2023:BHC-AS:33240

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
ANTICIPATORY BAIL APPLICATION NO.2801 OF 2023

Amar S. Mulchandani ... Applicant
versus
The State of Maharashtra ... Respondent

WITH
INTERIM APPLICATION NO.3704 OF 2023
IN
ANTICIPATORY BAIL APPLICATION NO.2801 OF 2023

Dhanraj Aswani ... Applicant
and
Amar S. Mulchandani ... Applicant
versus
The State of Maharashtra ... Respondent

Mr. Aabad Ponda, Senior Advocate with Mr. Shantanu Phanse, Mr. Sudhanva S. Bedekar, Ms. Ilsa Shaikh, for Applicant.
Mr. Naresh Shamnani with Ms. Minal Chandnani, for Intervener.
Mr. Atul Bhas, PI, EOW CID Pune,

CORAM: N.J.JAMADAR, J.

DATE : 31 OCTOBER 2023

ORDER :

1. Heard the learned Counsel for the parties.

2. This is an application for pre-arrest bail in connection with C.R.No.806 of 2019 registered with Pimpri Police Station for the offences punishable under Sections 420, 406, 409, 465, 467, 468, 471 read with Section 34 of the IndianPenal Code.

3. The applicant is already in custody in ECIR No.10 of 2021.

4. In this backdrop, the first informant – intervener has raised an objection to the maintainability of the application for pre-arrest bail on the ground that a person who is already in custody is not entitled to seek a relief of pre-arrest bail in connection with the other crimes which have been registered against him.

5. As the issue of maintainability is sought to be raised on the strength of the decision of the Supreme Court in the case of **Narinderjit Singh Sahni and Anr. V/s. Union of India and Ors.**[1] and the judgments of the learned Single Judges of Rajasthan and Allahabad High Courts in the cases of **Sunil Kallani V/s. State of Rajasthan**[2] and **Rajesh Kumar Sharma V/s. C.B.I.**[3] respectively, which seem to follow the decision of the Supreme Court in the case of **Narinderjit (supra),** to lay down the proposition that a person who is already arrested is not entitled to seek pre-arrest bail under Section 438 of the Code of Criminal Procedure, 1973 and a learned Single Judge of this Court in the case of **Alnesh Akil Somji V/s. State of Maharashtra**[4] struck a discordant note to hold that there is no embargo to prefer an application for pre-arrest bail even when a person is under arrest in another crime, the learned Counsel for the parties were heard on the point of maintainability of the application.

6. Mr. Shamnani, learned Counsel for the first informant, submitted that

1 (2002) 2 SCC 210
2 2022 0 Cri.L.J. 1378
3 2022 0 Supreme (ALL) 1331
4 2002 0 ALL M.R. (Cri.) 61

the decision of this Court in the case of **Alnesh Somji (Supra)**, does not consider the full import of the decision of the Supreme Court in the case of **Narinderjit (supra).** On the contrary, Mr. Shamnani submitted, the learned Single Judges of Rajasthan and Allahabad High Courts in the case of **Sunil Kallani V/s. State of Rajasthan**[5] and **Rajesh Kumar Sharma V/s. C.B.I. (supra),** have correctly appreciated the ratio of the decision in the case of **Narinderjit Singh Sahni and Anr. (supra).**

7. Amplifying the submission, Mr. Shamnani would urge that the prime reason for granting the relief of pre-arrest bail is to insulate a person, who apprehends arrest, from injury and humiliation which he would otherwise be subjected to in the event of an unjustified arrest, and, since the person who is already arrested cannot make a grievance of such possible injury and humiliation, such person is not entitled to seek anticipatory bail. This crucial factor was not considered by the learned Judge of this Court in the case of **Alnesh Somji (supra)**, urged Mr. Shamnani.

8. Mr. Shamnani would further urge that having regard to the object of granting pre-arrest bail which is essentially to prevent an arrest of a person where the court finds that, in the circumstances of the case, there should not be any restraint on his personal liberty, a person who is already under arrest cannot seek such dispensation as it would be a contradiction in terms that an arrested person seeks protection from arrest, be it in another case.

5 2022 0 Cri.L.J. 1378

9. Mr. Ponda, learned Senior Advocate for the Applicant, forcefully countered the submissions of Mr. Shamnani. It was submitted that on first principles, the objection to the maintainability of the application is misconceived. An arrest in one case, can never be construed to preclude a person from seeking a statutory remedy under Section 438 of the Code, where he is threatened with unjustified arrests in a number of cases. Taking such a view, according to Mr.Ponda, would jeopardise the cherished personal liberty irredeemably.

10. Mr. Ponda would further urge that in view of the decision of this Court in the case of **Alnesh Somji (supra),** the submission sought to be canvassed before this Court does not merit countenance as this Court, being a co-ordinate Bench, is bound by the said decision. If this court finds itself unable to agree with the view taken in **Alnesh Somji (supra)**, the well established principles of judicial discipline would necessitate a reference to a larger bench. Mr. Ponda would urge that the matter can be resolved only in two ways, either follow earlier decision or refer the matter to a larger bench to examine the issue in case it is felt that the earlier decision is not in consonance with law.

11. To buttress this submission, Mr. Ponda placed reliance on the decisions of the Supreme Court in the cases of **Sundarjas Kanyalal Bhatija and Ors. V/s. Collector, Thane and Ors.**[6] and **State of Bihar V/s. Kalika Kuer @ Kalika Singh**

6 (1989) 3 SCC 396

and Ors.[7]

12. Mr. Ponda urged the submission sought to be canvassed on behalf of the first informant is based on an incorrect impression of the decision of the Supreme Court in the case of **Narinderjit (supra).** In the said case, according to Mr. Ponda, the Supreme Court had no occasion to consider the issue of tenability of an application for pre-arrest bail at the instance of the person who is already under arrest in respect of another case where he apprehends arrest. **Narinderjit (supra)**, turned on its own peculiar facts. It was submitted that it is well recognized that a decision is an authority for what it decides and not which logically flows from the said decision.

13. Mr. Ponda further submitted that the judgments in the cases of **Sunil Kallani** and **Rajesh Kumar Sharma (supra),** have also proceeded on an incorrect reading of the decision in the case of **Narinderjit (supra).** In contrast, this Court in the case of **Alnesh Somji (supra)**, has enunciated correct position in law by observing, inter alia, that **Narinderjit (supra)** does not hold in very clear terms that the person arrested in one offence cannot seek the relief of pre-arrest bail in respect of another offence for the reason that he stands arrested.

14. As the objection to the maintainability seeks to draw support and sustenance primarily from the decision of the Supreme Court in the case of **Narinderjit (supra).**, it may be advantageous to notice the facts of the said case and

7 (2003) 5 SCC 448

the decision of the Supreme Court thereon.

15. In the case of **Narinderjit (supra),** a three Judge Bench of the Supreme Court was called upon to consider the maintainability of a petition under Article 32 of the Constitution of India by reason of supposed infraction of Article 21 and the grant of an order for bail in the nature as prescribed under Section 438 of the Code, for, in two earlier orders, a two Judge Bench of the Supreme Court had granted such relief.

16. The Petitioner – Narinderjit Singh Sahni, in the lead Petition, was the Managing Director of a group of companies. One of those companies has accepted deposits from a large number of persons, but failed to repay the same despite request. In some cases, the cheques drawn by the Company towards repayment were dishonoured. Eventually, prosecutions were initiated against the Petitioner as the principal accused in 8 cases for the offences punishable under Sections 420, 406, 409 and 120B at various police stations. Further 19 FIRs were lodged and were being investigated into at various police stations in different States. In addition, 182 complaints under Section 138 of the Negotiable Instruments Act, were lodged against the Petitioner. Similarly, in the connected Writ Petitions, the Petitioners therein faced multiple prosecutions in various States with the allegations of having defrauded a large body of investors in one way or the other.

17. A common grievance was that though the Petitioners were successful in getting bail in few cases they could not be set at liberty as multiple prosecutions were

pending across various States and their custody was sought for the purpose of investigation in those cases by seeking production warrant.

18. In the backdrop of the aforesaid peculiar fact situation, the Supreme Court was confronted with twin issues – first, the maintainability of a Petition under Article 32, and, second, grant of relief in the nature of an anticipatory bail by reason of alleged deprivation of the liberty of the Petitioners without their being any sanction of law.

19. The Supreme Court answered the first question of maintainability in favour of the Petitioners. While deciding the second issue of entitlement to an order in the nature of pre-arrest bail against the Petitioners, the Supreme Court made the following observations :

> "50. Let us however, try and analyse the grievance of the petitioners and consider as to whether there is any substance in such a grievance. Shortly put the petitioners' grievance, which stands identical in all the writ petitions, stand out to be that though the petitioners were favoured with an order of bail in one case but is being detained by reason of production warrant in another matter and resultantly the petitioners are languishing in the jails being deprived of the order of grant of bail, - this aspect of the matter has been stated to be violative of Article 21. In our view, however, the situation as noticed above does to ipso facto render it violative of Article 21. Article 21 of the Constitution postulates deprivation of life or personal liberty except according to the procedure established by law. Admittedly, the protection of personal liberty stands expanded to make the right to life under Article 21 more meaningful, the language of the Article itself records an exception indicating thereby that a person may be deprived of his liberty in

accordance with procedure established by law and it is in this sphere the courts will scrupulously observed as to whether the same stands differently and contra as regards the procedure established by law and in the event it is not so done, it would be a plain exercise of judicial power to grant redress to the petitioner. While there is no difficulty in appreciating the grievance and grant of relief in a given case but facts are too insufficient however, to come to a conclusion as regards the infraction of Article 21. Production warrants have been spoken of without any details whatsoever therefor - the reason offered is that the petitioners, in fact, are not in the know of things being behind the prison bars and it starts pouring in from all parts of the country and in the factual backdrop, as noticed above it is a well nigh impossibility to come to a finding as regards the infraction of Article 21 and since in the factual matrix, no infraction can be identified and thus question of sustaining the plea of infringement of Article 21 would not arise. In any event the liberty of the petitioners cannot said to have been trifled within the absence of due process of law. Deprivation, if any cannot claimed to be not in accordance with due process of law.

51. On the score of anticipatory bail, it is trite knowledge that Section 438 of the Crl. P. Code is made applicable only in the event of there being an apprehension of arrest - The petitioners in the writ petitions herein are all inside the prison bars upon arrest against all cognizable offences, and on the wake of the aforesaid question relieving the petitioners from unnecessary disgrace and harassment would not arise.

52. In that view of the matter and since no infraction can be identified, the petition also cannot be sustained as regards the issue of anticipatory bail under Section 438." (emphasis supplied)

20. The observations of the Supreme Court in paragraph 57 were also pressed into service on behalf of the first informant, which read thus :

"57.....If an accused facing a charge under Sections 406, 409, 420 and

> 120B is ordinarily not entitled to invoke the provisions of Section 438 of the Criminal Procedure Code unless it is established that such criminal accusation is not a bona fide one, it is difficult to conceive that an accused who is involved in thousands of cases in different parts of the country by cheating millions of countrymen, can be given benefit of the privilege of anticipatory bail as a matter of routine, as was done in the two cases, on the basis of which the present batch of cases have been filed. In the manner in which these white-collared crimes are committed and the extent to which it has pervaded the society at large, we are of the considered opinion that the two cases decided by this Court earlier would not be of universal application and cannot be used as a precedent for availing of the privilege in the nature of an anticipatory bail…….The object of Article 21 is to prevent encroachment upon personal liberty by the Executive save in accordance with law, and in conformity with the provisions thereof. It is, therefore, imperative that before a person is deprived of his life or personal liberty, the procedure established by law must strictly be followed and must not be departed from, to the disadvantage of the person affected……..."
>
> (emphasis supplied)

21. Mr. Shamnani would urge that the aforesaid enunciation of law renders the prayer for pre-arrest bail of a person who is already in custody, wholly untenable. Mr. Ponda countered by submitting that the aforesaid observations do not even qualify as an obiter much less the ratio of the decision in the case of **Narinderjit (supra).**

22. It would be apposite to immediately notice the decision of Rajasthan High Court in the case of **Sunil Kallani (supra)**, which takes a view that such an application is untenable. In the said case, the learned Single Judge of the Rajasthan High Court adverted to the Constitution Bench judgmentS of the Supreme Court in

the case of **Gurbaksh Singh Sibbia V/s. State of Punjab**[8] and **Sushila Aggarwal and Ors. V/s. State (NCT of Delhi) and Anr.**[9] and observed that a person who is already in custody cannot have reasons to believe that he shall be arrested as he stands already arrested. In view thereof, pre-condition of bail application to be moved under Section 438 i.e. reason to believe that he may be arrested, does not survive since a person is already arrested in another case and is in custody of police or in jail. The learned Single Judge, thereafter, went on to extract the aforesaid observations in the case of **Narinderjit Singh Sahni and Anr. (supra),** and concluded as under :

> "24. However, keeping in view observations in Narinderjit Singh Sahni and Anr. (supra), and considering that the purpose of preventive arrest by a direction of the court on an application under Section 438 Cr.P.C. would be an order in vacuum. As a person is already in custody with the police, this Court is of the view that such an anticipatory bail application under Section 438 Cr.P.C. would not lie and would be nothing but travesty of justice in allowing anticipatory bail to such an accused who is already in custody.
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> 25. Examining the issue from another angle, if such an application is held to be maintainable, the result would be that if an accused is arrested say for an offence committed of abduction and another case is registered against him for having committed murder and third case is registered against him for having stolen the car which was used for abduction in a different police station and the said accused is granted anticipatory bail in respect to the offence of stealing of the car or in respect to the offence of having, committed murder, the concerned police investigating agency where FIRs have been registered, would be prevented from conducting

8 AIR 1980 SC 1632
9 (2020) 5 SCC 1

> individual investigation and making recoveries as anticipatory bail once granted would continue to operate without limitation as laid down by the Apex Court in Sushila Aggarwal (supra). The concept of anticipatory bail as envisaged under Section 438 Cr.P.C. would stand frustrated. The provisions of grant of anticipatory bail are essentially to prevent the concerned person from litigation initiated with the object of injuring and humiliating the applicant by having him so arrested and for a person who stands already arrested, such a factor does not remain available.
>
> 26. In view of above discussion, this court holds that the anticipatory bail would not lie and would not be maintainable if a person is already arrested and is in custody of police or judicial custody in relation to another criminal case which may be for similar offence or for different offences." (emphasis supplied)

23. The decision of Allahabad High Court in the case of **Rajesh Kumar Sharma (Supra),** follows the judgment in **Sunil Kallani (supra),** in toto.

24. In contrast, in the case of **Alnesh Akil Somji (supra)**, the learned Single Judge of this Court, after adverting to the decision in the cases of **Narinderjit (supra)** and **Sunil Kallani (supra)**, formulated the following question of law :

> "Whether an anticipatory bail application would be maintainable by an accused who is already arrested and is in magisterial custody in relation to another crime ?

25. The question was answered in the affirmative opining, inter alia, as under :

> "11. It is thus very clear, according to Hon'ble Apex Court, that anticipatory bail will not be maintainable in case a person is in custody in the same offence for which pre-arrest bail is sought, the restriction, if any, upon

maintainability of pre-arrest bail will be there only if a person is in custody in that particular offence itself.

12. From the above pronouncements, two things are clear. First, there is no such bar in Cr.P.C or any statute which prohibits Session or the High Court from entertaining and deciding an anticipatory bail, when such person is already in judicial or police custody in some other offence. Second, the restriction cannot be stretched to include arrest made in any other offence as that would be against the purport of the provision.

13. In the present case, the applicant is in custody with respect to offence registered with Koregaon Park Police Station and he is yet to be arrested by police viz-a-viz the FIR registered with the respondent. As per the judgment of the Hon'ble Apex Court in the case of **Shri Gurbaksh Singh Sibbia and others** *(supra),* the restriction is only when the pre-arrest bail is sought for the same offence in which arrest is already made.

14. I may point out here that the case of **Narinderjit Singh Sahni and Another** *(supra)* was in respect of maintainability of Article 32 wherein relief in the nature of Section 438 was sought. Even, the said judgment does not hold in very clear terms that a person arrested in one offence cannot seek the relief provided under Section 438 of Cr.PC in another offence merely on the ground that he stands arrested in another district offence."

(emphasis supplied)

26. Relevant part of Section 438 of the Code reads as under :

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

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

(i) the nature and gravity of 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.
>
> …….
>
> (4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860).

27. Evidently, the restrictions on the consideration of a prayer for pre-arrest bail of a person who is already under arrest does not emanate from the phraseology of Section 438, especially sub-section (4). The Parliament has specified the cases in which pre-arrest bail cannot be granted to any person who is accused of those offences. In addition, there are statutory restrictions in the matter of grant of pre-arrest bail in other enactments like Sections 18 and 18A of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 and Section 21(3) of the the Maharashtra Control of Organized Crimes Act, 1999. The only condition which sub-section (1) of

Section 438 envisages for seeking pre-arrest bail is that the applicant must have reason to believe that he may be arrested on accusation of having committed a non-bailable offence. It is the reasonability of belief of arrest in connection with a non-bailable offence that furnishes the test for maintainability of the application for pre-arrest bail, unless there is a statutory restriction in other enactments. .

28. This being the expanse of the statutory provision, the object of which is to arrest the phenomena of indiscriminate and unjustified arrest, causing incalculable harm to the accused in a given case, should the court read the restrictions in the matter of entitlement of pre-arrest bail where the person is already in custody, is the core issue that crops up for consideration.

29. Any legal discourse on anticipatory bail would be incomplete without consulting the authoritative pronouncement of the Supreme Court in the case of **Gurbaksh Singh Sibbia (supra).** In the said case, the Constitution Bench of the Supreme Court was called upon to consider the justifiability of the eight propositions enunciated by the Full Bench of Punjab and Haryana High Court in the matter of the exercise of discretion to grant pre-arrest bail. The Supreme Court dealt with each of the propositions and enunciated the legal position.

30. In **Gurbaksh Singh Sibbia (supra)**, the Supreme Court, in the context of the said propositions laid down by the Punjab and Haryana High Court, observed that the true question that wrenched to the fore is whether by process of construction,

the amplitude of judicial discretion which is given to the High Court and the Court of Session to impose such conditions as they may think fit while granting anticipatory bail should be cut down by reading into the statute conditions which are not to be found therein like those evolved by the High Court or canvassed by the Additional Solicitor General.

31. The Supreme Court, inter alia, observed that there is no justification for reading into Section 438 the limitations mentioned in Section 437 and disagreed with the view of the High Court that such limitations were implicit in Section 438 as no such implication arose or could be read in that Section. The plenitude of the section must be given its full play. It was unnecessary to travel beyond it and subject the wide power conferred by the legislature to a rigorous code of self-imposed limitations.

32. In the context of the controversy sought to be raised, it may be advantageous to reproduce the observations in paragraphs 38 and 39 which read as under :

> "38. Fourthly, anticipatory bail can be granted even after an FIR is filed, so long as the applicant has not been arrested.
>
> 39. Fifthly, the provisions of Section 438 cannot be invoked after the arrest of the accused. The grant of 'anticipatory bail' to an accused who is under arrest involves a contradiction in terms, *insofar as the offence or offences for which he is arrested are concerned*. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail *in respect of the offence or offences for which he is arrested."*

33. A conjoint reading of the enunciation in paragraphs 38 and 39 above, makes it abundantly clear that the Supreme Court was careful to qualify the proposition that Section 438 cannot be invoked after the arrest of the accused by adding the expression "in so far as the offence or offences for which he is arrested are concerned". After arrest, the accused the accused must seek his remedy under Section 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested. Thus, the exposition of law is crystal clear and unequivocal.

34. The learned Single Judge of the Rajasthan High Court in the case of **Sunil Kallani (Supra)**, with respect, though correctly noted the aforesaid proposition to mean that after arrest, anticipatory bail application would not lie in the said case, went on to observe that the question still remained that if a person is to be arrested in another case than the one for which he had already been arrested whether the anticipatory bail application would lie ?

35. In my considered view, in the light of the text of of Section 438 and the aforesaid enunciation of law in the case of **Gurbaksh Singh Sibbia (supra)**, the said question does not remain debatable.

36. If there was any doubt, another Constitution Bench of the Supreme Court in the case of **Sushila Aggarwal and Ors.,** puts the same to rest. The propositionS enunciated by the Supreme Court in the case of **Gurbaksh Singh Sibbia**

(supra), were summarized by the Supreme Court in the case of Sushila Aggarwal and Ors.(supra).

In the context of the question at hand, the following propositions deserve to be noted :

> "52.6 Overgenerous introduction (or reading into) of constraints on the power to grant anticipatory bail would render it constitutionally vulnerable. Since fair procedure is part of Article 21, the court should not throw the provision (i.e. Section 438) open to challenge "by reading words in it which are not to be found therein". (para 26).
>
> 52.9 Courts should exercise their discretion while considering applications for anticipatory bail (as they do in the case of bail). It would be unwise to divest or limit their discretion by prescribing "inflexible rules of general application". (para 33, Sibbia).
>
> 52.13 Anticipatory bail can be granted even after filing of an FIR as long as the applicant is not arrested. However, after arrest, an application for anticipatory bail is not maintainable. (paras 38-39, Sibbia)."
>
> (emphasis supplied)

37. The Supreme Court further clarified that it was impermissible to import restrictions which were not found in the phraseology of Section 438 to whittle down the discretion advisedly vested by the Parliament in the High Court and Court of Session, premised on the guarantee of personal liberty under Article 21 of the Constitution of India. The observations in paragraphs 53, 56, 63 and 69 read as under :

> "53. It is quite evident, therefore, that the pre-dominant thinking of the larger, Constitution Bench, in Sibbia (supra), was that given the premium and the value that the Constitution and Article 21 placed on liberty- and given that a tendency was noticed, of harassment – at times by unwarranted

arrests, the provision for anticipatory bail was made. It was not hedged with any conditions or limitations- either as to its duration, or as to the kind of alleged offences that an applicant was accused of having committed. The courts had the discretion to impose such limitations (like co-operation with investigation, not tampering with evidence, not leaving the country etc) as were reasonable and necessary in the peculiar circumstances of a given case. However, there was no invariable or inflexible rule that the applicant had to make out a special case, or that the relief was to be of limited duration, in a point of time, or was unavailable for any particular class of offences.

56. The reason for enactment of Section 438 in the Code was Parliamentary acceptance of the crucial underpinning of personal liberty in a free and democratic country. Parliament wished to foster respect for personal liberty and accord primacy to a fundamental tenet of criminal jurisprudence, that everyone is presumed to be innocent till he or she is found guilty. Life and liberty are the cherished attributes of every individual. The urge for freedom is natural to each human being. Section 438 is a procedural provision concerned with the personal liberty of each individual, who is entitled to the benefit of the presumption of innocence. As denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when not imposed by the legislature.

……..

63. Clearly, therefore, where the Parliament wished to exclude or restrict the power of courts, under Seciton 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this court, nor can inflexible guidelines in the exercise of discretion, be insisted upon- that would amount to judicial legislation.

……..

69. It is important to notice, here that there is nothing in the provisions of

> Section 438 which suggests that Parliament intended to restrict its operation, either as regards the time period, or in terms of the nature of the offences in respect of which, an applicant had to be denied bail, or which special considerations were to apply. In this context, it is relevant to recollect that the court would avoid imposing restrictions or conditions in a provision in the absence of an apparent or manifest absurdity, flowing from the plain and literal interpretation of the statute (Ref Chandra Mohan v. State of Uttar Pradesh & Ors[10])." (emphasis supplied)

38. The legal position which thus emerges from the Constitution Bench judgments of the Supreme Court in the cases of **Gurbaksh Singh Sibbia (supra)**, and **Sushila Aggarwal and Ors.,** is that it is impermissible by a process of judicial reasoning to introduce and import restrictions and limitations in the matter of exercise of discretion to grant pre-arrest bail, save and except those which are expressly statutorily provided, either in the context of duration for which the order of pre-arrest bail shall remain operative, the conditions to be imposed or the offences in which the dispensation of pre-arrest bail shall not be extended. Cast iron restrictions like a person already under arrest, *de hors* the nature of accusation in the case in which he is under arrest and the nature of accusation in the cases in which he apprehends arrest, cannot seek the relief of pre-arrest bail, would put unwarranted and unjustified fetters on the exercise of discretion statutorily vested. It is a different matter that the Court which is called upon to exercise the discretion to grant pre-arrest bail to an accused,

10 1967(1) SCR 77

who is already under arrest, may, in the totality of the governing considerations refuse to exercise discretion, even taking into account the consequences which emanate from such arrest. But it is an altogether different proposition to lay down that the moment a person is arrested in one case, he is precluded from seeking pre-arrest bail in any other case irrespective of the considerations which otherwise weigh in the matter of grant of pre-arrest bail.

39. The proposition is fraught with incalculable harm to personal liberty. A person under arrest can be deprived of the statutory remedy thereby jeopardising his personal liberty by employing various devices. It is quite possible that such person can be arrested in another case the moment he is released in the first case or there is an impending possibility of release on account of default in filing of the charge sheet in the first case or the said person can be arrested in multiple prosecutions lodged against him by seeking production warrant under Section 267 of the Code. Can the High Court or Court of Session be precluded from examining the necessity and justifiability of arrest in another case, is the moot question. In my view, the object of Section 438 would be frustrated if the blanket proposition is laid down that the moment a person is arrested in one case, he is debarred from seeking pre-arrest bail in another case till he secures his release on regular bail in the first case.

40. I find substance in the submissions of Mr. Ponda that the import of the decision in the case of **Narinderjit (supra)** has not been correctly appreciated in the

case of **Sunil Kallani (supra),** First and foremost, the question as to whether a person already arrested is deprived of seeking pre-arrest bail under Section 438 of the Code in another case, did not squarely fall for consideration before the Supreme Court in the case of **Narinderjit (supra).** Secondly, in the said case, as noted by the Supreme Court in paragraph No.4, the main prayer of the Petitioners therein was grant of writ of mandamus or any other appropriate writ in the nature of an order under Section 438 of the Code, directing that in the event the Petitioner was arrested in connection with any criminal case, the arresting officer shall release him on bail on executing a bond to the satisfaction of the arresting officer. It is in that context, the Supreme Court after adverting to the nature of the accusation against the Petitioners before the Supreme Court observed that it was trite knowledge that Section 438 of the Code is made applicable only in the event of there being an apprehension of arrest and since the Petitioners before the Supreme Court were all inside the prison bars upon arrest against all cognizable offences, and, thus, the question of relieving the Petitioners from unnecessary disgrace and harassment would not arise.

41. In effect, in **Narinderjit (supra)** the Petitioners were seeking a blanket order of anticipatory bail in any and every case in which they apprehended arrest. **Gurbaksh Singh Sibbia (supra)** cautioned us that a 'blanket order' of anticipatory bail should not generally be passed. **Narinderjit (supra)**, if properly construed, followed **Gurbaksh Singh Sibbia (supra).**

42. In the case of **Sunil Kallani (supra)**, after noting the aforesaid observations of the Supreme Court, it was observed that the grant of anticipatory bail is essentially to prevent the concerned person from litigation initiated with the object of injuring and humiliating the applicant by having him so arrested and for a person who stands already arrested, such a ground is not available.

43. With respect, I am unable to persuade myself to agree with the aforesaid justification to deprive a person, under arrest, from seeking pre-arrest bail in another case. It would be suffice to note that in the case of **Gurbaksh Singh Sibbia (supra)** the Supreme Court had clarified that though a direction for the release of the applicant on bail, in the event of his arrest would generally be made where the accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, yet the converse of the said proposition was not necessarily true. The Supreme Court emphasised, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides.

44. I am, thus, in complete agreement with the view recorded by this Court in the case of **Alnesh Somji (supra)** that the judgment in **Narinderjit (supra)** does not hold in very clear terms that a person arrested in one offence cannot seek relief provided under Section 438 in another offence merely on the ground that he stands

arrested in another distinct offence.

45. The conspectus of aforesaid discussion is that there is no reason to take a different view of the matter. Thus, I am impelled to hold that the fact that the applicant is already in custody in one case does not preclude him from seeking pre-arrest bail in connection with another case in which he apprehends arrest. Resultantly, the objection to maintainability of the application on the said count stands disallowed.

46. The application be listed on 9 November 2023.

47. Interim protection granted earlier shall continue to operate till the next date.

(N.J.JAMADAR, J.)