifferent to mandatory provisions, by the subordinate magistracy but for the fact that in the present case the accused made up for it by surrender before the Sessions Court. Thus, the Sessions Court acquired jurisdiction to consider the bail application. It could have refused bail and remanded the accused to custody, but, in the circumstances and for the reasons mentioned by it, exercised its jurisdiction in favour of grant of bail. The High Court added to the conditions subject to which bail was to be granted and mentioned that the accused had submitted to the custody of the court. We, therefore, do not proceed to upset the order on this ground. Had the circumstances been different we would have demolished the order for bail. We may frankly state that had we been left to ourselves we might not have granted bail but, sitting under Article 136, do not feel that we should interfere with a discretion exercised by the two courts below." (Emphasis added by us)

It should not need belabouring that High Courts must be most careful and circumspect in concluding that a decision of a superior Court is per incuriam. And here, palpably without taking the trouble of referring to and reading the precedents alluded to, casually accepting to be correct a careless and incorrect editorial note, the Single Judge has done exactly so. All the cases considered in Rashmi Rekha including the decision of the Constitution Bench in Gurbaksh Singh Sibbia v. State of Punjab (1980) 2 SCC 565, concentrated on the contours and circumference of anticipatory bail, i.e. Section 438. We may reiterate that the Appellant's prayer for anticipatory bail had already been declined by this Court, which is why he had no alternative but to apply for regular bail. Before we move on we shall reproduce the following part of paragraph 19 of Sibbia as it has topicality:--

"19 … Besides, if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principles stated by this Court in State of U.P. v. Deoman Upadhyaya to the effect that when a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed so have surrendered himself to the police. The broad foundation of this rule is stated to be that Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. For similar reasons, we are unable to agree that anticipatory bail should be refused if a legitimate case for the remand of the offender to the police custody under Section 167(2) of the Code is made out by the investigating agency."

20. In this analysis, the opinion in the impugned Judgment incorrectly concludes that the High Court is bereft or devoid of power to jurisdiction upon a petition which firstly pleads surrender and, thereafter, prays for bail. The High Court could have perfunctorily taken the Appellant into its custody and then proceeded with the perusal of the prayer for bail; in the event of its coming to the conclusion that sufficient grounds had not been disclosed for enlargement on bail, necessary orders for judicial or police custody could have been ordained. A Judge is expected to perform his onerous calling impervious of any public pressure that may be brought to bear on him.

The Conundrum of Cognizance, Committal & Bail

21. We have already noted in para 8 the creation by the CrPC of a hiatus between the cognizance of an offence by the Magistrate and the committal by him of that offence to the Court of Session. Section 190 contemplates the cognizance of an offence by a Magistrate in any of the following four circumstances: (i) upon receiving a complaint of facts; or (ii) upon a police report of such facts; or (iii) upon information received from any person other than a police officer, or (iv) upon the Magistrate's own knowledge. Thereafter, Section 193 proscribes the Court of Session from taking cognizance of any offence, as a Court of original jurisdiction, unless the case has been committed to it by a Magistrate; its Appellate jurisdiction is left untouched. Chapter XVI makes it amply clear that a substantial period may inevitably intervene between a Magistrate taking cognizance of an offence triable by Sessions and its committal to the Court of Session. Section 204 casts the duty on a Magistrate to issue process; Section 205 empowers him to dispense with personal attendance of accused; Section 206 permits Special summons in cases of petty offence; Sections 207 and 208 obligate the Magistrate to furnish to the accused, free of cost, copies of sundry documents mentioned therein; and, thereafter, under Section 209 to commit the case to Sessions. What is to happen to the accused in this interregnum; can his liberty be jeopardized! The only permissible restriction to personal freedom, as a universal legal norm, is the arrest or detention of an accused for a reasonable period of 24 hours. Thereafter, the accused would be entitled to seek before a Court his enlargement on bail. In

connection with serious offences, Section 167 CrPC contemplates that an accused may be incarcerated, either in police or judicial custody, for a maximum of 90 days if the Charge Sheet has not been filed. An accused can and very often does remain bereft of his personal liberty for as long as three months and law must enable him to seek enlargement on bail in this period. Since severe restrictions have been placed on the powers of a Magistrate to grant bail, in the case of an offence punishable by death or for imprisonment for life, an accused should be in a position to move the Courts meaningfully empowered to grant him succour. It is inevitable that the personal freedom of an individual would be curtailed even before he can invoke the appellate jurisdiction of Sessions Judge. The Constitution therefore requires that a pragmatic, positive and facilitative interpretation be given to the CrPC especially with regard to the exercise of its original jurisdiction by the Sessions Court. We are unable to locate any provision in the CrPC which prohibits an accused from moving the Court of Session for such a relief except, theoretically, Section 193 which also only prohibits it from taking cognizance of an offence as a Court of original jurisdiction. This embargo does not prohibit the Court of Session from adjudicating upon a plea for bail. It appears to us that till the committal of case to the Court of Session, Section 439 can be invoked for the purpose of pleading for bail. If administrative difficulties are encountered, such as, where there are several Additional Session Judges, they can be overcome by enabling the accused to move the Sessions Judge, or by further empowering the Additional Sessions Judge hearing other Bail Applications whether post committal or as the Appellate Court, to also entertain Bail Applications at the pre-committal stage. Since the Magistrate is completely barred from granting bail to a person accused even of an offence punishable by death or imprisonment for life, a superior Court such as Court of Session, should not be incapacitated from considering a bail application especially keeping in perspective that its powers are comparatively unfettered under Section 439 of the CrPC.

22. In the case in hand, we need not dwell further on this question since the Appellant has filed an application praying, firstly, that he be permitted to surrender to the High Court and secondly, for his plea to be considered for grant of bail by the High Court. We say this because there are no provisions in the CrPC contemplating the committal of a case to the High Court, thereby logically leaving its powers untrammelled. There are no restrictions on the High Court to entertain an application for bail provided always the accused is in custody, and this position obtains as soon as the accused actually surrenders himself to the Court. Reliance on R v. Evans, (2012) 1 WLR 1192, by learned Senior Counsel for the respondents before us is misplaced, since on its careful reading, the facts are totally distinguishable inasmuch as the accused in that case had so engineered events as not to be available in persona in the Court at the time of the consideration of his application for surrender. The Court of Appeal observed that they “do not agree that reporting to the usher amounts to surrender”. The Court in fact supported the view that surrender may also be accomplished by the commencement of any hearing before the Judge, however brief, where the accused person is formally identified and plainly would overtly have subjected himself to the control of the Court. Incontrovertibly, at the material time the Appellant was corporeally present in the Bombay High Court making Evans applicable to the case of the Appellant rather than the case of the respondent. A further singularity of the present case is that the offence has already been committed to Sessions, albeit, the accused/Appellant could not have been brought before the Magistrate. It is beyond cavil “that a Court takes cognizance of an offence and not an offender” as observed in Dilawar Singh v. Parvinder Singh, (2005) 12 SCC 709, in which Raghubans Dubey v. State of Bihar, AIR 1967 SC 1167, was applied. Therefore, the High Court was not justified in directing the Appellant to appear before the Magistrate.

23. On behalf of the State, the submission is that the prosecution should be afforded a free and fair opportunity of subjecting the accused to custody for interrogation as provided under Section 167 CrPC. This power rests with the Magistrate and not with the High Court, which is the Court of Revision and Appeal; therefore, the High Court under Section 482 CrPC can only correct or rectify an order passed without jurisdiction by a subordinate Court. Learned State counsel submits that the High Court in exercise of powers under Section 482 can convert the nature of custody from police custody to judicial custody and vice versa, but cannot pass an Order of first remanding to custody. Therefore, the only avenue open to the accused is to appear before the Magistrate who is empowered under Section 167 CrPC. Thereupon, the Magistrate can order for police custody or judicial custody or enlarge him on bail. On behalf of the State, it is contended that if accused persons are permitted to surrender to the High Court, it is capable of having, if not a disastrous, certainly a deleterious effect on investigations and shall open up the flood gates for accused persons to make strategies by keeping themselves away from the investigating agencies for months on end. The argument continues that in this manner absconding accused in several sensitive cases, affecting the security of the nation or the economy of the country, would take advantage of such an interpretation of law and get away from the clutches of the investigating officer. We are not impressed by the arguments articulated by learned Senior Counsel for the Complainant or informant because it is axiomatic that any infraction or inroad to the freedom of an individual is possible only by some clear unequivocal and unambiguous procedure known to law.

Role of Public Prosecutor and Private Counsel in Prosecution

24. The concern of the Three Judge Bench in Thakur Ram v. State of Bihar AIR 1966 SC 911, principally was whether the case before them should have been committed to Sessions, as also whether this plea could be countenanced at the stage when only the Judgment was awaited and any such interference would effectuate subjecting the accused to face trial virtually de novo. The observations that where “a case has proceeded on a police report a private party has really no locus standi, since the aggrieved party is the State”, are strictly senso obiter dicta but it did presage the view that was to be taken by this Court later. In Bhagwant Singh v. Commissioner of Police, (1985) 2 SCC 537, another Three Judge Bench formulated the question which required its answer that “whether in a case where First Information Report is lodged and after completion of investigation initiated on the basis of the First Information Report, the police submits a report that no offence appears to have been committed, the Magistrate can accept the report and drop the proceeding without issuing notice to the first informant or to the injured or in case the incident has resulted in death, to the relatives of the deceased”. Sections 154, 156, 157, 173 and 190 of the CrPC were duly considered threadbare, before opining thus:--

“4. ….when, on a consideration of the report made by the officer- in-charge of a police station under sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process…..

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"5. The position may however, be a little different when we consider the question whether the injured person or a relative of the deceased, who is not the informant, is entitled to notice when the report comes up for consideration by the Magistrate. We cannot spell out either from the provisions of the Code of Criminal Procedure, 1973 or from the principles of natural justice, any obligation on the Magistrate to issue notice to the injured person or to a relative of the deceased for providing such person an opportunity to be heard at the time of consideration of the report, unless such person is the informant who has lodged the First Information Report. But even if such person is not entitled to notice from the Magistrate, he can appear before the Magistrate and make his submissions when the report is considered by the Magistrate for the purpose of deciding what action he should take on the report……"

Thereafter, in Shiv Kumar v. Hukam Chand (1999) 7 SCC 467, the question that was posed before another Three Judge Bench was whether an aggrieved has a right to engage its own counsel to conduct the prosecution despite the presence of the Public Prosecutor. This Court duly noted that the role of the Public Prosecutor was upholding the law and putting together a sound prosecution; and that the presence of a private lawyer would inexorably undermine the fairness and impartiality which must be the hallmark, attribute and distinction of every proper prosecution. In that case the advocate appointed by the aggrieved party ventured to conduct the cross-examination of the witness which was allowed by the Trial Court but was reversed in Revision by the High Court, and the High Court permitted only the submission of Written Argument after the closure of evidence. Upholding the view of the High Court, this Court went on to observe that before the Magistrate any person (except a police officer below the rank of Inspector) could conduct the prosecution, but that this laxity is impermissible in Sessions by virtue of Section 225 of the CrPC, which pointedly states that the prosecution shall be conducted by a Public Prosecutor. We, respectfully, agree with the observations that -- "A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well. …….. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor." In J.K. International v. State (2001) 3 SCC 462, the Appellant had filed a complaint alleging offences under Sections 420, 406 and 120-B IPC in respect of which a Charge Sheet was duly filed. The Appellant preferred a petition in the High Court for quashing the FIR in which proceeding the complainant's request for being heard was rejected by the High Court. Thakur Ram and Bhagwant Singh were cited and analysed. It was reiterated by this Court that it is the Public Prosecutor who is in the management of the prosecution the Court should look askance at frequent interjection and interference by a private person. However, if the proceedings are likely to be quashed, then the complainant should be heard at that stage, rather than compelling him to assail the quashment by taking recourse to an appeal. Sections 225, 301 and 302 were also adverted to and, thereafter, it was opined that a private person is not altogether eclipsed from the scenario, as he remains a person who will be prejudiced by an order culminating in the dismissal of the prosecution. The Three Judge Bench observed that upon the Magistrate becoming prescient that a prosecution is likely to end in its dismissal, it would be salutary to allow a hearing to the Complainant at the earliest; and, in the case of a Sessions trial, by permitting the filing of Written Arguments.

25. The upshot of this analysis is that no vested right is granted to a complainant or informant or aggrieved party to directly conduct a prosecution. So far as the Magistrate is concerned, comparative latitude is given to him but he must always bear in mind that while the prosecution must remain being robust and comprehensive and effective it should not abandon the need to be free, fair and diligent. So far as the Sessions Court is concerned, it is the Public Prosecutor who must at all times remain in control of the prosecution and a counsel of a private party can only assist the Public Prosecutor in discharging its responsibility. The complainant or informant or aggrieved party may, however, be heard at a crucial and critical juncture of the Trial so that his interests in the prosecution are not prejudiced or jeopardized. It seems to us that constant or even frequent interference in the prosecution should not be encouraged as it will have a deleterious impact on its impartiality. If the Magistrate or Sessions Judge harbours the opinion that the prosecution is likely to fail, prudence would prompt that the complainant or informant or aggrieved party be given an informal hearing. Reverting to the case in hand, we are of the opinion that the complainant or informant or aggrieved party who is himself an accomplished criminal lawyer and who has been represented before us by the erudite Senior Counsel, was not possessed of any vested right of being heard as it is manifestly evident that the Court has not formed any opinion adverse to the prosecution. Whether the Accused is to be granted bail is a matter which can adequately be argued by the State Counsel. We have, however, granted a full hearing to Mr. Gopal Subramanium, Senior Advocate and have perused detailed Written Submissions since we are alive to impact that our opinion would have on a multitude of criminal trials.

26. In conclusion, therefore, we are of the opinion that the learned Single Judge erred in law in holding that he was devoid of jurisdiction so far as the application presented to him by the Appellant before us was concerned. Conceptually, he could have declined to accept the prayer to surrender to the Courts' custody, although, we are presently not aware of any reason for this option to be exercised. Once the prayer for surrender is accepted, the Appellant before us would come into the custody of the Court within the contemplation of Section 439 CrPC. The Sessions Court as well as the High Court, both of which exercised concurrent powers under Section 439, would then have to venture to the merits of the matter so as to decide whether the applicant/Appellant had shown sufficient reason or grounds for being enlarged on bail.

27. The impugned Order is, accordingly, set aside. The Learned Single Judge shall consider the Appellant's plea for surrendering to the Court and dependent on that decision, the Learned Single Judge shall, thereafter, consider the Appellant's plea for his being granted bail. The Appellant shall not be arrested for a period of two weeks or till the final disposal of the said application, whichever is later. We expect that the learned Single Judge shall remain impervious to any pressure that may be brought to bear upon him either from the public or from the media as this is the fundamental and onerous duty cast on every Judge.

28. The appeal is allowed in the above terms.