GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

TWO HUNDERED AND THIRD REPORT

ON

SECTION 438 OF THE CODE OF CRIMINAL PROCEDURE, 1973 AS AMENDED BY THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2005 (ANTICIPATORY BAIL)

DECEMBER 2007

Dr. Justice AR. Lakshmanan
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D.O. No.6(3)128/2006-LC(LS) December 26, 2007

Dear Dr. Bhardwaj ji,

Sub:**203rd Report of the Law Commission on 'Anticipatory Bail'**

I have great pleasure in forwarding the 203rd Report of the Law Commission on 'Section 438 of the Code of Criminal Procedure, 1973' as amended by the Code of Criminal Procedure (Amendment) Act, 2005, dealing with 'anticipatory bail'.

The enforcement of the amended Section has been kept in abeyance by the Government in view of lawyers' objections thereto. Before taking a final decision in the matter, the Government decided to seek the expert opinion of this Commission on the amended Section. Hence, the present reference.

The Ministry of Home Affairs, in their D.O. letter No. 12/53/2006-Judl.Cell, dated September 19, 2006, sought the opinion of the Law Commission of India on the amended version of Section 438 Cr.P.C. The Section has been amended to the effect that:

(i) the power to grant anticipatory bail should be exercised by the Court of Session or the High Court after taking into consideration certain factors;

(ii) upon consideration of these factors, the Court will either reject the application or issue an

interim order for the grant of anticipatory bail in the first instance;

(iii) where the Court has rejected the application or has not passed any interim order, it will be open to the officer-in-charge of a Police Station to arrest the applicant, without warrant, on the basis of the accusation apprehended in the application for the grant of anticipatory bail;

(iv) where the Court makes an interim order for the grant of interim bail, it will forthwith give a notice being not less than seven days' notice to the Public Prosecutor and the Superintendent of the Police with a view to give them an opportunity of being heard when the application is finally heard;

(v) the presence of the applicant seeking anticipatory bail will be obligatory at the time of final hearing of the application if the Court considers such presence necessary in the interest of justice on an application made by the Public Prosecutor for such presence.

The principal objection against the new provisions has been the personal presence of the applicant at the time of final hearing of the application. The main apprehension has been that the applicant could be arrested in the event of rejection of his application and the applicant would thus be deprived of his right to move the higher court for necessary relief.

In this 203rd Report, the Law Commission has made an in-depth study of the scope and ambit of the existing as well as the amended Section with reference to the case law on the subject before making its recommendations. A draft text for revising the Section is also given in the concluding Chapter of the Report.

As regards the Proviso to sub-section (1) of Section 438, as amended, permitting arrest of the applicant by the police without warrant on the basis of the accusations apprehended in the application for grant of anticipatory bail, the Law Commission has been of the view that the proviso is more of explanatory nature and clarifies that there shall no bar against such arrest by the police in the circumstances mentioned therein if there are otherwise reasonable grounds to make such arrest. The Commission noted that the correct law was laid down by the Hon'ble Supreme Court on this aspect in the case of M.C. Abraham and another Vs State of Maharashtra and others, (2003) 2 SCC 649. Accordingly, the power of arrest is not to be exercised in a mechanical manner but with caution and circumspection. The mere fact that the bail applications are rejected is no ground for directing the applicants' immediate arrest. There may be cases where an application may be rejected and yet the applicant is not put up for trial as, after investigation, no material is found against him. In this case, the apex court held that the High Court proceeded on the assumption that since petitions for anticipatory bails were rejected, there was no option for the State but to arrest those persons. This assumption, the Supreme Court said, was erroneous. Accordingly, the Commission has concluded that it is not necessary to have the Proviso inserted in Section 438(1) and recommended its omission.

As regards sub–section (1B) relating to the presence of the applicant at the time of final hearing, the Law Commission has gone in depth in the nitty gritty of restraint and custody to which the applicant may be subjected to in terms of the Court's order under sub-section (1B). The Law Commission has come to the conclusion 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 (1B) of Section 438 Cr.P.C.

During the course of its examination of the subject, the Law Commission noted plethora of case-law as to in what order the Court of Session and the High Court should be approached under Section 438 as well as the grant, or as the case may be, denial of anticipatory bail after an application for the same relief has been considered and disposed of by one of the two alternative judicial forums. It is noted that concurrent powers under the Section are vested in the two courts in their original jurisdiction. This might be for the reason that orders for grant or refusal of bail are interlocutory orders against which no revision lie. But this position was obtained when the law does not provide for interim and final orders on anticipatory bail applications and such applications are ordinarily filed in pending cases. Now, when even registration of FIR is not considered necessary for serving an anticipatory bail application and final orders are required to be passed after hearing the applicants and the State authorities, the scenario has materially altered. Accordingly, the Law Commission has recommended insertion of a provision in the Section 438 on the lines of sub-section (3) of Section 397 providing for an option to choose either the Court of Session or the High Court in which concurrent powers of revision are vested and once that option is exercised, the recourse to the other alternative forum is barred for the same relief. However, all other existing remedy against such a final order will continue to be available except to the extent as aforesaid. In addition, the benefit of revision under Section 397 are recommended and for this purpose, also with a view to place the matter beyond pale of any controversy, an Explanation is recommended to be inserted to clarify that

a final order on an anticipatory bail application will not be construed as an interlocutory order for the purposes of the Code.

The Law Commission has thus recommended revision of the amended Section 438 as follows:

(i) The proviso to sub-section (1) of Section 438 shall be omitted.

(ii) Sub-section (1B) shall be omitted.

(iii) A new sub-section on the lines of Section 397 (3) should be inserted.

(iv) An Explanation should be inserted clarifying that a final order on an application seeking direction under the Section shall not be construed as an interlocutory order for the purposes of the Code.

The Report contains the text of Section 438 so revised in its final chapter.

We, therefore, request you to kindly issue instructions for transmission of this 203rd Report to the Ministry of Home Affairs.

With respectful Regards,

Yours sincerely,

(Dr. Justice AR. Lakshmanan)

Dr. H.R. Bhardwaj,
Union Minister of Law & Justice,
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Encl: as above

LAW COMMISSION OF INDIA

SECTION 438 OF THE CODE OF CRIMINAL PROCEDURE, 1973 AS AMENDED BY THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2005 (ANTICIPATORY BAIL)

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CHAPTER–1

INTRODUCTION

1.1 This Report deals with Section 438 of the Code of Criminal Procedure, 1973 as amended by the Code of Criminal Procedure (Amendment) Act, 2005. This Section provides for a direction from the Court of competent jurisdiction, viz. the High Court or the Court of Session, for grant of bail to person apprehending arrest in the event of his arrest. This is popularly known as 'Anticipatory Bail', that is to say, bail in anticipation of arrest. The amended Section has not yet been brought into force.

1.2 It is expedient to state briefly the genesis of this Report so that its scope can be properly understood and appreciated in its right perspective.

1.3 Vide its D.O. letter No. 12/53/2006-Judl.Cell, dated September 19, 2006, Ministry of Home Affairs, Government of India, made the present reference, the relevant extracts of which read as follows:-

> "The Code of Criminal Procedure (Amendment) Act, 2005 has a provision vide clause 38 to amend Section 438 Cr.P.C. to the effect that (i) the power to grant anticipatory bail should be exercised by the Court of Session or High Court after taking into consideration certain circumstances; (ii) if the Court does not reject the application for the grant of anticipatory bail, and makes an interim order of bail,

it should, forthwith give notice to the Public Prosecutor and Superintendent of Police and the question of bail would be re-examined in the light of the respective contentions of the parties; and (iii) the presence of the person seeking anticipatory bail in the Court should be made mandatory at the time of hearing of the application for the grant of anticipatory bail subject to certain exceptions.

The Bill, after being passed by Parliament, the lawyers' fraternity from various parts of the country especially from the State of Tamil Nadu protested against some of the provisions of the Act including the proposed amendment to Section 438 Cr.P.C. relating to anticipatory bail.

The principal objection against the new provision is that a person seeking advanced bail has to be present in Court when the petition is taken up. The main apprehension is that the suspect could be arrested as soon as Sessions Court rejects his anticipatory bail application, if he is present in the Court. The lawyers' fraternity feels that such provision would deny the accused the right to move higher courts for relief/appeal. Grant of anticipatory bail is a power concurrently vested in both the Sessions Court and the High Court. The Lawyers fear that the suspects may be arrested even before they could exhaust their option of moving the High Court.

In view of the strong protest against this provision by the Lawyers fraternity, giving effect to this provision was kept in abeyance and it

was decided to seek expert opinion of the Law Commission of India on the amended version of Section 438 Cr.P.C."

1.4 Accordingly, the Law Commission was requested to examine the amended version of Section 438 Cr.P.C. and to suggest a revised version which might have the required provision to enable the accused to get due opportunity to approach higher courts with his plea before being apprehended by police.

1.5 On a query by this Commission, the Ministry of Home Affairs clarified, vide their Office Memorandum No. 12/53/2006-Judl.Cell, dated August 8, 2007 as follows:

"The amendment made to Section 438 Cr.P.C. was on the basis of the suggestions made by the Inspectors General of Police Conference, 1981. At the behest of the Committee of Secretaries, a Group of Officers consisting of Director, CBI, Director, BPR&D, Chief Secretary, Delhi, Additional Secretary, MHA and Joint Secretary in the Department of Legal Affairs was constituted to examine the suggestions made by the aforesaid Inspectors General of Police Conference. The Group of Officers agreed with the suggestion to amend Section 438 Cr.P.C. as suggested by Inspectors General of Police Conference and accordingly this was included in the Code of Criminal Procedure (Amendment) Bill, 1994 which was introduced in the Rajya Sabha on 9th May, 1994.

The proposal which was considered and passed in Parliament went through consideration and checking at various levels including the

Law Ministry, Parliamentary Standing Committee on Home Affairs, etc.

After consideration and passing of the Bill in Parliament during the budget session of 2005, the lawyers' fraternity from many parts of the country particularly from the State of Tamil Nadu strongly protested against some of the provisions including amendment made to Section 438 Cr.P.C. Therefore, a proposal was made to give effect to those provisions of the Act which have not been objected to by a large section. As regards those provisions which did not find favour with the lawyers' fraternity, it was proposed that they might be re-examined by an expert group or the Law Commission of India. The Cabinet Note wherein this proposal was made had been approved by the Cabinet in its meeting held on 4th March, 2006. Subsequently, a reference was made to the Law Commission of India requesting the Law Commission to examine the possibility of revising the amended Section 438 Cr.P.C. with sufficient safeguards so as to neutralize the apprehension expressed by the lawyers' fraternity".

1.6 Accordingly, the Law Commission was requested to examine the amended version of Section 438 Cr.P.C. and to explore the possibility of suggesting a modified version to make the provision workable with sufficient safeguards to protect the rights and liberty of the citizen.

CHAPTER–2

PRE-AMENDED LAW

2.1 Chapter XXXIII of the Code of Criminal Procedure, 1973 contains provisions as to Bail and Bonds. Section 438 provides for Court's direction for grant of bail to person apprehending arrest. Such a bail is popularly referred to as anticipatory bail as it is granted in anticipation of arrest. This is a new provision in the present Code. The earlier Code i.e. the Code of Criminal Procedure, 1898, did not contain any specific provision corresponding to the present Section 438. In the absence of specific provision under the Old Code, there was a difference of opinion among the High Courts of different States 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. (See Shri Gurbaksh Singh Sibbia and others Vs State of Punjab (1980) 2 SCC 565).

2.2 The new provision in Section 438 (has been inserted in the Code on the recommendation of the Law Commission in its 41st Report. In this Report, the Law Commission made the following observations on 'anticipatory bail' viz.

> "39.9. **Anticipatory Bail**:- 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 causes 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 High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter.

…….

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 pre-judging (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." (pp. 320-321).

2.3 Based on the 41st Report of the Law Commission, Government introduced the Criminal Procedure Code Bill, 1970. In the Statement of Objects and Reasons of the Bill of the Code of Criminal Procedure in respect of Clause 447 which was incorporated in the Code as Section 438, it was stated as follows:-

> "As recommended by the Commission, a new provision is being made enabling the superior Courts to grant anticipatory bail, i.e., a direction to release a person on bail issued even before the person is arrested. With a view to avoid the possibility of the person hampering the investigation, special provision is being made that the Court granting anticipatory bail may impose such conditions as it thinks fit. These conditions may be that a person shall make himself available to the Investigating Officer as and when required and shall not do anything to hamper investigation."

2.4 From the Statement of Objects and Reasons for introduction of Section 438 of the Code, it is apparent that the framers of the Code on the basis of recommendation of the Law Commission purported to evolve a device by which a citizen is not forced to face disgrace at the instance of influential persons who try to implicate their rivals in false cases; but the Law Commission, at the same time, had also issued a note of caution that such power should not be exercised in a routine manner. [see Durga Prasad Vs State of Bihar, 1987 Cri. L.J.1200].

2.5 The Bill was referred to the Joint Committee of both the Houses. In the meantime, Government decided to seek the opinion of the Law Commission on few points, the reasons for which were stated as follows:-

> "Ás there are divergent opinions on certain points which are being considered by the Joint Committee in respect of the said Bill, the Government would like to have the considered opinion of the present Law Commission on certain specific points hereinafter mentioned. As the consideration of the Bill, clause by clause, has already been taken by the Joint Committee of Parliament, it would not be necessary to refer the whole Bill for the opinion of the Law Commission afresh. But the Government would very much like to have the considered opinion of the Commission on a few specific points which has arisen for consideration."

2.6 These points, inter alia, included … (vi) Provision for grant of anticipatory bail".

2.7 The Commission submitted 48th Reports on these points. As regards anticipatory bail, the Report stated as follows:-

> "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 Public Prosecutor. The initial order should only be an interim one. Further, the relevant Sections 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 interest of justice.
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> 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," [48th Report of Law Commission of India, July 1970, P.10 (para 31)].

2.8 It appears that the aforesaid recommendations did not find favour with the Government as can be gathered from the text of Section 438 as ultimately enacted in the Code of Criminal Procedure, 1973.

2.9 The Joint Committee of the Parliament made the following observations in respect of Clause 436, which was the original clause 447 of the Code of Criminal Procedure Bill, 1970:-

> "The Committee is of the opinion that certain specific conditions for the grant of anticipatory bail should be laid down in the clause itself for being complied with before the anticipatory bail is granted. This clause has been amended accordingly".

2.10 Clause 436 was then enacted as Section 438 of the Code of Criminal Procedure, 1973, which reads as follows:-

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

(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-section (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 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).

CHAPTER–3

LEGISLATIVE CHANGES

3.1 With a view to removing certain difficulties experienced in its working, the Code of Criminal Procedure, 1973 underwent several amendments in 1974, 1978, 1980, 1983, 1988, 1990, 1991 and 1993 for specific purposes.

3.2 In May, 1994 the Government of India introduced the Code of Criminal Procedure (Amendment) Bill, 1994 in the Rajya Sabha incorporating many amendments in the Code including those proposed to be made in Section 438.

3.3 Earlier, the IGP's Conference, 1981, inter alia, suggested that Section 438 be amended so as to take away the powers to grant anticipatory bail from the Court of Session and vest the same only in the High Courts. In May 1983, the Home Ministry constituted a Group of Officers, which considered the question of deletion of the provision of anticipatory bail and felt that since, after deletion of the provision, the High Court will be competent to grant bail under the inherent powers, the provision need not be deleted. As sometimes, the Courts take a very liberal view in granting anticipatory bail to criminals, it was considered that such powers should be taken away from the Court of Session and vest only in the High Court even though it will make difficult for the poor persons to avail of the provisions of anticipatory bail. At times, an accused person secures

anticipatory bail even without making an appearance before the Court. It was, therefore, proposed to amend Section 438 Cr.P.C. to the effect that:-

(i) the power to grant anticipatory bail should be taken away from the Court of Session and should vest only in the High Court;

(ii) if the Court does not reject the application for the grant of anticipatory bail, and makes an interim order of bail, it should, forthwith give notice to the public prosecutor or Government Advocate. The question of bail would then be re-examined in the light of the respective contentions of the parties; and

(iii) the presence of the person seeking anticipatory bail in the Court should be made mandatory at the time of hearing of the application for the grant of anticipatory bail and provision made for certain exceptions so as to cover cases where a person is sick or cannot appear in Court due to certain unavoidable circumstances.

3.4 A Parliamentary Bill being No. 56 of 1988 was introduced in the Lok Sabha on 13th May, 1988, clause 49 whereof sought to amend Section 438 by inter alia, omitting the words “or the Court of Session” both from sub-section (1) and (2) of that Section, but the same had not been carried out.

3.5 In May, 1994 the Government of India introduced the Code of Criminal Procedure (Amendment) Bill, 1994 in the Rajya Sabha while the Bill was before the Parliamentary Committee on Home Affairs, the Government of India made a reference to the Law Commission to undertake comprehensive revision of the Code of Criminal Procedure and suggest reforms in the law. Accordingly, the Law Commission submitted its 154th Report on the subject. It may be expedient to reproduce the relevant extracts of this Report hereinbelow insofar as the same relate to anticipatory bail.

> "Since the introduction of the provision of anticipatory bail under Section 438, its scope has been under judicial scrutiny. The leading case on the subject is Gurubaksh Singh Sibbia Vs State of Punjab (1980) 2SCC 565. The Supreme Court, reversing the Full Bench decision of the Punjab and Haryana High Court in this case (Shri Gurubaksh Singh Sibbia and others Vs State of Punjab, AIR 1978 P&H 1), which had given a restricted interpretation of the scope of Section 438, held that in the context of Article 21 of the Constitution, any statutory provision (Section 438) concerned with personal liberty could not be whittled down by reading restrictions and limitations into it. The Court observed:-
>
> "Since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that Section" (p. 586).

The Court also held that the conditions subject to which the bail can be granted under 437(1) should not be read into Section 438. While allowing unfettered jurisdiction to the High Court and the Court of Session, the Supreme Court fondly hoped that a convention may develop whereby the High Court and the Court of Session would exercise their discretionary powers in their wisdom. The Court laid down the following clarifications on certain points which had given rise to misgivings:-

(i) The person applying for anticipatory bail should have reason to believe that he will be arrested. Mere 'fear' of arrest cannot amount to 'reasonable belief'.

(ii) The High Court and the Court of Session must apply their mind with care and circumspection and determine whether the case for anticipatory bail is made out or not.

(iii) Filing of FIR is not a condition precedent to the exercise of power under Section 438.

(iv) Anticipatory bail can be granted even after the filing of FIR.

(v) Section 438 cannot be applied after arrest.

(vi) No blanket order of anticipatory bail can be passed by any Court (pp. 589-590).

The working of Section 438 has been criticized in that it hampers effective investigation of serious crimes, the accused misuse their

freedom to criminally intimidate and even assault the witnesses and tamper with valuable evidence and that whereas the rich, influential and powerful accused resort to it and the poor do not, owing to their indigent circumstances thus giving rise to the feeling that some are "more equal than others" in the legal process.

In view of the above circumstances, some State governments have made local amendments to the Code of Criminal Procedure. Uttar Pradesh Legislature has repealed 438 by the Amending Act of 1976. West Bengal Legislature enacted amendments in 1990 incorporating certain limitations on the power to grant anticipatory bail. Those are: (i) mere filing of application in the High Court or Court of Session for grant of anticipatory bail does not debar the police from apprehending the offenders; (ii) the High Court or the Court of Session be required to dispose of an application for anticipatory bail within thirty days from the date of such application and (iii) in offences punishable with death, imprisonment for life or imprisonment for a term not less than 7 years, no final order shall be made without giving the state a minimum of seven days' notice to present its case.

The Code of Criminal Procedure Amendment Bill in clause 43 seeks to amend Section 438, echoing the recommendations of the Law Commission in its 48th Report and also on some other grounds referred to above, in the following manner:-

"In Section 438 of the principal Act for sub-section (1), the following sub-sections shall be substituted, namely:

(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, if there are reasonable grounds for such arrest.

(1A) 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.

(1B) 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."

In the various workshops diverse views were expressed regarding the retention or deletion of the provision of anticipatory bail. One view is that it is being misused by affluent and influential sections of accused in society and hence be deleted from the Code. The other view is that it is a salutary provision to safeguard the personal liberty and therefore be retained. Misuse of the same in some instances by itself cannot be a ground for its deletion. However, some restraints may be imposed in order to minimize such misuse. We are, however, of the opinion that the provision contained under Section 438 regarding anticipatory bail should remain in the Code but subject to the amendments suggested in

clause 43 of the Code of Criminal Procedure (Amendment) Bill, 1994 which lays down adequate safeguards". (Pages 27-29)

CHAPTER–4

AMENDED LAW

4.1 The Code of Criminal Procedure (Amendment) Act 2005 came into force on 23rd June, 2006 except certain Sections thereof, including Section 38. Section 38 relates to amendment of Section 438 of the Code. Accordingly for existing sub-section (1), new sub-sections (1), (1A) and (1B) are substituted. As stated above, the amended Section has not yet come into force.

4.2"Section 438 as substituted by Code of Criminal Procedure (Amendment) Act, 2005 is reproduced hereinbelow:

"438 (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.

(1A) 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.

(1B) 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 think 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).

CHAPTER–5

LAWYERS' OBJECTIONS TO AMENDED SECTION

5.1 The Madras Bar Association appointed a Committee, headed by a former State Public Prosecutor, to study the various amendments to the Code of Criminal Procedure made by the Code of Criminal Procedure (Amendment) Act, 2005. The Committee gave its report to the effect that 40 out of 44 amendments were welcome ones. The other four, including the one made in Section 438 were opposed being against public interest and would, in the opinion of the Committee, interfere with the independence of the judiciary and the rights of the accused seriously. The other three set of amendments related to Sections 25A, 324 and 378(1)(a). The Bar Association, therefore, appealed to the Government not to enforce these amendments. The relevant extracts of the Committee's recommendations in respect of Section 438 are as follows:-

> "The proviso (2) to sub-section (1) of Section 438 has to be deleted. The apprehension of the accused is manifold and in some cases there may not even be a real possibility of arrest though the accused may apprehend an arrest. To permit the police officer-in-charge to arrest without warrant, the applicant, on the basis of the accusation apprehended in such an application would defeat the very purpose of Section 438. Similarly, sub-section would only make the hearing of the bail application more cumbersome and the presence of the accused

as envisaged in sub-section (1B) at the time of the final hearing of the application would enable the police officer to arrest the accused in the event of the rejection of the bail application. The whole object of introducing Section 438 Cr.P.C. in 1973 Cr.P.C. will be defeated if the present amendment is given effect to. It is pertinent that both the Court of Session as well as the High Court have the concurrent powers in entertaining the bail application. In the event of the applicant choosing to move the Court of Session, he has a right to move the High Court in the event of his anticipatory bail application being dismissed. In such circumstances, if the accused is present in the Court of Session at the time of hearing of anticipatory bail application and if he were to be arrested without giving him an opportunity to move the High Court for anticipatory bail, the very object of this provision would be defeated."

5.2The Advocates' Association, High Court, Chennai, too opposed the amended Section 438. It has submitted as follows:-

"The proposed amendment being brought in Section 438 of Code of Criminal Procedure will take away the rights of an alleged accused who may not have involved in any offence without there being any chance to get anticipatory bail without subjecting himself before the Court where the anticipatory application is pending. In the event of not granting any anticipatory bail by the Court, such person can straightaway be arrested. This amendment provides an

unexpected opportunity and embarrassment to the Advocates to bring the alleged accused before the Court hearing anticipatory bail applications on an application made to the Court by the public prosecutor and such advocates indirectly help the police to arrest such accused without there being any investigation made in the alleged offence. This amendment will take away the rights and liberty of an individual to put forth his plea before a Court without getting arrested."

CHAPTER–6

ANALYSIS OF THE AMENDED LAW AND CONCLUSIONS

6.1 Nature and Extent of Amendments

6.1.1 sub-section (1) of Section 438 has been extensively amended by the Code of Criminal Procedure (Amendment) Act, 2005. New sub-sections (1), (1A) and (1B) substitute the existing sub-section (1) of Section 438. Accordingly, the following major changes have been made in the Section, namely:

1. Certain factors which the Court will consider, among others, while dealing with application for anticipatory bail, are mentioned in sub-section (1).
2. Upon consideration of these factors, the Court will either reject the application or issue an interim order for the grant of anticipatory bail in the first instance.
3. Where the Court has either rejected the application or has not passed any interim order for grant of anticipatory bail, it will be open to the officer-in-charge of a police station to arrest without warrant the applicant on the basis of the accusation apprehended in such application [Proviso to sub-section (1)].
4. Where the Court grants an interim order, it will give notice being not less than seven days notice to 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 is finally heard by the Court [sub-section (1A)].

5. The presence of the applicant seeking anticipatory bail will be obligatory at the time of final hearing of the application and passing of a 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. [sub-section (1B)].

6.1.2 The Court would grant or refuse anticipatory bail 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.

6.1.3 The changes mentioned at Sl. No.1 to 4 are already being followed in practice by Courts while dealing with applications for grant of anticipatory bail, without these being formally incorporated in the Section. The change mentioned at Sl. No. 5 is the only new

addition. The objections to the amendments are primarily directed against the changes mentioned at Sl. Nos. 3 and 5 above.

6.1.4 Thus, it may be seen that in Rattan Kumar Vs State of Assam (1979) Cri. L.J. NOC 143 (Gauhati), ad interim anticipatory bail was granted ex parte. Subsequently on hearing both the parties, the earlier order granting bail was reversed. It was held that the subsequent order was not order of cancellation but refusal to grant bail.

6.1.5 Although the existing Section 438 does not stipulate hearing of the State authorities while considering grant of anticipatory bail, it is inherent in the provision that the State authorities being necessary parties to such an application should be afforded an opportunity of being heard in the matter. In State of Assam and another Vs R.K. Krishan Kumar and others, AIR 1998 SC 144, the learned Single Judge of Bombay High Court issued direction under Section 438 to release the respondents, if arrested, on bail without even affording an opportunity to the appellants, i.e. the State of Assam and its Director General of Police in spite of they being made parties in each of the applications for anticipatory bail. In view of the conceded position that appellants were not heard by the High Court, the Supreme Court set aside the impugned orders on that ground alone. Without going into the question whether Bombay High Court had jurisdiction to entertain the applications filed by respondents in respect of the offences perpetrated in Assam, the Supreme Court further directed that a Division Bench of Guwahati

High Court should dispose of the applications which stood transferred to it, after hearing the appellants. The Court further directed that "status quo as on today will be maintained by the appellants vis-à-vis the respondents herein till 7.11.1997 which is necessary to enable the Division Bench of the High Court of Guwahati to pass appropriate orders on the applications filed by the respondents" The appeals were disposed of accordingly.

6.1.6 In Shri Gurbaksh Singh Sibbia and others Vs State of Punjab (1980) 2 SCC 565, the Supreme Court made the following observation, viz.:

> "There was some discussion before us on certain minor modalities regarding the passing of bail orders under Section 438(1). Can an order of bail be passed under the 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 condition should be imposed on the applicant even at that stage." (at page 591)

6.1.7 In a very recent case, the Supreme Court set aside the impugned order made by the High Court without service on the appellant, converting the application under Section 482 Cr.P.C. to one under Section 438 and granted interim protection. While

deprecating the practice of converting applications filed under Section 482 to one for bail in terms of Section 438 or 439 Cr.P.C. Dr. Arijit Pasayat, J. observed in Savitri Goenka Vs Kusum Lata Damant and others, 2007 (12) SCALE 799: “Though many points were urged in respect of the appeal, we find that the impugned order of the High Court cannot be maintained on one ground. Though it had issued notice to the appellant, the matter was disposed of without hearing the appellant.”

6.1.8 Thus, it may be seen that Courts, as a matter of practice, ordinarily pass interim order in the first instance and the same is then confirmed or recalled and cancelled after hearing the Public Prosecutor though there has been no specific provision in Section 438 to that effect. Similarly, the factors for consideration in dealing with anticipatory bail applications as are now mentioned in the new Section are only illustrative in nature and the same, along with other relevant factors are indeed being taken into consideration while making final orders on such applications inspite of the fact that these have not been expressly incorporated in the pre-amended Section. In State of Rajasthan Vs Bal Chand, AIR 1977 SC 2447, Justice Krishna Iyer observed: “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 Court.” In Jagannath Vs State of Maharashtra, 1981 Cri.L.J. 1808 (Bom.), the Court listed certain factors which have to

be kept in view while granting any bail either post-arrest or pre-arrest, namely, (i) nature and seriousness of the accusations, (ii) the nature of the prosecution evidence, (iii) the severity of the likely punishment in case the prosecution succeeds, (iv) status of the accused, (v) likelihood of repeating similar offences, and (vi) likelihood of tampering of prosecution evidence etc.

6.1.9 It can therefore be said that the amended Section merely seeks to formalize certain aspects that are otherwise being followed in practice without having been formally included in the Section. It needs to be borne in mind that legislation is a sphere which is seldom perfectly complete. There may be conditions and practices which escape formal translation into statutory laws but yet, they continue to influence the conduct of the organs of the State and their subjects. Such conditions and/or practices may have been initiated in the first instance in individual cases based on sound reasons, logic and rationale. Based on their intrinsic value and inherent appeal, no sooner than later, they develop into customary practices before crystallizing into binding precedents. When the impact point is reached, these conditions and/or practices will emerge as explicit law through passage of legislation. This is what we say, inchoate law or, the law in the making. In the present case, such inchoate law on anticipatory bail has thus been imbibed into the formal legal order by statutory incorporation thereof into the Code except to the extent of conditions mentioned at No. 3 and 5 above which are not in sync with the extant judicial practices and procedures. These two aspects are dealt in detail hereinafter.

6.2 Note on Proviso to Sub-Section (1) of the Amended Section:

6.2.1 As far as the proviso permitting the arrest where either the Court has not passed any interim order or has rejected the application for grant of anticipatory bail, merely based on the averments in the anticipatory bail application is concerned, the said power granted by the proviso can cause incalculable harm for the following reasons:-

(i) A person approaches the Court for anticipatory bail mainly for the reason that with some malafide motive the complainant is seeking to implicate him falsely in a criminal case.

Predominantly, this is a reason why a person seeks anticipatory bail. No doubt, certain real offenders also make false allegations of malafide and under that garb seek to obtain anticipatory bail.

(ii) In order to get at the latter category of people, the former are also exposed to the humiliation of arrest. It is here that the proviso to Section 438 fails to arrive at the right balance.

(iii) Permitting arrest merely because interim bail is denied, in a matter where notice has been issued to the police would virtually render the anticipatory application infructuous. Traditional view was that once an anticipatory bail is filed, till it is disposed off, the person should not be arrested. In fact, some Police Standing Orders had also prescribed that this procedure should be followed.

(iv) This proviso should be read down and it should mean that only where the anticipatory bail application is rejected, either ex-parte or after notice and if a police officer, under Section 157(1) Cr.P.C., considers arrest necessary, then and then alone should arrest be done. Merely because anticipatory bail application is rejected, an innocent person should not be arrested for the reason that he set out certain averments as the basis for apprehending arrest.

(v) Permitting arrest of an applicant seeking anticipatory bail in case the Court has not passed any interim order providing protection against his arrest would render the pending bail application infructuous even without going into its merits. Such arrest may have the effect of over-reaching the Court and the judicial process.

(vi) Unless the above interpretation is put the ambiguity in the proviso will cause hardship. The Supreme Court has held that an anticipatory bail application can be moved in certain cases even before an FIR is registered. (Shri Gurbaksh Singh Sibbia and others Vs State of Punjab (1980) 2 SCC 565). In a case where an FIR is not registered or even an FIR is refused to be registered (of which the applicant himself may not be aware), merely because the anticipatory bail application is moved, and interim order is not passed or where anticipatory bail is rejected as a matter of course based on the averments, arrest should not be made.

6.2.2 There seems to be much substance in the aforesaid submissions especially when we bear in mind the proper nature and scope of the power to arrest and the manner in which it is ought to be exercised in law. It will be relevant to refer to certain very useful and succinct observations made by the Supreme Court on this subject in the case of M.C. Abraham and another Vs State of Maharashtra and others (2003) 2 SCC 649.

6.2.3 In this case, a complaint was filed by the Provident Fund Commissioner against the Directors of Maharashtra Antibiotics and Pharmaceuticals Ltd. (referred to as MAPL) alleging offences under Sections 406 and 409/34 IPC. MAPL was a joint venture of the Government of India and the State of Maharashtra and had been declared a sick industry by the Board of Industrial and Financial Reconstruction. Some of the accused persons moved the High Court for grant of anticipatory bail under Section 438 of the Code of Criminal Procedure. Those petitions were rejected by the High Court by its order dated 7-9-2001. The orders rejecting those petitions were not appealed against.

6.2.4 On 10.1.2002, the High Court passed the impugned order observing that it was shocking that the writ petitioners have to approach the High Court seeking directions against the State to act on the complaint lodged by the Provident Fund Commissioner against the Directors of MAPL. Despite the fact that their applications for grant of anticipatory bail had been rejected by the High Court by a reasoned order, they had not been arrested. The

High Court, therefore, felt that in the circumstances, the only course open to the respondent State was to cause their arrest and prosecute them. The High Court thereafter passed the following order:-

> "We, therefore, direct the respondent State to cause arrest of those accused and produce them before the Court on or before 14.1.2002. On their failure to do so we will be constrained to summon the Commissioners of Police, Nagpur, Pune and Mumbai to appear before this Court in person and explain that as to why they are not able to cause arrest of these persons.
>
> Merely because the accused are government servants/officials they do not enjoy any immunity from arrest if they have committed an offence. It is expected of the State to be diligent in prosecuting such offenders without discrimination.
>
> The order be communicated to the Principal Secretary, Home Department, Government of Maharashtra and also to the Commissioners of Police of three cities who will be solely responsible for failure to comply with the orders of this Court. Learned APP is directed to communicate the orders by fax, wireless message in addition to other mode of service and even inform them on telephone SO 16.1.2002. Authenticated copy be furnished to APP".

6.2.5 On 16.1.2002, the Court passed another order wherein it was observed: "Our anxiety is to see that the State expeditiously

concludes the investigation in the case and file a charge sheet. We may again remind the State of the order passed by this Court while rejecting the pre-arrest bail application on 7.9.2001 and should not show any laxity in the investigation."

6.2.6 Earlier on 11.1.2002, the Court had dismissed an application filed by Respondents for modification of Court's Order, dated 7.9.2001. All these three orders were challenged in appeals by the appellants in the Supreme Court.

6.2.7 Allowing the appeals, the Hon'ble Supreme Court made the following observations:

> "In the first place, arrest of an accused is a part of the investigation and is within the discretion of the investigating officer. Section 41 of the Code of Criminal Procedure provides for arrest by a police officer without an order from a Magistrate and without a warrant. The Section gives discretion to the police officer who may, without an order from a Magistrate and even without a warrant, arrest any person in the situations enumerated in that Section. It is open to him, in the course of investigation, to arrest any person who has been concerned with any cognizable offence or against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned. Obviously, he is not expected to act in a mechanical manner and in all cases to

arrest the accused as soon as the report is lodged. In appropriate cases, after some investigation, the investigating officer may make up his mind as to whether it is necessary to arrest the accused person. At that stage the court has no role to play. Since the power is discretionary, a police officer is not always bound to arrest an accused even if the allegation against him is of having committed a cognizable offence. Since an arrest is in the nature of an encroachment on the liberty of the subject and does affect the reputation and status of the citizen, the power has to be cautiously exercised. It depends inter alia upon the nature of the offence alleged and the type of persons who are accused of having committed the cognizable offence. Obviously, the power has to be exercised with caution and circumspection.

… … …

The mere fact that the bail applications of some of the appellants had been rejected is no ground for directing their immediate arrest. In the very nature of things, a person may move the court on mere apprehension that he may be arrested. The court may or may not grant anticipatory bail depending upon the facts and circumstances of the case and the material placed before the court. There may, however, be cases where the application for grant of anticipatory bail may be rejected and ultimately, after investigation, the said person may not be put up for trial as no material is disclosed against him in the course of investigation. The High Court proceeded on the assumption that since petitions for anticipatory bail had been

rejected, there was no option open for the State but to arrest those persons. This assumption, to our mind, is erroneous. A person whose petition for grant of anticipatory bail has been rejected may or may not be arrested by the investigating officer depending upon the facts and circumstances of the case, nature of the offence, the background of the accused, the facts disclosed in the course of investigation and other relevant considerations."

6.2.8 Reference may also be made to the observations of the Supreme Court in S.N. Sharma Vs Bipen Kumar Tiwari and others (1970) 1 SCC 653 wherein the Court observed:

"It appears to us that, though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer malafide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers" [pp. 657-658 (Para 11).

6.2.9 It may thus be seen that the arrest of a person should not necessarily be resorted to merely because his application for

anticipatory bail has been rejected by the Court. There has to be sufficient grounds to arrest such a person. The power of arrest should not be exercised mechanically. Instead, it should be exercised cautiously and with circumspection, having regard to the facts and circumstances of each case, especially the nature of the offence alleged to have been committed and antecedents of the accused person and other relevant material. If upon such a consideration, the arrest of the accused person is considered necessary, only then it would be made and not otherwise. This may be viewed as inherent in the power of arrest. Necessity of arrest in a case may be construed as an essential attribute of the valid exercise of the power to arrest. Absence of such necessity will vitiate the exercise of the power to arrest and render the arrest so made as arbitrary and bad in law.

6.2.10 The proviso is more of clarificatory nature. It is not by way of an exception to sub-section (1) of the Section. It only seeks to clarify whether there is any embargo on the Police power to arrest the applicant/petitioner on whose anticipatory application either no interim order has been passed or whose application for direction under sub-section (1) has been rejected. The proviso declares that there will not be any embargo and it will be open to the Police to arrest such a person if such an arrest is otherwise considered necessary in a given case. The proviso, however, does not say that the Police must necessarily arrest the person in the situation envisaged therein. Undoubtedly, the proviso does not enjoin upon the Police Officer to mandatorily arrest the person whose application

for anticipatory bail has been rejected. It only provides that in the exigencies mentioned therein, there will not be a bar to the arrest of the person if the Police otherwise considers his arrest necessary and there are sufficient grounds to do so. The well settled legal position is that in the absence of any protective judicial order, there will not be any fetter on the exercise of power of arrest by the police in accordance with the provisions of the Code. Since the law on this aspect of the matter is already very clear, it is not necessary to insert this proviso in the Section. We are of the considered view that the general power of arrest of the police need not in fact be asserted in the context of anticipatory bail as is done in the said Proviso in as much as it may unwittingly give an impression, howsoever wrong it might be, that police could arrest if the applicant is not granted anticipatory bail. One must further note that the contingencies contemplated in the proviso are not only confined to rejection of anticipatory bail application but also extend to the cases of pendency of anticipatory bail applications though no interim order has been made thereon. Arrest in such a case will render the pending anticipatory bail application infructuous as no direction for release on bail in the event of arrest can be issued after the arrest has already been made. Arrest in such a case will have the effect of overreaching the Court even during the pendency of anticipatory bail application. Permitting arrest of the applicant during the pendency of his anticipatory bail application will defeat the very purpose of Section 438. We expect the police to be bit more discreet in effecting arrest in such cases. As a matter of principle arrest in such cases should not be made unless it is absolutely necessary to do

so in the interest of justice. Even while doing so, proper decorum and respect ought to be shown to the judicial institution before which anticipatory bail application may be pending. Arrest of a person whose application for anticipatory bail is rejected, will also deprive him of his right to move the higher Court for relief against his arrest. We, therefore, recommend that the Proviso to sub-section (1) of Section 438 should be omitted as there is no warrant for reiterating the general power of arrest of the police as is otherwise obtained under the existing law.

6.3 Note on Section 438 (1B):

6.3.1 As far as Section 438(1B) is concerned, the Section provides:

(a) the presence of the person;
(b) seeking anticipatory bail
(c) shall be obligatory;
(d) at the time of final hearing of the application and posting for final order by the court;
(e) if on application made to it by the Public Prosecutor;
(f) the court considers such presence necessary in the interest of justice.

6.3.2 It may thus be seen that the presence of the petitioners is not necessary in all the cases of final hearing of anticipatory bail applications. It is only in such cases where an application has been filed by the Public Prosecutor for the presence of the petitioner and the court considers the presence of such person necessary in the

interest of justice. Such a conclusion can be reached by the court after hearing both the parties. The petitioner would thus have an opportunity to present his side of the case while opposing the application filed by the Public Prosecutor. Where no such application has been filed by the Public Prosecutor, it may not be necessary for the applicant to be present at the final hearing of his application for anticipatory bail.

6.3.3. Under the existing provision, it is not necessary for the applicant to be personally present in the court while applying for anticipatory bail. There is no obligation cast on a person against whom a crime has been registered by the police for having committed a non-bailable offence to appear before the Court to get himself released on bail in anticipation of his arrest. If there is no such duty cast on him to surrender and move for bail, it does not stand to reason that he should be deprived of the right to move for anticipatory bail as soon as a crime is registered against him. The right to move for anticipatory bail is available to a petitioner till he is actually arrested on the basis of the accusation (See Chandramohan Vs State of Kerala, 1977 K.L.T. 791).

6.3.4 Once the arrest is made, the provisions relating to anticipatory bail cease to apply. Even an appeal against the grant of anticipatory bail becomes infructuous. In State of Assam and another Vs Dr. Brojen Goga and others, AIR 1998 SC 143, the State challenged the order of a Single Judge of the Bombay High Court granting anticipatory bail to the respondent No.1. Inspite of the said order,

the Assam Police arrested respondent No.1 and took him into custody. When the petition was taken up for hearing, the Supreme Court declined to deal with the respective contentions of the parties as the appeal became infructuous upon the arrest of the respondent No. 1. The Court observed that it was for the respondent No. 1 to move the Court of appropriate forum if he wanted to take up the issue of violation of the direction in the impugned order.

6.3.5 In Hajialisher Vs The State of Rajasthan, (1976) Cri. L.J. 1658 (Raj.), it was held that surrender of accused could not be insisted upon in case of an application for anticipatory bail. In this case, the petitioner came straight to the High Court under Section 438 Cr. P.C. without approaching the Court of Session. The High Court expressed the view that ordinarily the lower Court should be first moved though in exceptional cases or special circumstances, the High Court might entertain and decide an application for bail under Section 438. The learned Counsel of the petitioner then hinted that the Session Court might insist upon surrendering the accused before giving consideration to the application under Section 438. In response to this, the learned Single Judge observed: “I do not see any ground for such apprehension. Law is crystal clear on the point that under Section 438 Cr.P.C. whenever any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply for anticipatory bail. If the surrender of the accused were insisted upon, then the very purpose of Section 438 Cr.P.C. for grant of anticipatory bail would be defeated. It need hardly be pointed out that Section 438

was provided to meet those cases where for political or other extraneous considerations, false and unfounded criminal charges may be brought against innocent persons and they may be harassed and humiliated. Keeping in view the intention of the legislature implicit in the Section, I am of the view that if the application properly falls under Section 438, Cr.P.C., the surrender of the accused cannot be insisted upon."

6.3.6 The lawyers' objections to new sub-section (1B) are two-fold – firstly that personal appearance of the applicant in the Court at the time of final hearing of his application would enable the police to arrest him in the event of rejection of his application by the Court, and secondly, in such an event, the applicant would be deprived of his statutory right to move the High Court under Section 438 Cr.P.C. otherwise available to him under this Section as concurrent powers have been vested thereunder in the Court of Session as well as the High Court. There is some substance in what the lawyers say. The position available under new sub-section (1B) is certainly less advantageous than what is presently obtained under the existing Section 438. However, it is more a matter of legislative policy as to what the law should be. The right to move the Court of Session or the High Court one after another has been so given under the statute and the same can be taken away or suitably modified by amending the statute. Even under the existing provision, if a person chooses to move, the High Court first, he will not have an effective right to have the same relief at the hands of the Court of Session as grant of such relief by a lower court is most likely to be viewed as an act of

judicial impropriety when the same relief has been refused by the Higher Court on the same facts and material. Theoretically, a person can move either the Court of Session or the High Court at his option and not necessarily in any given order. To this aspect, we may deal in greater detail a little later. But suffice it to say, the new sub-section (1B) is not open to any objection on account of lack of legislative competence. As regards the value opinion as to whether the law should be as provided in new sub-section (1B), is a different matter.

6.3.7 But there could be another serious objection to new sub-section (1B) which is inherent in the nature of anticipatory bail itself. As stated earlier, anticipatory bail is in anticipation of arrest. Once arrested, the benefit of anticipatory bail is not amenable to be availed of.

6.3.8 Section 438 known as anticipatory bail is, in fact, a pre-arrest bail. The legislature has given authority or has conferred right upon a citizen of this country that if he apprehends his arrest in connection with some non-bailable offence, then, he can move an application to the Court of Session or the High Court for grant of pre-arrest bail and the Court may grant a protective order in favour of such person. While granting such order, the Court may impose certain conditions enumerated under Section 438(2), Cr.P.C. Section 439, Cr.P.C. deals with the powers of Session Court and High Court in cases where the accused has already been taken into custody. Any order passed under Section 439, Cr.P.C. would be a post-arrest

order, it directs a competent Court to release the accused on his furnishing personal bond and/or surety bond or on complying certain conditions.

6.3.9 Application under Section 439 Cr.P.C. in view of the language employed under Section 439, Cr.P.C., would be maintainable only when the accused is in the custody.

6.3.10 In Naresh Kumar Yadav Vs Ravindra Kumar and others, 2007 (12) SCALE 531, Dr. Ajit Pasayat J. very aptly amplified the distinction between anticipatory bail under Section 438 and regular bail under Section 439 of the Code of Criminal Procedure, 1973 as follows:

> "The facility which Section 438 of the Code gives is generally referred to as 'anticipatory bail'. This expression which was used by the Law Commission in its 41st Report is neither used in the section nor in its marginal note. But the expression 'anticipatory bail' is a convenient mode of indication that it is possible to apply for bail in anticipation of arrest. Any order of bail can be effective only from the time of arrest of the accused. Wharton's Law Lexicon explains 'bail' as '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 the custody of Police. The distinction between an ordinary order of bail and an order under Section 438 of the Code is that whereas the former is

granted after arrest, and therefore means release from custody of the Police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. (See: Gur Baksh Singh v. State of Punjab 1980 (2) SCC 565). Section 46 (1) of the Code, which deals with how arrests are to be made, provides that in making an arrest the Police Officer or other person making the same "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". The order under Section 438 of the Code is intended to confer conditional immunity from the touch as envisaged by Section 46 (1) of the Code or any confinement. This Court in Balachand Jain v. State of Madhya Pradesh (AIR 1977 SC 366) has described the expression 'anticipatory bail' as misnomer. It is well-known that bail is ordinary manifestation of arrest, that the Court thinks first to make an order is that in the event of arrest a person shall be released on bail. Manifestly there is no question of release on bail unless the accused is arrested, and therefore, it is only on an arrest being effected the order becomes operative. The power exercisable under Section 438 is somewhat extraordinary in character and it is 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 then power is to be exercised under Section 438. The power being of important nature it is entrusted only to the higher echelons of judicial

> forums, i.e. the Court of Session or the High Court. It is the power exercisable in case of an anticipatory accusation of non-bailable offence. The object which is sought to be achieved by Section 438 of the Code is that the moment a person is arrested, if he has already obtained an order from the Court of Session or High Court, he shall be released immediately on bail without being sent to jail.
>
> Sections 438 and 439 operate in different fields. It is clear from a bare reading of the provisions that for making an application in terms of Section 439 of the Code a person has to be in custody. Section 438 of the Code deals with "Direction for grant of bail to person apprehending arrest".

6.3.11 Section 438, Cr.P.C. clearly says that 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 Court of Session for a direction under this Section, and that in the event of such arrest, he shall be released on bail. Section 438, Cr.P.C. provides a protective order in favour of the accused who is apprehending his arrest; while Section 439, Cr.P.C. applies to the accused who is in custody. The word 'custody' for the purposes of Section 439 has been interpreted by the Supreme Court and by the High Court. [Akhilesh Jindani (Jain) And another Vs State of Chhattisgarh, 2002 Cri. L.J. 1660 (Chhattisgarh)].

6.3.12 While interpreting the expression "in custody" within the meaning of Section 439 Cr. P.C., Krishna Ier J speaking for the Bench in Niranjan Singh and another Vs Prabhakar Rajaram Kharote (1980) 2 SCC 559 observed that:

> "When is a person in custody, within the meaning of Section 439 Cr.P.C.? 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 quibbling 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 Session Judge and the jurisdiction to grant bail thus arose.

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.

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 Session Court. This direction of the Magistrate was wholly irregular and may be, enabled the accused persons to circumvent the principle of Section 439 Cr. P.C. 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 Session 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 accused

had submitted to the custody of the court. We, therefore, do not proceed to upset the order on this ground."

6.3.13 In Directorate of Enforcement Vs Deepak Mahajan and another (1994) 3SCC 440, the Supreme Court made the following observations:

"The word 'arrest' is derived from the French word '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 Pandia,, J. as he then was being the Judge of the High Court of Madras) in Roshan Beevi and others Vs Joint Secretary, Government of Tamil Nadu and others 1984 (Cri. L.J. 134: (1984) 15 ELT 289: 1983 MLW (Cri) 289 (Mad)) had an occasion to go into the gamut of the meaning of the word 'arrest' with reference to various textbooks and dictionaries, the New Encyclopaedia Britannica, Halsbury's Laws, A History 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 lexicons, it has been held that:

"[T]he 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 where he pleases. When used in the legal sense in the procedure connected 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 intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which is so understood by the person arrested."

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.

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 circums-tances. 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."

6.3.14 In State of Assam Vs Mobarak Ali and others, 1982 Cri. LJ 1816, a Division Bench held that when an accused voluntarily surrendered before the Court and the Court granted him bail, then grant of bail would be under Section 437 and within the jurisdiction of the Magistrate. Such an action could not be said to be one under Section 438. While interpreting Section 437 of the Code of Criminal Procedure, 1973, Lahari J, speaking for the Bench, made the following observations:

> "The Section assigns the authority competent to grant bail, namely, a Court other than the High Court and the Court of Session. It specifies the nature of the offence, i.e. non-bailable offences. The section also prescribes the circumstances when bail may be granted, namely, (1) when the accused has been arrested or detained without warrant by an officer-in-charge

of a police station. In such circumstances production or appearance in Court is non-essential; (2) when the accused appears, or, (3) he is brought before a Court, other than the High Court or Court of Session, he may be enlarged on bail by "the Court". Therefore, the conditions precedent to entertain application for bail is whether the person is an accused or suspected of the commission of any offence. If the learned Magistrate finds that he is accused of an offence or is suspected of commission of a non-bailable offence, the second condition comes into play, namely, whether he is under arrest or detention without warrant by an office-in-charge of the police station. If he is arrested or detained, the detention must be by an officer-in-charge of the police station and without any warrant. Apart from this an accused may be brought before the Court by any police officer or authority competent to arrest an accused or any person legally competent to arrest him. Therefore, in the first case the physical production of the accused before the Court is not at all necessary whereas in the case of bringing the accused before the Court requires production of his "corpus". This production of the accused before a Court does not depend on the own volition of the accused. It is an act of the third party. In between, there is another class or type of persons who may be enlarged on bail under Section 437, that is, person who is accused of or suspected of a commission of a non-bailable offence appears voluntarily before the Court, what he should do on "appearance" is to make an application

before the Court asking for bail. The grant of bail or refusal thereof is absolutely within the discretion of the Court. His appearance in Court capacitates the Court to grant bail with condition or without condition. No sooner does he appear before the Court, the accused or the suspect surrenders to the custody of the Court. The act of appearance or surrender to the custody enables the accused to ask for bail. Such accused may be enlarged on bail by the order of the Court or the Court may straightway send the accused to jail if it does not grant bail. As such, whenever an accused appears voluntarily before the Court and surrenders to the Court he remains throughout in the custody of the Court until he is enlarged on bail. The question of granting bail to such an accused cannot arise unless he is not in custody of the Court. When an accused "appears" and asks for bail, he must surrender to the Court and remain in custody of the Court. No such accused or suspect can ask for bail under Section 437, if he appears but does not submit to the custody of the Court. The meaning of the term "custody" is "physical control" or at least physical presence of the accused in Court coupled with submission to the jurisdiction and order of the Court, as explained by the Supreme Court in Niranjan Singh Vs Prabhakar, AIR 1980 SC 785 : (1980 Cri. L.J. 426). Their Lordships have clearly stated: "he can be stated to be in judicial custody when he surrenders before the Court and submits to its direction". Therefore, the term "appears" in Section 437 means and includes voluntary appearance before the Court without

intervention of any agency and the act of surrender before the Court coupled with submission to its directions. These are implicit in Section 437 of "the Code".

As Such, we hold that when an accused appears and remains in the physical control of the Court or he is physically present and submits to the jurisdiction and orders of the Court, the Magistrate is empowered to grant bail to such an accused or suspect, if he is so entitled to. In the instant case, the accused appeared and surrendered to the jurisdiction of the Court, prayed for enlargement on bail. The Magistrate was competent to grant bail. However, the learned Judge is of the view that exercise of such power collides with the exclusive power of the High Court or the Court of Session conferred on them under Section 438 of "the Code". The ambit and scope of Section 438 are quite distinct and separate. A direction for grant of bail to a person apprehending arrest can be made in favour of a person who apprehends arrest. No application under Section 438 can be made by a person detained or arrested by the police. The applicant need not appear in Court nor should be brought in Court. He cannot be granted bail by the Court forthwith. He can only get a direction from the Court that in the event of his arrest he may be enlarged on bail by the police. Therefore, the distinctive features are that in Section 438 – (i) the applicant need not be an accused person, (ii) he need not be brought before a court nor his personal appearance in Court is a condition precedent; he may apply without personally appearing before the Court; (iii) the applicant need not surrender to the physical control of the Court nor need

he submit to the custody of the Court; (iv) the application must be for anticipatory bail in the event of his arrest. Therefore, on arrest no application under Section 438 is maintainable; (v) the Court cannot direct that he should be released on bail forthwith. It can only make a direction that in the event of his arrest he should be released on bail. The authority to grant bail is the officer-in-charge of police station, if the applicant is wanted to be arrested without warrant, on such accusation. This extraordinary power to make direction for grant of bail cannot be exercised by the Magistrate directly or indirectly. It can only be exercised by the High Court or the Court of Session.

In the instance case, the accused did not ask for grant of bail apprehending arrest. The accused persons surrendered before the Court and prayed for bail. Therefore, Section 438 had no application in the present case. Under these circumstances, we hold that the learned Chief Judicial Magistrate did not exercise the powers and functions under Section 438 of "the Code". The exercise of the powers and functions were limited within the scope of Section 437 of "the Code".

Accordingly, we answer the question that the learned Chief Judicial Magistrate acted under Section 437 of the Code and did not exercise any power and function under Section 438. The order is revisable by the learned Session Judge."

6.3.15 As stated earlier, the Code of Criminal Procedure did not contain any specific provisions corresponding to the present Section 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. It will be expedient to refer to the reasons underlying this view. For this purpose, the following observations made by Madhya Pradesh High Court in the case of State of Madhya Pradesh Vs Narayan Prasad Jaiswal, AIR 1963 Madhya Pradesh 276 will be of relevance:

"The dictionary meaning of the word 'bail' is to set free or liberate a person on security being given for his appearance. In Wharton's Law Lexicon (14th Edn.) the word "bail" has been defined thus -

> "to set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required, in order that he may be safely protected from prison, to which they have, if they fear his escape, etc. the legal power to deliver him."

In Tomlin's Law Dictionary, it has been stated that the word 'bail' is used in our Common Law for the freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, on surety taken for his appearance at a day and place certain. The reason why it is called 'bail', is because by this means the party restrained is delivered into the hands of those that binds themselves for his forthcoming, in order to a safe keeping or protection from prison". The word has been similarly defined in Earl Jowitt's 'Dictionary of English Law' (1959 Edn.). It has also been similarly defined in Stroud's Judicial Dictionary and other legal dictionaries. 'Bail' thus means release of a person from legal custody. This meaning of the word has been adhered to in the Code. A reference to Sections 57, 59, 62, 63, 64, 169, 170, 496 and 497 giving to the police the power to release on bail and Sections 76, 86, 91, 186, 217, 426, 427, 432, 438, 496 and 497 dealing with the power of the Court to grant bail and to the forms prescribed for bailable warrants and for bail-bonds which are to be executed when bail is given makes it very clear that where a person is granted bail he is released from restraint. If, therefore, the grant of bail to a person presupposes that he is in the custody of the Police or of the Court, or, if not already in such custody is required to surrender to such custody, then it is unreal to talk of any person, who is under no such restraint, being granted bail."

6.3.16 The contention that anticipatory bail was permissible because of use of the word 'appears' in Sections 496 and 497, did not find favour with Court. The Court was of the view that mere voluntary

appearance, without anything more could not give rise to the Court the power of releasing the person on bail. The reason is that a person who is free and is not required to surrender to any custody under any order of arrest issued against him is under no custody from which he could be released.

6.3.17 Single Judge of the High Court of Kerala too observed in Varkey Paily Madthikudiyil Pulinthanam Vs State of Kerala, AIR 1967, Kerala 189 that bail means release of a person from legal custody and the grant of bail to a person pre-supposes that he is in the custody of the police or of the Court.

6.3.18 In B. Narayanappa and others Vs State of Karnataka, 1982 Cri.L.J.1334, it was held that when the accused appeared and submitted to the jurisdiction of the court, he was under judicial custody and the Magistrate could not have rejected his bail application under Section 436 of the Code of Criminal Procedure, 1973 on the ground that the applicants were neither arrested by the police nor they had been summoned by the Court nor they appeared in response to any process of the Court. The Court observed:

> "There is nothing in the Section either to exclude voluntary appearance or to suggest that the appearance of the accused must be in obedience to a process issued by the Court. No doubt the other expressions used in the section as "is brought before Court" have reference to prior arrest and bringing of such person before Court by the police either in pursuance of

> a process issued by the Court or otherwise on account of the inability of such person arrested to give bail immediately on being arrested and detained by an officer in charge of the police station. The word 'appearance' as used in the section to me, it appears, is wide enough to include the voluntary appearance."

6.3.19 Referring to the decision of the Supreme Court in Niranjan Singh and another Vs Prabhakar Rajaram Kharote, AIR 1980 SC 785, the High Court of Karnataka further observed:

> "In the present case also the accused having appeared before the Court had submitted to the jurisdiction of the Court and asked for bail. As enunciated in the above decision, if the surrender and the physical presence of the accused with submission to the jurisdiction and orders of the Court is judicial custody, then the accused-petitioner herein having appeared before the Court and asked of bail, they were under restraint and they had submitted to the jurisdiction of the Court. The Magistrate was not right in saying that he is not in a position to understand the meaning of the word 'appears' within the meaning of the expression "custody' as used in Section 439 as discussed in the said decision with the meaning of Section 436 Cr.P.C. When the mere physical presence before the Court with a request to grant bail amounts to custody, it is more than appearance."

6.3.20 Section 88 of Code of Criminal Procedure, 1973 provides for power to take bond for appearance. Accordingly, when any person for whose appearance or arrest the officer presiding in any court is empowered to issue a summons or warrant, is present in such court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such court, or other court to which the case may be referred for trial. The presence of the person must be on his own volition as a free agent and not under compulsion of any court's order. This section was held to be inapplicable when the accused was present along with his counsel in response to the court's summons in the case of K. Pandarinathan Vs V. Raju and another, 1998 Cri. L.J. 1128.

6.3.21 Section 88 corresponds to Section 91 of the old Code. While dealing with Section 91 of the Code of Criminal Procedure, 1898, the Supreme Court made the following observations in the case of Madhu Limaye and another Vs Ved Murti and others (AIR 1971 SC 2481), viz. "In fact Section 91 applies to a person who is present in court and is free because it speaks of his being bound over to appear on another day before the court. That shows that the person must be a free agent whether to appear or not. If the person is already under arrest and in custody, as were the petitioners, their appearance depended not on their own volition but on the volition of the person who had their custody….. It is not necessary to take a bond from a person who is already in detention and is not released. The danger arises when the man is free and not when he is in custody. It is to prevent his acting that the bond is taken or he is kept in custody till

he gives the bond. Section 344 deals with ordinary adjournment of a case and allows a person to be admitted to bail or the court to remand him if he is in custody".

6.3.22 It will be expedient to recapitulate the essential ingredients of the new sub-section (1B) even at the cost of repetition. Firstly, the presence of the applicant seeking anticipatory shall be obligatory in terms of sub-section (1B); Secondly, such presence will be so obligatory at the time of final hearing of his application and passing of final order by the court; Thirdly, such presence is rendered obligatory on an application made to the court by the Public Prosecutor praying for such presence in the interest of justice; And lastly, such presence will be insisted upon as obligatory if the court considers, on the application made to it by the Public Prosecutor, that such presence is necessary in the interest of justice. In the aforesaid circumstances, there is obvious restraint on the freedom and liberty of the applicant and obligatory presence envisaged by the sub-section subject the applicant to the dictate of the court. Such obligatory presence is apparently not compatible with the applicant's right to court's direction for anticipatory bail as he is already placed under restraint and he is most likely to be transferred from court's custody to the police/judicial custody in the event of rejection of his anticipatory bail application. Such an eventuality would not have been in the legislative contemplation while providing for anticipatory bail. We are therefore inclined to take the view that sub-section (1B) renders the right to anticipatory bail nugatory and infructuous.

6.3.23 From the aforesaid, it may be seen that in case a person happens to be present in the Court on his own volition, the Court may take action under Section 88 of the Code to bind him for appearance on a future date. However, if a person surrender himself in the Court and subject himself to Court directions, Section 88 would be inapplicable in such a case and the proper course would be to either remand him to judicial custody or admit him to bail. Where a person seeks anticipatory bail, the Court may not direct his personal appearance. It will, however, be open to the Court to either reject his application or grant him anticipatory bail. 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. In view of the aforesaid, the insertion of new sub-section (1B) in Section 438 is apparently not in consonance with the nature and scheme of anticipatory bail. The obligatory nature of the presence as envisaged in this new sub-section renders the application for anticipatory bail infructuous as the applicant has already been placed under restraint and is in the custody of Court.

6.3.24 We are conscious of the fact that this aspect of the matter seems to have unwittingly escaped this Commission's attention at the time of submitting 154th Report. We are also aware of the fact that the similar provision has been inserted in the Code in its application to the State of Maharashtra by State amendment made in

1993. It has not been brought to our notice if the obligatory presence of the applicant in compliance with the Court's order has received judicial consideration in any case. We have noted the case of State of Maharshtra and another Vs Mohd. Sajid Husain Mohd. S. Husain etc. 207(12) SCALE 63 under Section 438 Cr.P.C. as amended by the State of Maharshtra by Act No. 24 of 1973. But the case was dealt with reference to the four factors mentioned in sub-section (1) of Section 438 that were relevant for considering the application for grant of anticipatory bail. The question of obligatory presence of the applicant did not crop up for Court's consideration. Nevertheless, we are of the view that obligatory presence of the applicant seeking anticipatory bail in compliance with Court's order to that effect will be antithesis to his right to anticipatory bail. We are, therefore, of the considered view that sub-section (1B) should be omitted from this section.

6.4 **Note on Concurrent Jurisdiction:**

6.4.1 One of the objections raised against the amended section has been that if the applicant seeking anticipatory bail is required to be compulsorily present in the Court in terms of new sub-section (1B), he is most likely to be arrested from the Court precincts in the event of rejection of his bail. Such an arrest of the applicant will deprive him of his right otherwise available to him to move the alternative forum provided in Section 438 of the Code. Concurrent jurisdiction of the Court of Session and the High Court under Section 438 has generated much litigation. The Code has not prescribed any specific

order in which the two alternative forums are to be approached. It is left to the option of the applicant to move either the Court of Session or the High Court for anticipatory bail one after another or in reverse order. There is conflict of opinion amongst various High Courts as to whether the Court of Session should originally be approached in the first instance or the High Court can be straightaway approached for grant of anticipatory bail without first taking recourse to the Court of Session. It may be noted that both Court of Session and the High Court exercised original jurisdiction under Section 438. However, when the High Court is moved after the anticipatory bail application has been dismissed by the Court of Session, the petition for anticipatory bail in the High Court is required to be accompanied with a copy the Session Court's order from which reason for dismissal of anticipatory bail application can be gathered. In such a case, the High Court essentially exercises revisionary powers over the order of the Court of first instance. i.e. Session Court though purporting to be exercising original jurisdiction under Section 438. On the other hand, it has been held in some cases that where the applicant moved High Court for anticipatory bail which was rejected then the Court of Session should not grant anticipatory bail to the applicant on the same facts and material as otherwise it would be an act of judicial impropriety. There are also cases where similar view has been taken in reverse order in respect of rejection of application for anticipatory bail by Court of Session. Accordingly, it has been held in some cases that if an application for anticipatory bail is rejected by the Court of Session, then similar application on the same fact would not lie in the High Court unless there is some new

material or facts. There are cases also where contrary view has been taken whereby no such fetter is admitted on the powers of the High Court.

6.4.2 It will be useful to refer to some of these cases for better appreciation.

6.4.3 In Onkar Nath Agrawal and others Vs State 1976 Cri. L.J. 1142, the Full Bench of Allahabad High Court held that Section 438 "clearly contemplates two forums for moving an application for anticipatory bail, namely the Court of Session and the High Court. Both the jurisdictions are concurrent and it is left for the person to choose either of the two… The provision read as a whole does not prima facie create any bar that he must apply to the Court of Session first before coming to the High Court to seek his redress. Thus, a bail application under Section 438 may be moved in the High Court without the applicant taking recourse to the Court of Session."

6.4.4 In Y. Chendrasekhara Rao Vs Y.V. Kamala Kumari, 1993 Cri. L.J. 3508, the Division Bench of Andhra Pradesh High Court held that an application for anticipatory bail was maintainable in the High Court without the party approaching the Court of Session in the first instance. The Court did not find any justification for the registry to return the papers on the ground that the applications in the first instance were not maintainable in the High Court under Section 438. The Court observed: "The provision clearly implies that not only concurrent power is conferred on the High Court and the Court of

Session but choice is given to the affected person to move either of the two fora … if the party who intends to move an application under Section 438 feels that moving the Court of Session is more convenient, he may do so. But if he thinks that approaching the High Court is more convenient and less time-consuming, he shall not be precluded from doing so. Situations may conceivably arise when a person may find it more efficacious to approach the High Court under Section 438. A resident of Srikakulam or Visakhapatnam, if apprehends arrest when he is in Hyderabad, may find it more convenient to move the High Court under Section 438 for anticipatory bail without any loss of time instead of moving the Court of Session of his native district. It is not possible to visualize comprehensively what precise reasons impel persons to invoke jurisdiction of the High Court, in the first instance, under Section 438. … When the procedure incorporated under Section 438 in unequivocal language confers power both on the High Court and the Court of Session to grant anticipatory bail, denial of the right to move the High Court, in the first instance, clearly amounts to violation of the guaranteed fundamental right under Article 21 of the Constitution of India".

6.4.5 In Devidas Raghu Naik Vs State, 1989 Cri. L.J. 252, a Single Judge of Bombay High Court held "that in view of the concurrent jurisdiction given to the High Court and Session Court, the fact that the Session Court has refused a bail under Section 439 does not operate as a bar for the High Court entertaining a similar application under Section 439 on the same facts and for the same offence.

However, if the choice was made by the party to move first the High court and the High Court has dismissed the application, then the decorum and the hierarchy of the Courts require that if the Session Court is moved with a similar application on the facts, the said application be dismissed."

6.4.6 In Jagannath Vs State of Maharashtra, 1981 Cri. L.J. 1808, the Bombay High Court held that "the Session Court and the High Court have the concurrent jurisdiction in the matter of grant of anticipatory bail." Referring to Section 397(3) of the new Code providing that if one Court was moved in its revisional jurisdiction, the other Court shall not entertain similar application, the Court stated that "nothing prevented Parliament from putting a similar bar in the provisions relating to bail – either pre-arrest or post-arrest – and this indicates that what was intended was exercise of concurrent jurisdiction by Court of Session and High Court in the matter of grant of bail."

6.4.7 In Amiya Kumar Vs State of West Bengal, 1979 Cri. L.J. 288, a Division Bench of Calcutta High Court held that "Section 438 has given a choice of selecting the forum for filing the petition for anticipatory bail – to choose either the High Court or the Court of Session though both the Courts have been made forums for the approach of the applicant. This section gives right to the party with restricted choice. …Two Courts are empowered to grant bail under Section 438, namely, the High Court and the Court of Session, but the petitioner may choose one of the two Courts and apply to the court of his choice. We cannot hold that if the petitioner approaches

the Court of Session for the relief under Section 438 and if his prayer is rejected, he will be again entitled to approach the High Court for the same relief on the same ground under that Section."

6.4.8 However, a three member's Bench of the same High Court did not agree with this view in Diptendu Nayak and others Vs The State of West Bengal, 1989(1) Crimes 435 (Calcutta) wherein it was held that the bail application under Section 438 Cr.P.C. might be moved to the High Court after the applicant had not succeeded before the Court of Session.

6.4.9 Similar views were expressed by Delhi High Court in Arun Madan Vs State, 1993(1) Crimes 599: 1993 Cri. L.J. 1493 wherein it was held that "a person after unsuccessfully moving the Court of Session for anticipatory bail under Section 438 of the Code of Criminal Procedure can again approach the High Court for the same purpose under the same section."

6.4.10 In Mohan Lal and others etc. Vs Prem Chand and others, AIR 1980 Himachal Pradesh 36, the Full Bench of the High Court held that "a person can apply for anticipatory bail to the High Court direct without first invoking the jurisdiction of the Session Judge."

6.4.11 In K.C. Iyya Vs State of Karnataka, 1985 Cri. L.J. 214, it was ruled that: "Since both the Courts, the Court of Session and the High Court have concurrent powers in the matter of grant of anticipatory bail under Section 438 of the Criminal P.C., a person seeking

anticipatory bail under Section 438 should approach the Court of Session in the first instance as this would serve the ends of justice, public interest, and also the administration of justice. There may be cases with special reasons or involving special circumstances necessitating the person concerned to approach the High Court at the first instance. If the reasons assigned by him to approach the High Court at the first instance are found genuine, such an application may be considered by the High Court."

6.4.12 In Smt. Manisha Neema Vs State of Madhya Pradesh, 2003 (2) Crimes 402, the High Court expressed the opinion that the applicant should have filed the application at the first instance before the Court of Session and thereafter, if it was rejected, he could have approached the High Court. In reaching this conclusion, the Madhya Pradesh High Court relied on one of its earlier judgments in the case of Dainy alias Raju Vs State of MP, 1989 JLJ 232 wherein Hon'ble Justice R.C. Lahoti (later on the Judge of the Supreme Court and Hon'ble Chief Justice of India) has held that though under Sections 438 and 439 of the Cr.P.C. there is concurrent jurisdiction, but the application should be filed first before the Court of Sessions and on failure before that Court, the application should be filed before the High Court accompanied with the first order of Sessions Court and also mentioning all the relevant facts. His Lordship, in paras 19, 20 and 21 has given detailed reasons for holding so. For convenience, the same are reproduced below:-

"19. The jurisdiction of High Court and Court of Session under Section 439, Cr.P.C. being concurrent, as a matter of practice, the bail applicants are required ordinarily to approach the Court of Sessions in the first instance and if relief is denied they approach the High Court u/s 439, Cr.P.C. itself, not as a superior Court sitting in appellate or revisional jurisdiction over the order of the Court of Sessions, but because the superior Court can still exercise its own jurisdiction independently, unaffected by the result of exercise by the Court of Session because the latter is an inferior Court though vested with concurrent jurisdiction. The application seeking bail before the High Court is accompanied by an order of the Court of Session rejecting a similar prayer. The idea is to provide the superior Court with an advantage of apprising itself with the grounds as considerations which prevailed with the Court of Session in taking the view which it did. It has come to my notice in several cases that the first order of the Court of Session rejecting a prayer for bail is a detailed order and when another application is repeated before the same Court, the subsequent order rejects the application simply by stating that earlier application having been rejected on merits, the Court did not see any reason to take a different view of the matter. The latter order is not a detailed one. This subsequent order is filed before the High Court to fulfil the formality but the inevitable consequence is that the High Court is deprived of the opportunity of apprising itself with the reasons which formed foundation for rejection of the

prayer by the Sessions Court. The possibility cannot be ruled out that such a course is adopted purposely because the bail-applicant does not feel comfortable before the High Court in the presence of a detailed order of the Court of Session rejecting the prayer for bail.

20. To sum up the disciplines of the system are:

(i) In view of the decision of the Apex Court in Shahzad Hssan Khan (supra), a subsequent application for bail in the same jurisdiction, must be placed before the same Judge (so long as he is available) before whom had come up the earlier application, with whatever result;

(ii) a subsequent application for bail must mention all the earlier or pending attempt to that and made before the High Court as well as the Court of Sessions along with their fate;

(iii) while moving an application for bail before the High Court, the application ought ordinarily to be accompanied by the order of the Court of Session rejecting the first prayer for bail and containing reasons, unless dispensed with;

(iv) a bail petition is expected to incorporate a statement as to all facts and circumstances considered relevant by the applicant in support of his prayer so that whatever is put forth before the Court does not vanish in thin air, but is retained in the record, though there is no format prescribed for bail applications; if any statement is likely to be controverted by the opposite party, the party would do well to support its statement by an affidavit or documents, as advised.

21. A question may be posed whether these requirements falling within the domain of format or procedural requirements only, laying down rules of discipline only can be treated so imperative as to override the substantive law of bails, negativing the right or privilege for failure of compliance therewith. The requirements have a laudiable purpose, principle and policy behind. They have been projected by judicial wisdom founded on judicial experience. The rightful result must be achieved by rightful means. That is the rule of law. If bifocul interests of justice to the individual involved and the society affected (as spoken of in Babusingh and others, supra), are to be secured, if fallacies as to bail jurisdiction are to be removed: if fairness in dispensation of criminal justice has to be retained, nay brightened, if abuse of process of law is to be avoided, and if unwanted practice/tactics are to be curbed: these rules of discipline have to be treated as imperative. A failure to observe them may be destructive of the very purpose sought to be achieved."

6.4.13 In Chhajju Ram Godara and others Vs State of Haryana, 1978 Cr. L.J. 608 (Punjab & Haryana), it was held that "Section 438 of the Cr. P.C. gives concurrent powers of granting anticipatory bail both to the High Court and the Court of Session. As in other analogous provision in the Code, it is normally to be presumed that the Court of Session would be first approached for the grant thereof unless an adequate case for not approaching the said court has been made out."

6.4.14 In Hajialisher Vs State of Rajasthan, 1976 Cri. L.J. 1658, the High Court observed that although the High Court has concurrent jurisdiction with the Session Court to grant bail under either of the aforesaid two Sections, viz. Sections 438 and 439, it is desirable that the ordinary practice should be that the lower court should be first moved in the matter, though in exceptional cases or special circumstances, the High Court may entertain and decide an application for bail either under Section 438 or Section 439, Cr. P.C. This is specially important because any expression of opinion by the superior court is likely to prejudice, if not frequently, in cases few and far between, the trial in the lower court. On proof of special circumstances the High Court would certainly entertain an application under Section 439 and decide it on merits. But, for that reason, an accused person cannot claim as a matter or right to get such an application decided in the first instance by the High Court."

6.4.15 In Dharampal Vs State of Punjab, 2002 Cri. L.J. 1621, grant of anticipatory bail by the Session Judge Ropar was adversely commented upon in view of the fact that he himself had refused anticipatory bail twice earlier and the High Court too had refused anticipatory bail and the Supreme Court had also refused to interfere with order refusing anticipatory bail. The High Court observed that "in these circumstances, Session Judge, Ropar has not done well and has shown gross judicial indiscipline and impropriety while granting anticipatory bail in disregard of the orders of the High Court and those of the Supreme Court and his own orders."

6.4.16 In Gandhi Vs State of Andhra Pradesh, 1991(3) Crimes 796 (AP), it was held that a second bail application for anticipatory bail was not barred under Section 438 Cr.P.C. However, if the second bail application did not reveal any changed circumstances since the rejection of the first application filed by the petitioner, it would be liable to be dismissed.

6.4.17 In Rameshchandra Kashiram Vora Vs State of Gujarat, 1988 Cr. L.J. 210, it was observed that "it would be a sound exercise of judicial discretion not to entertain each and every application for anticipatory bail directly by-passing the Court of Session. Ordinarily, the Session Court is nearer to the accused and easily accessible and remedy of anticipatory bail is same and under same section and there is no reason to believe that Session Court will not act according to law and pass appropriate orders. In a given case, if any accused is grieved, his further remedy to approach the High

Court is not barred and he may prefer a substantive application for anticipatory bail under Section 438 or revision application under Section 397 of the Cr. P.C. to the High Court and the High Court would have the benefit of the reasons given by the Session Court. It would be only in exceptional cases or special circumstances that the High Court may entertain such an application directly and these exceptional and special circumstances must really be exceptional and should have valid and cogent reasons for by-passing the Session Court and approaching the High Court…When the accused has simple and equally efficacious remedy available in the Session Court, special and weighty reasons would be required to make out a special and exceptional case for persuading the High Court to entertain such application directly."

6.4.18 In State of Maharashtra and another Vs Mohd. Sajid Hussain etc., 2007(12) SCALE 63, the respondents filed application for anticipatory bail before the Session Judge, which was dismissed. The respondents moved the High Court and their application for anticipatory bail was allowed while allowing the appeal filed thereagainst by the State, the apex Court observed that "it is now well-settled principle of law that while granting anticipatory bail, the Court must record the reasons therefor". The Supreme Court noted that the High Court had refused to grant regular bail to the accused against whom charge-sheet had been submitted. The learned Session Judge also did not grant bail to some of the accused persons. The apex Court then observed that "if on the same materials, prayer for regular bail has been rejected, we fail to see any reason as to why

and on what basis the respondents could be enlarged on bail." The Supreme Court therefore concluded that the High Court ought not to have granted anticipatory bail to the respondents and accordingly set it aside.

6.4.19 There are a lot many more cases on the above aspects. Suffice it to say that the section has generated much litigation that could have been avoided. There are certain other provisions in the Code which have vested concurrent jurisdiction in the High Court and the Court of Session. For example, both the High Court and the Court of Session have concurrent jurisdiction of revision under Section 397. However, under Section 397 if a person approaches either of these Court, he cannot again agitate that matter by way of revision in the other Court. Whereas there seems to be justifiable reason for conferring concurrent jurisdiction on the High Court and the Court of Session, yet the person seeking anticipatory bail should have been given an option on the lines of Section 397(3). Accordingly, if he approaches either of these two Courts, he should not be allowed again to seek the same relief by way of a substantive application under Section 438 in the other Court. It may be noted as observed by Karnataka High Court in K.C. Iyya and etc. Vs State of Karnataka, 1985 Cri. L.J. 214 that in the matter of bail, either anticipatory as regular, the voice of the Court of Session is not final but is subject to revisional or appellate jurisdiction of the High Court and the Supreme Court. Also in these matters of bail, either anticipatory or regular, the Court of Session is given as wide a power of discretion as vests in the High Court. In this connection, the following

observations of Chandrachud, C.J. in Gurbaksh Singh Sibbia etc. Vs The State of Punjab, AIR 1980 SC 1632 may be noted.

> "There is no risk involved in entrusting 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 revision scrutiny."

6.4.20 t may be noted in this regard that Inspectors General of Police Conference, 1981, inter alia suggested that Section 438 be amended so as to take away the powers to grant anticipatory bail from the Session Court and vest it only in the High Courts. A Group of officers, constituted pursuant to the decision taken at the meeting of Secretaries held on 2nd July, 1982, too concurred with it when it observed that "as sometimes, the Courts take a very liberal view in granting anticipatory bail to criminals, it was considered that such powers should be taken from the Court of Session and vest only in the High Court even though it will make difficult for the poor persons to avail of the provisions of anticipatory bail. A Parliamentary Bill being No. 56 of 1988 was introduced in the Lok Sabha on 13th may, 1988, clause 49 of which related to amendment of Section 438, providing, inter alia, omission of the words or the Court of Session" from sub-section (1) and (2) of that section. However, these proposed amendments were ultimately not carried out and both the High Court and

the Court of Session continued to have concurrent jurisdiction under Section 438 in the matter of anticipatory bail and in our opinion, rightly so. There are certainly distinct advantages of vesting concurrent jurisdiction in the two judicial forums and giving an option to an applicant to choose one of two, depending upon his convenience or otherwise. These advantages have been referred to in some of the decided cases. (See Shivasubramanyam Vs State of Karnataka and another, 2002 Cri.L.J. 1998; Y. Chendrasekhara Rao Vs Y.V. Kamala Kumari, 1993 Cri.L.J. 3508 (A.P.); Rameshchandra Kashiram Vora Vs State of Gujarat, 1988 Cri.L.J.210 (Guj.). However, it is not readily discernible as to why same relief or facility has been made available to same persons at the hand of two different judicial forums one after another in exercise of their respective original jurisdiction when efficacious remedy is otherwise available against the order of the Court which may have been chosen by an applicant for relief in the first instance. One fails to understand as to why a provision on the lines of Section 397(3) has not been made in Section 438 whereby once the applicant has availed his option to choose one of the two alternative forums, his recourse to the other forum is foreclosed, if he fails to get the desired relief from the forum he has earlier chosen. Thus, if a person moves the Court of Session for anticipatory bail and fails to get it, then why he should again be allowed to file another substantive application to anticipatory bail to High Court instead of revision, or, as the case may be, appeal against the order of

rejection of the application by the Session Court. Again, if the person has moved the High court in the first instance, does it not look apparently anomalous for the same person to move the lower Court, namely, the Court of Session for the same relief on the same facts that has been denied to him by the High Court? Theoretically, it is permissible. But, as a matter of propriety and policy, should that person not be made to move the higher judicial forum instead of a lower one in such cases. It is inherent in the scheme of things that when two alternative forums are provided in law for seeking directions for anticipatory bail, one lower and another higher, then the lower should be first resorted to as a matter of principle except in exceptional cases in which event the applicant should be deprived of his option to move the lower forum afresh on the same facts and material. Any different approach may lead to anomalous results where the relief sought at the hands of the High Court having been denied, can again be sought from the lower court without there being any change in the circumstances in which the relief has been denied by the High Court. Theoretically, it may be feasible but in practice it will not be. Such a scenario might not have been in the contemplation of the framers of the law. If that be so, then we fail to understand as to what distinct advantage is intended to be conferred on persons seeking anticipatory bail by allowing them to move the two alternative forums one after another in their original jurisdiction for the same relief on the same facts. One reason for this could be that an order rejecting an

application bail is interlocutory [See Zubair Ahmad Bhat Vs State of Jammu and Kashmir, 1990 Cri.L.J. 103 (J&K), Joginder Singh Vs State of Himachal Pradesh, ILR (1975) HP 181. A different view was, however, expressed in Mohan Lal and other Vs Prem Chand and others, AIR 1980 HP 36 (FB)] wherein it was held that Sessions Judge's order refusing anticipatory bail was not an interlocutory order. The power of revision conferred by sub-section (1) of Section 397 is not exercisable in relation to any interlocutory order in any appeal, inquiry, trial or other proceeding. (See Section 397(2) of the Code of Criminal Procedure, 1973). The conflicting views of High Courts in various cases in this regard have led to varied judicial practices whereby recourse is sometime taken to the powers of revision of the High Courts against orders of Courts of Session declining anticipatory bails and in other cases inherent powers of the High Courts are invoked in such matters. The High Courts exercise their inherent powers to redress the grievance of the aggrieved person or to prevent the use of the process of the Court and to secure the ends of justice or to prevent miscarriage of justice or illegal exercise of jurisdiction under Section 482 of the Code of Criminal Procedure, 1973 or under Article 227 in exceptional cases. [See Shyam M. Sachdev Vs State and another, 1991 Cri.L.J. 300 (Delhi)]; Ram Prakash Vs State of H.P. 1979 Cri.L.J. 750 (HP); Bhola and others Vs State 1979 Cri.L.J. 718 (Allahabad); Kamal Krishna De Vs State 1977 Cri.L.J. 1492 (Calcutta)]. The Supreme Court in a number of cases has laid

down the scope and ambit of the powers of the courts under Section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone if exists, or to prevent abuse of the process of the court. Inherent power under Section 482 Cr.P.C. can be exercised: (i) to give effect to an order under the Code; (ii) to prevent abuse of the process of court; and (iii) to otherwise secure the ends of justice. Inherent powers under Section 482 Cr.P.C. though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute…The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. (See Inder Mohan Goswami and another Vs State of Uttaranchal and others, 207(12) SCALE 15 at 25). Section 482 is not controlled by Section 397(2) or 397(3). The inherent powers of the High Court are not subjected to the bar contained in Section 397 as the powers of the High Court under these two Sections are distinct, different and mutually exclusive and ought not to be equated. Nothing in the Code nor even the bar under Section 397 affect the amplitude of the High Court's

inherent power if glaring injustice stares the Court in the face [See Govind Das Biyani and others Vs Badrinarayan Rathi (1995) 4 Crimes 755 (M.P.); Smt. Chander Mohini Khuller Vs State of West Bengal and another, 1995(4) Crimes 289 (Cal.); Rajeev Bhatia Vs Abdulla Mohmed Gani and another, 1992 Cri.L.J. 2092 (Bom.); Binod Sitha Vs Suna Devi 1986(1) Crimes 208 (Ori); Raj Kapoor and others Vs State (Delhi Administration)and others, AIR 1980 SC 258); Malam Singh Vs State of Rajasthan, 1977 Cri.L.J. 730 (Raj.)]. Thus, where an application for anticipatory bail has been rejected by the Court of Session and no revision lies against it for the order of rejection being an interlocutory order, then the remedy of the applicant will be to invoke the inherent powers of the High Court under Section 482 or the constitutional powers under Article 227 of the Constitution of India, in a case a provision is inserted in Section 438 on the lines of Section 397(3). It may be seen that there is lack of uniformity in judicial practices in these matters that needs to be remedied. One way of doing this is to extend the benefit of revision by suitably amending the law. It may be noted that the amended provision envisages passing of ad interim order on an application for anticipatory bail application in the first instance, followed by a final order after hearing the Public Prosecutor. Besides, such an application need not necessarily be filed in any pending case as registration of a FIR is not considered necessary. To add to it, the applicant may not be ultimately put up for trial if the investigation of the case does not reveal any material

against the applicant. In such a scenario, the final order on the application may not be in the nature of interlocutory as the case may stand disposed of finally. Besides, the use of legal fiction is not unknown to Law and it is quite often applied to meet a given exigency or to secure certain ends. It is thus legally feasible to expressly provide in the Law that final orders on an anticipatory bail application may not be construed as interlocutory for the purposes of the Code. And, we recommend accordingly.

6.4.21 Accordingly, the position that will so emerge will proceed on the following lines, viz.,

(i) Both the High Court and the Court of Session will have concurrent jurisdiction to deal with application for directions under Section 438 and it will be open to a person to move either of these two Courts at his option;

(ii) Once that option is exercised and that person decides to move one of these Courts, then the person will not have any further option to move the other Court;

(iii) Where the person chooses to move the Court of Session in the first instance, a revision will lie in the High Court against the order of Court of Session on the application for issue of directions under Section 438;

(iv) Where the person chooses to straightaway move the High Court in the first instance, subject to Court's satisfaction of the special or exceptional circumstances justifying such move, the person will

stand deprived of the aforesaid remedy of revision. In such a case the person if aggrieved of the High Court's order on his application for direction under Section 438 may have to invoke the extraordinary constitutional powers of the Supreme Court by seeking special leave to appeal in the Supreme Court.

6.4.22 We are, therefore, of considered view that Section 438 should be amended so as to contain a provision on the lines of Section 397(3). All other remedies that are presently provided in the Code or otherwise against the final order on an application for anticipatory bail, will, however, continue to be available. This will also take away much of the sting of lawyers' objections against the amendments, particularly those contained in sub-section (1B), that the applicants have been so denied the right to move the other forum against the rejection of his application as he could be arrested being present in the Court, though we have recommended omission of that sub-section, albeit, on different grounds.

6.4.23 We would summarize our recommendations in the succeeding chapter, and also attempt a draft of the revised text of Section 438 as amended on the basis of recommendations made hereinabove.

CHAPTER-7

RECOMMENDATIONS

7.1 We recommend that:

(i) The proviso to sub-section (1) of Section 438 shall be omitted.

(ii) Sub-section (1B) shall be omitted.

(iii) A new sub-section on the lines of Section 397(3) should be inserted.

(iv) An Explanation should be inserted clarifying that a final order on an application seeking direction under the section shall not be construed as an interlocutory order for the purposes of the Code.

7.2 The text of Section 438 so revised will be as follows:

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

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

(i) the nature and gravity of the accusation;

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

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

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail.

2. 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.

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

3. 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 think 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.

4. 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).

5. If an application under this section has been made by any person either to the High Court or the Court of Session, no further application by the same person shall be entertained by the other of them.

We recommend accordingly.

(Dr. Justice AR. Lakshmanan)
Chairman

(Prof. (Dr.) Tahir Mahmood) **(Dr.D.P. Sharma)**
Member **Member-Secretary**