
(2022) 08 SHI CK 0007

High Court Of Himachal Pradesh

Case No: Criminal Miscellaneous Petition (Main) No. 1279 Of 2022

Hem Kumar Sharma

APPELLANT

Vs

State Of H. P

RESPONDENT

Date of Decision: Aug. 1, 2022

Acts Referred:

Constitution Of India, 1950 " Article 21, 22#Code Of Criminal Procedure, 1973 " Section 41, 41(1)(b)(ii), 41(1)(ba), 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 376, 437, 438, 438(1), 438(2), 439#Indian Penal Code, 1860 " Section 34, 149, 354, 354A, 376, 376(2)F, 376(3)#Protection Of Children From Sexual Offences Act, 2012 " Section 6, 8, 10, 29, 30#Evidence Act, 1872 " Section 27#Prevention Of Money Laundering Act, 2002 " Section 19

Citation: (2022) 08 SHI CK 0007

Hon'ble Judges: Vivek Singh Thakur, J

Bench: Single Bench

Advocate: Anirudh Sharma, Hemant Vaid

Final Decision: Dismissed/Disposed Of

Judgement

Vivek Singh Thakur, J

1. Petitioner has approached this Court, invoking provisions of Section 438 Cr.P.C., seeking anticipatory bail in case FIR No. 98 of 2022, dated

10.6.2022, registered in Police Station Dharampur, District Solan, H.P. under Sections 354-A, 354, 376(3), 376(2)F of the Indian Penal Code (for short

Act, 1860) and Sections 6 and 10 of Protection of Children from Sexual Offences Act, 2012 (for short POCSO Act, 2012).

2. Status Report stands filed. Record was also made available.

3. Petitioner has also placed a certificate on record, whereby he has been given State Level Teachers Award-2020 for doing extra-ordinary work for

characteristic, physical and cultural development of students. A Pen Drive has also been placed on record, allegedly having conversation of someone

on behalf of complainant with relative of the petitioner making offer for amicable settlement.

4. Prosecution case is that on 10.6.2022 an e-mail bearing rapat No. 15 in Daily Diary dated 10.6.2022 was received in the Police Station, Dharampur

from Police Chowki Subathu, informing that one Devinder Kumar had submitted a complaint about teasing the school girls by DPE, posted in

Government Girls School, Subathu, during training of Yoga, stating therein that complainant was a wholesale businessman and his daughter, studying in

9th Class, on 9.6.2022, after returning from the School, told her mother that since so many days, their DPE sir, in the School used to tease her and

other 9 girls students during Yoga learning. The complainant's wife disclosed it to him. Thereafter complainant alongwith parents of other girls

met Principal of School in his office, who assured Departmental inquiry on the issue. All girls were stated to be under stress and fear due to

inappropriate conduct of DPE as he, with ulterior motive and ill-intention, had been touching body parts of girls while instructing Yoga.

5. On the basis of aforesaid complaint and inquiry, FIR under Section 354-A of IPC and Section 8 of POCSO Act was registered. Thereafter

statements of victims were recorded under Section 161 Cr.P.C. and they were medically examined in CHC Dharampur. From the statements of

victims it transpired that petitioner, on the pretext of improving the postures and stretching, used to touch their private parts and insert his figure in

private part and petitioner used to wear a torn lower without wearing underwear, exposing his private part to girls. Torn lower has been recovered

from the Almirah kept in sports room of the school.

6. During investigation written complaints submitted by victim girls to Sexual Harassment Committee and a communication sent by one victim girl to

her elder sister, were taken into possession and statements of victim girls were also recorded under Section 164 Cr.P.C. before the Magistrate. As

per certificates of victims, all victims are of less than 16 years of age. On the basis of statements of victims, Sections 354, 376(3), 376(F) of IPC and

Sections 6 and 10 of POCSO Act, attracted in the case, were also incorporated and Section 8 of POCSO Act was omitted.

7. In the communication sent by one victim to her elder sister, victim wrote that
“Sir was too mean as he put his hand on her lower private part

and thereafter asked that she was feeling good by saying that when it would be in heat, then she would enjoy it and for that reason she was resisting

direction of her mother to attend Yoga classes.”

8. In the complaints submitted to the Principal, it has been stated by victims that they used to attend Yoga classes on call of petitioner and during

classes of Yoga, sir used to touch their private parts. Petitioner used to lay down the girls on the table on the pretext of improving flexibility of body by

stretching and used to touch their body inappropriately, and touch of body parts of petitioner without undergarments was very embarrassing for them

and he used to ensure touching of his stomach with the girls and because of this sometimes they missed the Yoga class but next day petitioner used to

compel girls to attend Yoga class. At the time of stretching, petitioner used to ask about part where girls were feeling pain and irrespective of location

of pain pointed out by the girls, he used to touch their private part and to say that he was not able to identify or catch their nerve and for that he had to

open their trouser, and on the pretext of helping back bending, petitioner used to touch his private part with body of girls by asking the girls for more

back bending. He used to massage private parts of girls on the pretext of increasing flexibility without pain. He used to sit in front of girls stretching his

legs in such a manner that his private part would visible to the girls. Whenever, it was brought in his notice he asked them to look forward and

whenever girls used to close their eyes, petitioner forced them to open their eyes at that time by insisting to do Yog Aasan with open eyes.

9. In their statements recorded before the Magistrate, victims have re-iterated the allegations in same fashion.

10. Learned counsel for the petitioner has submitted that in the medical examination of the victims, there is nothing to implicate the petitioner under

Section 376 IPC or under Section 6 of POCSO Act. There is no threat not to disclose the incident. There is no penetration or any physical harm to

any victim. The communication claimed to be written by one of the victim to her sister is not authentic document, as it bears no date, no identity of

scribe or recipient has been mentioned thereon. Further that the statements indicate that girls have been tutored to depose against the petitioner to

implicate him in a false case as there are more than 50 students in the class, but allegations have been leveled only by ten students. Other students

have not been associated to verify the facts and it has been further submitted that petitioner is teaching Yoga class since 1999 and his students have

performed well at State level and National level, details of such ten students have been given in para 4 of the application. He has further stated that his

work has been appreciated by SMC Kavarag and petitioner was awarded with State Award on 5.9.2020 by Hon'ble Education Minister of

Himachal Pradesh for physical, cultural and characteristic development of students for his dedication towards personality development of students;

one student Promila has referred the petitioner as Farishta in her written communication; petitioner has participated as coach (Yoga) in 60th National

School Yoga Championship/Tournament at Ahmednagar, Gujarat; and he was head of delegation in 59th National Yoga Championship (girls) under-

19. Further that since 1999 till date, no such allegations have ever been leveled by anybody at any point of time and this case has been concocted

against the petitioner to create pressure upon him as immediately after complaints of students, one person claiming him speaking from Human Rights

Commission called one Naval Kishore Sharma, a relative of petitioner, to settle the issue.

11. Learned Additional Advocate General has submitted that the parents of victim girls reported the matter to the Principal and thereafter to the Police

and they have taken a risk of exposing their girls in the Courts, who are of adolescent age, but these parents or students have no enmity with the

petitioner and they are not going to be benefited in any manner and that all 50 students were not attending Yoga class and further that it is not

improbable that every person would not like to complaint or expose his girl child by raising such issue publicly and, therefore, complaint made by ten

students out of more students attending the class is not a ground for rejecting the version of victims, who not only narrated the incident to their parents

and gave in writing to Principal, but also re-iterated the same complaint before the Magistrate at the time of recording their statements under Section

164 Cr.P.C. Further that parents of girls have not only made complaints to Principal and Police, but also allowed victims to be medically examined

which reflects the intensity of mental suffering being faced by victims as well as their parents compelling them to complain the matter irrespective of

odd situations faced by victims. It has further been stated that matter is under investigation and there is unrest in society, and further that past history

of achieving certificates and good performance by the students at State level and National level, does not provide immunity to the petitioner for

committing any offence or to exploit adolescent girls physically or otherwise and/or entitle him for anticipatory bail in present case rather his claim for

anticipatory bail is to be assessed on the basis of material of present case. Thus it has been submitted that petitioner is not entitled for anticipatory bail.

12. Learned counsel for the petitioner has placed reliance upon judgment dated 12.4.2022 passed by Delhi High Court in Bail Application No. 163 of

2022, titled Surya Prakash Pal Vs. State of NCT of Delhi, wherein it has been observed that presumption against accused under Section 29 of

POCSO Act is attracted only after framing of charge. Learned counsel for the petitioner has also referred pronouncement of the Supreme Court in

Bhadresh Bipinbhai Sheth Vs. State of Gujarat & another reported in 2016 (1) Criminal Court Cases 264 (SC), wherein it has been observed that for

grant of anticipatory bail, accused is not to make out a special case and presumption of innocence of an accused until he is found guilty and sanctity of

individual liberty is to be considered for that and limitations mentioned in Section 437 Cr.P.C. are not to be read in Section 438 Cr.P.C.

13. Reliance has also been placed on behalf of petitioner on pronouncement of Kerala High Court in Dr. Jaseer Aboobackr Vs. State of Kerala,

reported in 2019 1 ILR (Ker) 362, wherein referring pronouncement of the Supreme Court in Noor Aga Vs. State of Punjab, 2008 (16) SCC 417, it

has been observed that an accused is certainly entitled to show to the Court, if he apprehends arrest, that case of the complainant was motivated and

if it can be so shown there is no reason that the Court is not able to protect liberty of such a person, as there cannot be any mandate under the law for

arrest of an innocent.

14. Referring the judgment dated 1.1.2020 of co-ordinate Bench of this Court in Cr.MP (M) No. 2477 of 2019, titled Netar Singh Vs. State of

Himachal Pradesh, it has been contended that gravity of offence alone cannot be a decisive ground to deny bail, rather competing factors are required

to be balanced by the Court while exercising its discretion and object of bail is to secure attendance of the accused in the trial and proper test to be

applied for granting or refusing bail is as to whether it is probable that the person will appear to take his trial or not because normal rule is bail but not

jail.

15. Law of bail deals with two complicating interests, i.e. societal interest to cure hazards of crime and to avoid repeating of the same and on the other

hand principle of criminal jurisprudence referring presumption of innocence of accused till he is found guilty and his individual liberty. There was no

specific provision in Code of Criminal Procedure, 1898 empowering the Court to grant bail to the person apprehending arrest. This provision was

introduced, for the first time, in Cr.P.C. in 1973 on the basis of recommendations of Law Commission, urging necessity of such provision.

16. This Court in *Freed and other connected matters v. State*, reported in 2020(4) Shim. LC 1614, has observed as under:

“8. Section 438 of the Cr.P.C. is a right provided for a person to approach the trial Court or the Court of Session, seeking direction to

enlarge him on bail, in the event of his arrest, in a case wherein he apprehends his arrest on accusation of having committed a non-bailable

offence.

9. Commenting upon the right provided under Section 438 of the Cr.P.C., the Supreme Court in *State of M.P. & another v. Ram Kishna*

Balothia & another, (1995) 3 SCC 221, has observed that it is essentially a statutory right conferred long after the coming into force of the

Constitution, but with clarification that it cannot be considered as an essential ingredient of Article 21 of the Constitution.

10. Dealing with a case under unamended Section 438, a five-Judges Constitution Bench of the Apex Court in *Gurbaksh Singh Sibbia &*

others v. State of Punjab, (1980) 2 SCC 565, has clarified few points as under:

“35. Section 438 (1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant

must show that he has “‘reason to believe’ that he may be arrested for a non-bailable offence. The use of the expression “‘reason to believe

shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere ‘fear’ is not ‘belief’, for which

reason it is not enough for the applicant to show that he has some sort of a vague apprehension that ‘some one is going to make an

accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be

arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can

determine whether the applicant has reason to believe that he may be so arrested S. 438 (1), therefore, cannot be invoked on the basis of

vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise the number of applications for

anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is

neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.

36. Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the

question and decide whether a case has been made out for grant-in such relief. It cannot leave the question for the decision of the

Magistrate concerned under S. 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438.

37. Thirdly, the filing of a First Information Report is not a condition precedent to the exercise of the power under S. 438. The imminence of

a likely arrest founded on a reasonable belief can be shown to exist even if an F. I. R. is not yet filed.

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

39. Fifthly, the provisions of S. 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is

under arrest involves a contradiction in terms, in so far as the offences for which he is arrested, are concerned. After arrest, the accused

must seek his remedy under S. 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for

which he is arrested.

11. The Apex Court in Savitri Agarwal and others v. State of Maharashtra and another, (2009) 8 SCC 325, dealing with a post-amendment

case, referring Constitution Bench Judgment passed in Gurbaksh Singh Sibbia's case has observed as under:

"24. While cautioning against imposition of unnecessary restrictions on the scope of the Section, because, in its opinion, over generous

infusion of constraints and conditions, which were not to be found in Section 438 of the Code, could make the provision constitutionally

vulnerable, since the right of personal freedom, as enshrined in Article 21 of the Constitution, cannot be made to depend on compliance

with unreasonable restrictions, the Constitution Bench laid down the following guidelines, which the Courts are required to keep in mind

while dealing with an application for grant of anticipatory bail:

(i) Though the power conferred under Section 438 of the Code can be described as of an extraordinary character, but this does not justify

the conclusion that the power must be exercised in exceptional cases only because it is of an extraordinary character. Nonetheless, the

discretion under the Section has to be exercised with due care and circumspection depending on circumstances justifying its exercise.

(ii) Before power under sub-section (1) of Section 438 of the Code is exercised, the Court must be satisfied that the applicant invoking the

provision has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable

grounds. Mere "fear" is not belief, for which reason, it is not enough for the applicant to show that he has some sort of vague apprehension

that someone is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the

applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the Court objectively. Specific

events and facts must be disclosed by the applicant in order to enable the Court to judge of the reasonableness of his belief, the existence of

which is the sine qua non of the exercise of power conferred by the Section.

(iii) The observations made in *Balchand Jain v. State of M.P.*, (1976) 4 SCC 572, regarding the nature of the power conferred by Section

438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot be treated as

conclusive on the point. There is no warrant for reading into Section 438, the conditions subject to which bail can be granted under Section

437(1) of the Code and therefore, anticipatory bail cannot be refused in respect of offences like criminal breach of trust for the mere

reason that the punishment provided for is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too,

though of course, the Court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

(iv) No blanket order of bail should be passed and the Court which grants anticipatory bail must take care to specify the offence or the

offences in respect of which alone the order will be effective. While granting relief under Section 438(1) of the Code, appropriate

conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One such condition can even be that in the

event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable

to be taken in police custody for facilitating the recovery. Otherwise, such an order can become a charter of lawlessness and a weapon to

stifle prompt investigation into offences which could not possibly be predicated when the order was passed.

(v) The filing of First Information Report (FIR) is not a condition precedent to the exercise of power under Section 438. The imminence of a

likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.

(vi) An anticipatory bail can be granted even after an FIR is filed so long as the applicant has not been arrested.

(vii) The provisions of Section 438 cannot be invoked after the arrest of the accused. 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.

(viii) An interim bail order can be passed under Section 438 of the Code without notice to the Public Prosecutor but notice should be issued

to the Public Prosecutor or to the Government advocate forthwith and the question of bail should be re-examined in the light of respective

contentions of the parties. The ad-interim order too must conform to the requirements of the Section and suitable conditions should be

imposed on the applicant even at that stage.

(ix) Though it is not necessary that the operation of an order passed under Section 438(1) of the Code be limited in point of time but the

Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of FIR in respect of the

matter covered by the order. The applicant may, in such cases, be directed to obtain an order of bail under Section 437 or 439 of the Code

within a reasonable short period after the filing of the FIR.

12. In *Siddharam Satlingappa Mhetre v. State of Maharashtra and others*, (2011) 1 SCC 694, following *Gurbaksh Singh Sibbia's* case,

the Supreme Court has pointed out the following factors and parameters, which can be taken into consideration at the time of dealing with

anticipatory bail:

“(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a

Court in respect of any cognizable offence;

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

(iv) The possibility of the accused's likelihood to repeat similar or the other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the

exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal

Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge

and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice

should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention

of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the

matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events,

the accused is entitled to an order of bail.

13. In *Bhadresh Bipinbhai Sheth v. State of Gujarat and another*, (2016) 1 SCC 152, the Supreme Court, in addition to reiterating the

factors and parameters, delineated in the judgment in *Siddharam Satlingappa Mhetre*'s case, has further culled out the following

principles for the purpose of dealing with a case of anticipatory bail under Section 438 of the Cr.P.C.:

25.1 The complaint filed against the accused needs to be thoroughly examined, including the aspect whether the complainant has filed a

false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the

accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict

action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is

established then action be taken against the investigating officer in accordance with law.

25.2 The gravity of charge and the exact role of the accused must be properly comprehended. Before arrest, the arresting officer must

record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases, the reasons could be recorded

immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also

be properly evaluated by the court.

25.3 It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion to grant bail must

be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view

that the accused has joined the investigation and he is fully cooperating with the investigating agency and is not likely to abscond, in that

event, custodial interrogation should be avoided. A great ignominy, humiliation and disgrace is attached to arrest. Arrest leads to many

serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any

distinction between arrest at a pre-conviction stage or post-conviction stage.

25.4 There is no justification for reading into Section 438 CrPC the limitations mentioned in Section 437 CrPC. The plenitude of Section

438 must be given its full play. There is no requirement that the accused must make out a ""special case"" for the exercise of the power to

grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 CrPC to a dead letter. A person seeking

anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his

freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall

be enlarged on bail.

25.5 The proper course of action on an application for anticipatory bail ought to be that after evaluating the averments and accusations

available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public

Prosecutor. After hearing the Public Prosecutor the court may either reject the anticipatory bail application or confirm the initial order of

granting bail. The court would certainly be entitled to impose conditions for the grant of anticipatory bail. The Public Prosecutor or the

complainant would be at liberty to move the same court for cancellation or modifying the conditions of anticipatory bail at any time if liberty

granted by the court is misused. The anticipatory bail granted by the court should ordinarily be continued till the trial of the case.

25.6 It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation

of bail can be exercised either at the instance of the accused, the Public Prosecutor or the complainant, on finding new material or

circumstances at any point of time.

25.7 In pursuance of the order of the Court of Session or the High Court, once the accused is released on anticipatory bail by the trial

court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

25.8 Discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and

circumstances justifying its exercise. Similarly, the discretion vested with the court under Section 438 CrPC should also be exercised with

caution and prudence. It is unnecessary to travel beyond it and subject the wide power and discretion conferred by the legislature to a

rigorous code of self-imposed limitations.

25.9 No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail because all circumstances and

situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with legislative intention, the

grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case.

...

16. It is also settled that for granting or rejecting anticipatory bail, assigning reason(s) for that is must. The Supreme Court has set aside the

anticipatory bail granted/ rejected without assigning any reason. {See: Fekan Yadav v. Satendr Yadav alias Boss Yadav alias Satendra

Kumar and others, (2017) 16 SCC 775; Prem Giri v. State of Rajasthan, (2018) 6 SCC 571; and Prem Giri v. State of Rajasthan, (2018) 12

SCC 20}.

17. Fundamental of criminal jurisprudence postulates the presumption of innocence, meaning thereby that a person is believed to be

innocent until found guilty and grant of bail is the general rule and putting a person in jail or in prison or in correction home, during trial,

is an exception and bail is not to be withheld as a punishment and it is also necessary to consider whether the accused is a first time

offender or has been accused of other offences and, if so, nature of such offence and his or her general conduct also requires

consideration. Character of the complainant and accused is also a relevant factor.

Reiterating these principles, the Apex Court in Dataram

Singh v. State of Uttar Pradesh and another, (2018) 3 SCC 22, has also observed that however it should not be understood to mean that

bail should be granted in every case, and the grant or refusal of bail is entirely within the discretion of the Judge hearing the matter and

though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately.

18. While considering a bail application, it would be necessary on the part of the Court to see culpability of the accused and his

involvement in the commission of organized crime, either directly or indirectly, and also to consider the question from the angle as to

whether applicant was possessed of the requisite mens rea. Interim bail, pending investigation, can be granted, keeping in view the facts

and circumstances of the case.

Ã¢â¬ÅÃ¢â¬ÅÃ¢â¬ÅÃ¢â¬ÅÃ¢â¬ÅÃ¢â¬ÅÃ¢â¬Å

22. Section 438 of the Cr.P.C. in itself provides certain factors, referred supra, for taking into consideration at the time of deciding bail

applications under this Section, which are inclusive in nature. Some of other such principles, factors and parameters to be taken into

consideration by the Court at the time of adjudicating an application under Section 438 of the Cr.P.C. have been elaborated and explained

in pronouncements referred supra.Ã¢â¬ÅÃ¢â¬Å

17. In Pokar Ram v. State of Rajasthan and others, (1985) 2 SCC 597, the Supreme Court, referring Constitution Bench in Gurbaksh Singh Sibbia Vs.

State of Punjab (1980) 2 SCC 565, had observed that relevant considerations governing the court's decision in granting anticipatory bail under Section

438 are materially different from those when an application for bail by a person who is arrested in the course of investigation as also by a person who

is convicted and his appeal is pending before the higher Court and bail is sought during the pendency of the appeal. These situations, in which the

question of granting or refusing to grant bail would arise, materially and substantially differ from each other and the relevant considerations on which

the Court would exercise its discretion, one way or the other, are substantially different from each other. Ã¢â¬ÅÃ¢â¬ÅÃ¢â¬ÅÃ¢â¬ÅÃ¢â¬ÅÃ¢â¬ÅÃ¢â¬Å.

18. In P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 24, the Supreme Court has observed as under:

Ã¢â¬ÅÃ¢â¬Å“Grant of anticipatory bail in exceptional cases

69. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes.

Power under Section 438 CrPC is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail

should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application

of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit

case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and

hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a

matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary

remedy.

70. On behalf of the appellant, much arguments were advanced contending that anticipatory bail is a facet of Article 21 of the Constitution

of India. It was contended that unless custodial interrogation is warranted, in the facts and circumstances of the case, denial of anticipatory

bail would amount to denial of the right conferred upon the appellant under Article 21 of the Constitution of India.

71. Article 21 of the Constitution of India states that no person shall be deprived of his life or personal liberty except according to

procedure prescribed by law. However, the power conferred by Article 21 of the Constitution of India is not unfettered and is qualified by

the later part of the Article i.e. ""....except according to a procedure prescribed by law."" In State of M.P. and another v. Ram Kishna

Balothia, (1995) 3 SCC 221, the Supreme Court held that the right of anticipatory bail is not a part of Article 21 of the Constitution of India

and held as under: (SCC p.226, para 7)

7.We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In

the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code. The Law Commission in its 41st Report

recommended introduction of a provision for grant of anticipatory bail. It observed:

“We agree that this would be a useful advantage. Though we must add that it is in very exceptional cases that such power should be

exercised.”

In the light of this recommendation, Section 438 was incorporated, for the first time, in the Criminal Procedure Code of 1973. Looking to

the cautious recommendation of the Law Commission, the power to grant anticipatory bail is conferred only on a Court of Session or the

High Court. Also, anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming

into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to

a certain special category of offences cannot be considered as violative of Article 21.”
(emphasis supplied)

72. We are conscious of the fact that the legislative intent behind the introduction of Section 438 Cr.P.C. is to safeguard the individual's

personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody.

However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal

interest is at stake. Therefore, a delicate balance is required to be established between the two rights - safeguarding the personal liberty of

an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights

conferred upon the appellant under Article 21 of the Constitution of India.

73. The learned Solicitor General has submitted that depending upon the facts of each case, it is for the investigating agency to confront the

accused with the material, only when the accused is in custody. It was submitted that the statutory right under Section 19 of PMLA has an

in-built safeguard against arbitrary exercise of power of arrest by the investigating officer. Submitting that custodial interrogation is a

recognised mode of interrogation which is not only permissible but has been held to be more effective, the learned Solicitor General placed

reliance upon *State v. Anil Sharma*, (1997) 7 SCC 187; *Sudhir v. State of Maharashtra*, (2016) 1 SCC 146; and *Directorate of Enforcement*

v. Hassan Ali Khan, (2011) 12 SCC 684.

74. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which

the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper

the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating

agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant

information. In *State v. Anil Sharma*, (1997) 7 SCC 187, the Supreme Court held as under: (SCC p.189, para 6)

6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation- oriented than questioning a

suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a

suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been

concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest

bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that

the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for,

such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would

conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders.

75. Observing that the arrest is a part of the investigation intended to secure several purposes, in *Adri Dharan Das v. State of W.B.*, (2005)

4 SCC 303, it was held as under: (SCC p.313, para 19)

19. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned

in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if

any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may

be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons

connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons,

arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an

application under Section 438 of the Code. The role of the investigator is well defined and the jurisdictional scope of interference by the

court in the process of investigation is limited. The court ordinarily will not interfere with the investigation of a crime or with the arrest of

the accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of

the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code.

76. In *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694, the Supreme Court laid down the factors and parameters

to be considered while dealing with anticipatory bail. It was held that the nature and the gravity of the accusation and the exact role of the

accused must be properly comprehended before arrest is made and that the court must evaluate the available material against the accused

very carefully. It was also held that the court should also consider whether the accusations have been made only with the object of injuring

or humiliating the applicant by arresting him or her.

77. After referring to Siddharam Satlingappa Mhetre and other judgments and observing that anticipatory bail can be granted only in

exceptional circumstances, in *Jai Prakash Singh v. State of Bihar*, (2012) 4 SCC 379, the Supreme Court held as under: (SCC p.386, para

19)

19. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the

court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of

the view that the applicant has falsely been enroled in the crime and would not misuse his liberty. (See *D.K. Ganesh Babu v. P.T.*

Manokaran, (2007) 4 SCC 434, *State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain*, (2008) 1 SCC 213 and *Union of India v.*

Padam Narain Aggarwal, (2008) 13 SCC 305.)"

83. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in

collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the

accused knows that he is protected by the order of the court.

19. In *Mangal Singh Negi v. Central Bureau of Investigation*, reported in 2021(2) Shim. LC 860 : 2021(2) Him L.R. (HC) 917, this Court observed as

under:

19. Provisions related to information to the Police and their powers to investigate have been incorporated in Sections 154 to 176

contained in Chapter-XII of the Code of Criminal Procedure (Cr.P.C., for short).

20. Section 156 Cr.P.C. empowers Police Officer to investigate in cognizable offences without order of the Magistrate and Section 157

prescribes procedure for investigation, which also provides that when an Officer Incharge of a Police Station has reason to suspect the

commission of an offence, which he is empowered to investigate under Section 156, he, after sending a report to the Magistrate, shall

proceed in person or shall depute one of his subordinate Officers as prescribed in this behalf, to proceed, to the spot, to investigate the

facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender.

21. Chapter V of the Cr.P.C. deals with provisions related to arrest of persons, wherein Section 41 also, inter alia, provides that any Police

Officer may, without an order from Magistrate, and without a warrant, arrest any person against whom reasonable complaint has been

made or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable

with imprisonment which may be less than seven years or may extend to seven years, subject to condition that he has reason to believe, on

the basis of such complaint, information, or suspicion, that such person has committed the said offence and also if the Police Officer is

satisfied of either of the conditions provided under Section 41(1)(b)(ii), which also include that if such arrest is necessary for proper

investigation of the offence. Whereas Section 41(1)(ba) empowers the Police Officer to make such arrest of a person against whom

credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may

extend to more than seven years or with death sentence and the Police Officer has reason to believe, on the basis of that information, that

such person has committed the said offence, and for commission of such offence no further condition is required to be satisfied by the

Police Officer. Therefore, Police Officer/Investigating Officer is empowered to arrest the offender or the suspect for proper investigation of

the offence as provided under Section 41 read with Section 157 Cr.P.C.

22. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to the

procedure established by law. Arrest of an offender during investigation, as discussed supra, is duly prescribed in Cr.P.C.

23. At the same time, Cr.P.C. also contains Chapter XXXIII, providing provision as to bail and bonds, which empowers the Magistrate,

Sessions Court and High Court to grant bail to a person arrested by the Police/Investigating Officer in accordance with provisions

contained in this Chapter. This Chapter also contains Section 438 empowering the Court to issue directions for grant of bail to a person

apprehending his arrest. Normally, such bail is called as "Anticipatory Bail". Scope and ambit of law on Anticipatory Bail has been

elucidated by the Courts time and again.

24. Initially, provision for granting Anticipatory Bail by the court was not in the Cr.P.C., but on the recommendation of the Law commission

of India in its 41st Report, the Commission had pointed out necessity for introducing a set provision in the Cr.P.C. enabling the High Court

and Court of Session to grant Anticipatory Bail, mainly because sometimes influential persons try to implicate their rivals in false cases for

the purpose of disgracing them or for other purposes by getting them detained in jail for some days. It was also observed by the Commission

that with the accentuation of political rivalry, this tendency was showing signs and steady increase and further that where there are

reasonable grounds for holding that the 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 to submit to custody, remain in prison for some days and then apply for bail. On the basis of

these recommendations, provision of Section 438 Cr.P.C. was included in Cr.P.C. as an antidote for preventing arrest and detention in false

case. Therefore, interpretation of Section 438 Cr.P.C., in larger public interest, has been done by the Courts by reading it with Article 21 of

the Constitution of India to keep arbitrary and unreasonable limitations on personal liberty at bay. The essence of mandate of Article 21 of

the Constitution of India is the basic concept of Section 438 Cr.P.C.

25. Section 438 Cr.P.C. empowers the Court either to reject the application forthwith or issue an interim order for grant of Anticipatory

Bail, at the first instance, after taking into consideration, inter alia, the factors stated in sub-section (1) of Section 438 Cr.P.C. and in case

of issuance of an interim order for grant of Anticipatory Bail the application shall be finally heard by the Court after giving reasonable

opportunity of being heard to the Police/ Prosecution. Section 438 Cr.P.C. prescribes certain factors which are to be considered at the time

of passing interim order for grant of Anticipatory Bail amongst others, but no such factors have been prescribed for taking into

consideration at the time of final hearing of the case. Undoubtedly, those factors which are necessary to be considered at the time of

granting interim bail are also relevant for considering the bail application at final stage.

26. A balance has to be maintained between the right of personal liberty and the right of Investigating Agency to investigate and to arrest

an offender for the purpose of investigation, keeping view various parameters as elucidated by the court in Gurbaksh Singh Sibbia v. State

of Punjab, (1980) 2 SCC 565 and Sushila Aggarwal & others v. State (NCT of Delhi) & another, (2018) 7 SCC 731 cases and also in other

pronouncements referred by learned counsel for CBI.

27. The Legislature, in order to protect right of the Investigating Agency and to avoid interference of the Court at the stage of investigation,

has deliberately provided under Section 438 Cr.P.C. that High Court and the Court of Session are empowered to issue direction that in the

event of arrest, an offender or a suspect shall be released on bail. The Court has no power to issue direction to the Investigating Agency not

to arrest an offender. A direction under Section 438 Cr.P.C. is issued by the Court, in anticipation of arrest, to release the offender after

such arrest. It is an extraordinary provision empowering the Court to issue direction to protect an offender from detection. Therefore, this

power should be exercised by the Court wherever necessary and not for those who are not entitled for such intervention of the Court at the

stage of investigation, for nature and gravity of accusation, their antecedents or their conduct disentitling them from favour of Court for

such protection.

28. Where right to investigate, and to arrest and detain an accused during investigation, is provided under Cr.P.C., there are provisions of

Articles 21 and 22 of the Constitution of India, guaranteeing protection of life and personal liberty as well as against arrest and detention

in certain cases. It is well settled that interference by the Court at the investigation stage, in normal course, is not warranted. However, as

discussed supra, Section 438 Cr.P.C. is an exception to general principle and at the time of exercising power under Section 438 Cr.P.C.,

balance between right of Investigating Agency and life and liberty of a person has to be maintained by the Courts, in the light of

Fundamental Rights guaranteed under Articles 21 and 22 of the Constitution of India, but also keeping in mind interference by the Court

directing the Investigating Officer not to arrest an accused amounts to interference in the investigation.

29. Though bail is rule and jail is exception. However, at the same time, it is also true that even in absence of necessity of custodial

interrogation also, an accused may not be entitled for anticipatory bail in all eventualities. Based on other relevant factors, parameters and

principles enumerated and propounded by Courts in various pronouncements, some of which have also been referred by learned counsel

for CBI, anticipatory bail may be denied to an accused. Requirement of custodial interrogation is not only reason for rejecting bail

application under Section 438 Cr.P.C.

30. Nature and gravity of offence, extent of involvement of petitioners, manner of commission of offence, antecedents of petitioners,

possibility of petitioners fleeing from justice and impact of granting or rejecting the bail on society as well as petitioner, are also amongst

those several relevant factors which may compel the Court to reject or accept the bail application under Section 438 Cr.P.C. It is not

possible to visualize all factors and enlist them as every case is to be decided in its peculiar facts and circumstances.Ã¢â¬â¢

20. Learned Additional Advocate General submits that there is nothing on record to indicate that victims or their family members or anybody else

behind them was having any enmity with the petitioner for having motivated complaints against him and also victims are stating similar facts in one

voice, but in different manner and enlargement of petitioner on anticipatory bail in present case would have serious adverse impact on societal interest

and for that reason alone, bail application filed by petitioner deserves to be dismissed.

21. Learned Additional Advocate General has referred Section 30 of POCSO Act to substantiate his plea that presumption of culpable mental state of

accused is to be presumed in existence by the Court in a case under POCSO Act.

22. Learned counsel for the petitioner has responded that such presumption shall be applied in a case before the Special Court during trial, but not

before the High Court dealing with an application for anticipatory bail.

23. Learned Additional Advocate General has submitted that for commission of offence under Section 376 Cr.P.C. or Section 6 of POCSO Act

penetration causing any injury, evident in medical report, is not necessary ingredient, but otherwise also in the given set of evidence, a person can be

liable to be punished under Section 376 IPC or Section 6 of POCSO Act and for attracting Section 6 of POCSO Act touching vagina or making the

child to touch penis is sufficient and, therefore, case has rightly been registered under Sections 6 and 10 of POCSO Act read with Section 376 IPC.

24. From the material placed before me and submissions made by learned counsel for the parties, I am of the considered opinion that it is not a case

where ex-facie no case is made out at all against the petitioner. For material placed before the Court, it cannot be said to be totally false on the face of

it. Therefore, in present case accusation cannot be said to have been made with object to injuring or humiliating the petitioner by having him so

arrested without any cause. Investigation in present case is going on.

25. Without commenting upon the merits of the rival contentions, but taking into consideration nature and gravity of offence, stage of investigation, and

the factors and parameters to be considered at the time of adjudicating an application for anticipatory bail, as propounded by the Courts, including the

Supreme Court, balancing the personal interest vis-à-vis public interest, I am of the opinion that no case for grant of anticipatory bail is made out.

26. Hence, in view of the above discussion, the bail petition is dismissed and disposed of.